environmental defender's office new south wales

Submission to the NSW Law Reform Commission on Security for costs and associated costs orders

15 February 2010

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *the fundamental role of early engagement in achieving good environmental outcomes*
- *the importance of indigenous involvement in protection of the environment*
- *the importance of providing equitable access to EDO services around NSW*

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Introduction

The Environmental Defender's Office of NSW (*EDO*) welcomes the opportunity to comment on the NSW Law Reform Commission's inquiry into security for costs and associated orders.

The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. We therefore provide comment from the perspective of community legal centre (CLC) and public interest litigants who are undertaking legal proceedings to protect the environment or to enforce breaches of environment protection legislation.

The EDO NSW, through its association with the Australian Network of Environmental Defenders Offices (ANEDO), has commented extensively on access to justice issues, in particular commenting on the impact of costs orders on environmental public interest litigation[1]. As ANEDO has frequently argued, a significant barrier to access to justice in environmental law issues is the cost of justice. Costs barriers can make it difficult for public interest litigants to initiate court proceedings, thereby limiting their access to justice. This submission will therefore focus on the operation of, and impact of, costs orders in relation to environmental public interest litigation. It will address whether existing rules adequately take into account whether litigation is in the public interest.

At the outset, it is important to note that the EDO was created to fill an unmet community need for good quality legal advice on environmental law. This is because other CLCs traditionally did not have expertise in this area. Moreover, assistance from pro bono services offered by private law firms is limited because providing pro bono advice to members of the community on environmental law matters often involves conflicts with commercial firms' traditional client base. Therefore, the EDO occupies a unique position in providing access to justice to the community on public interest environmental law issues.

In this submission, we address the following three costs barriers for public interest litigants, as relevant to the Commission's terms of reference:

- adverse costs orders;
- security for costs; and
- undertakings as to damages.

We consider whether the current law and practice in relation to these three areas is adequate in the context of environmental public interest litigation. In particular, we focus on the jurisdiction of the NSW Land and Environment Court.

Key Recommendations

- The *Land and Environment Court Rules* 2007 should be amended to stipulate that in all proceedings in the Court's jurisdiction, parties should pay their own costs unless there are exceptional circumstances;

[1] Previous ANEDO submissions on access to justice issues can be located at the EDO website, see: http://www.edo.org.au/edonsw/site/policy.php#5

- The *Uniform Civil Procedure Rules* ('UCPR') should include provisions to enable courts to make 'upfront costs orders' in appropriate circumstances;
- Rule 42.4 of the UCPR should be amended to make it explicit that there is no limitation on circumstances when a 'protective costs order' can be made, and that such orders are available in public interest proceedings;
- The UCPR should be amended to include broad provisions relating to 'public interest costs orders,' giving courts a wide discretion to make a variety of costs orders if proceedings are declared to be in the public interest;
- There should be a clearly defined exemption in the UCPR from security for costs orders for litigants who can demonstrate that they are taking action in the public interest;
- The *Land and Environment Court Rules 2007* should be amended to prohibit the NSW Land and Environment Court from requiring public interest litigants to give an undertaking as to damages as a condition of granting an interim injunction.

1. Adverse costs orders

Introduction

Despite the number of positive factors in favour of community access to courts (such as open standing) granted by many Acts, the threat of an adverse costs order is one of the greatest deterrents to litigants seeking to bring public interest proceedings.[2] Indeed, whilst any litigant's own costs can be estimated in advance (in the public interest litigant's case these may involve capped fee arrangements), the costs of the other parties will be largely unknown which leaves public interest litigants in a position of uncertainty and open to a potentially large costs order which they may be unable to pay.

As Justice Toohey has observed:

> *There is little point in opening the door 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, that if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealth private corporation), with devastating consequences to the individual or the environmental group bringing the action must inhibit the taking of cases to court. In any event, it will be factor that looms large in any consideration to initiate litigation.*[3]

The ALRC has also noted that:

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[2] Ogle L, "The Court Process and the Public Interest Litigant", *Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law* 1979-1999, Conference presented by Nature Conservation Council of NSW, pg. 26. Ruddock K, "The Bowen Basin case" in *Climate Law in Australia*, Bonyhady T & Christoff P (eds), pg 184, Federation Press. McGrath C, Flying foxes, dams and whales (2008) 25 EPLJ 324.

[3] Toohey J, "Address to the NELA Conference" (1989) quoted in Stein P, "The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law" (1996) 13 Environmental Planning Law Journal 179 at 181.

> *Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation.*[4] *The significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules*[5].

In NSW courts, the usual order that costs 'follow the event' applies in accordance with Rule 42.1 of the Uniform Civil Procedure Rules 2005 (UCPR).

However, in order to promote access to justice for public interest litigants, several mechanisms have been utilised in various jurisdictions around Australia in order to alleviate the concerns of public interest litigants of an adverse costs order, including in the NSW Land and Environment Court ('LEC'). In NSW, almost all environmental public interest litigation is conducted in the LEC. Therefore, we discuss below how the rules relating to adverse costs orders are applied in the LEC, and whether there is a need for law reform in this area.

Own Party Costs

'Own party costs' provisions apply when each party is to bear its own costs of proceedings, regardless of the outcome. Most jurisdictions across Australia implement such a rule in certain circumstances, either through legislation or through allowing courts the discretion to make such an order.[6]

In the 'merits review' jurisdiction of LEC ('class 1'), the Court is 'not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances'.[7] Therefore, there is a presumption that each party will pay its own costs, unless there are particular circumstances which warrant a departure from this position. However, the possibility of an adverse costs order cannot be ruled out.

There is no such presumption against a costs order for judicial review or civil enforcement proceedings in the LEC ('class 4'). This is the jurisdiction in which most public interest environmental litigation is conducted. In the past, the LEC has indicated a willingness to depart from the usual order that costs 'follow the event' only on rare occasions. For example, the High Court affirmed a decision of the LEC in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236 that costs will not necessarily be awarded to the victor in public interest cases where it can be shown there are 'special circumstances' justifying a departure from the general rule.[8]

However, as such discretion has been infrequently applied, it has done little to placate concerns by public interest litigants that they will have to pay for the costs of the other party/parties if they are unsuccessful.[9] This is even despite a recent amendment to the NSW *Land and Environmental Court Rules 2007* (LEC Rules) which explicitly enables the

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[4] Australian Law Reform Commission (ALRC) Report 75, (1995) "Costs Shifting – who pays for litigation" at [2.2].
[5] ALRC 75 at [13.11].
[6] See *Minister for Planning v Walker* (No 2) [2008] NSWCA 334 (3 December 2008)
[7] Rule 3.7 of the *Land and Environment Court Rules 2007*
[8] *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, upheld in High Court in (1998) 193 CLR 72.
[9] The discretion has been applied in only a handful of cases: *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44 at [56] per Bignold J; *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365; *Roy Kennedy v Director-General of the Department of Environment and Conservation (No 2)* [2007] NSWLEC 271

Court to 'decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest': Rule 4.2.

We note that this amendment was made after the EDO raised concerns with the Land and Environment Court Users Group about the accessibility of the LEC to public interest litigants. Problematically, however, the LEC did not indicate on what basis the amendments were made and what was the intention behind them. It has been left to subsequent decisions of the LEC to interpret the intention of those amendments.

In particular, two recent cases that the EDO was involved with indicate that the LEC is likely to continue to exercise its discretion regarding costs in favour of public interest litigants sparingly.

Case study: the *Anderson* cases

The EDO acted on behalf of Douglas and Susan Anderson, two Traditional Owners of Bundjalung country who have fought for many years to protect their own cultural heritage and an important site at Angels beach near Ballina,[10] in two separate judicial review proceedings in class 4 of the LEC's jurisdiction. Both proceedings were unsuccessful.

In adjudicating on the issue of costs, the LEC declined to exercise its discretion in each case, and made costs orders against the Andersons. In the costs hearings, the EDO had argued that the intention of rule 4.2 of the LEC rules was to vary the existing requirements as established by case law, so that an applicant only need to prove they were bringing the proceedings in the 'public interest' to obtain an order that there be no order as to costs.

In one of the judgments[11], Justice Biscoe found that while the proceedings were considered to be in the 'public interest', a number of factors weighed against the departure from the usual order as to costs, including the fact that there was some disagreement amongst the local Aboriginal community. Biscoe J emphasised the flexibility of the costs discretion, noting that while the moment or magnitude of the public interest consideration alone might justify departure, in most cases he expected that it would also be necessary to establish special circumstances additional to the public interest in order to enliven the discretion.

The refusal of the LEC to exercise its discretion in these two cases demonstrates that there remains a reluctance of the LEC to accept the formulation proposed by the EDO, and a clear unwillingness to depart from existing case law on public interest costs and interpret rule 4.2 in a manner that promotes, rather than hinders, access to justice.

[10] *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)*[2008] NSWLEC 272 (2 October 2008); *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director General of the Department of Environment and Climate Change & Anor* [2008] NSWLEC 299 (10 October 2008)
[11] *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272 (2 October 2008)

In the circumstances of these cases, the practical effect of this reluctance has been the potential bankruptcy of the Traditional Owners who were seeking to protect their cultural heritage for the benefit of their community.[12]

In contrast to the limited application of costs discretion in the LEC, many other comparable jurisdictions around Australia have 'own costs' provisions that apply broadly across their environmental and planning law jurisdictions. In Victoria, the equivalent jurisdiction is the Victorian Civil and Administrative Tribunal, which hears both merits matters and judicial review matters relating to environmental and planning law issues. Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that each party will bear its own costs. Costs can only be awarded against a party in exceptional circumstances, such as where the proceedings are vexatious, or there has been a failure to comply with an order of the tribunal. Similarly, the Tasmanian Resource Management and Planning Tribunal requires each party to pay its own costs, except in exceptional circumstances.[13] South Australia's Environment, Resources and Development Court is also an own costs jurisdiction, and the court only has the power to award costs in limited circumstances.[14] In Queensland, litigants in the Planning and Environment Court bear their own costs unless they are found to have caused unreasonable delay or been frivolous or vexatious.[15]

None of these jurisdictions have had a significant number of public interest appeals even with the presence of these own costs provisions. Indeed, whether a litigant takes an action depends not only on costs, but on whether applicants have significant resources, time, access to experts and prospects of success.

In the circumstances, the EDO submits that there is a clear need for law reform to ensure that public interest litigants are able to bring their cases to the LEC without the threat of an adverse costs order. In the absence of suitable costs provisions, the LEC will only remain available for those who are willing to risk bankruptcy or able to obtain a grant of legal aid. In NSW legal aid for environmental matters is limited. As a result, many public interest litigants cannot take the risk of commencing proceedings in the LEC.

The EDO therefore submits that the procedural rules relating to 'own costs' orders in the LEC should be amended to stipulate that in *all* proceedings in the Court's jurisdiction, parties should pay their own costs unless there are exceptional circumstances, such as where the proceedings are vexatious or frivolous. Such 'own costs' rules are critical in order to avoid situations where public interest litigants have to face bankruptcy in order to achieve a public good for the benefit of the wider community, such as in the Anderson case discussed above.[16] They would facilitate meaningful access to the LEC for public interest litigants, and would be in step with the law and practice in comparable jurisdictions around Australia.

Upfront costs orders

[12] For a further discussion of the problematic nature of these costs decisions, see Ruddock K, "Bankruptcy – the price for seeking to protect Indigenous rights? (Editorial Commentary)" (2009) 26 *Environmental Planning Law Journal* 81.
[13] *Resource Management and Planning Appeal Tribunal Act 1993* (Tas), s 28.
[14] *Environment, Resources and Development Court Act 1993* (SA), s 29.
[15] *Sustainable Planning Act 2009* (Qld) s457.
[16] See Ruddock K, "Bankruptcy – the price for seeking to protect Indigenous rights? (Editorial Commentary)" (2009) 26 *Environmental Planning Law Journal* 81.

Further or in the alternative, the EDO submits that it would be appropriate to include provision for upfront costs orders broadly across NSW, through the UCPR. Upfront costs orders involve the court determining at the outset how the costs will fall once proceedings are completed. Such orders are currently only available in Queensland under s49 of the *Judicial Review Act 1991*. Section 49 allows the court to determine (on application) that once the proceedings are complete the parties will either have to bear their own costs or pay the costs of the other side if they are unsuccessful. In considering the costs application, the court is to have regard to amongst other things, the financial resources of the applicant and:

> *whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant*[17]

An example of the use of this provision is the case of *Alliance to Save Hinchinbrook Inc v Cook & Ors*,[18] where an environmental group successfully sought an upfront costs order on the basis that they would not otherwise be able to afford to conduct the litigation. The court in that case made an upfront order under s49 that each party would bear their own costs after taking into account the public interest nature of the proceedings. Similarly, in the case of *Save Bell Park Group v Kennedy*[19] the Court made an own costs order under s49 after finding that the public interest arguments were 'the most compelling' taking into account the fact that the applicant was an unincorporated association, had few financial resources and its members were not motivated by private interests.

The EDO submits that NSW should introduce an upfront costs order mechanism in the UCPR to allow public interest litigants to apply to the court to determine how the costs will fall at the outset, and seek an own costs order. This will give applicants some certainty about the financial consequences of taking legal action. Without such a mechanism, the financial uncertainties facing potential litigants will continue to restrain the potential of the LEC to serve the public interest in environmental litigation.

Maximum costs orders or protective costs orders

In the LEC, the UCPR and the LEC Rules both apply. In relation to costs orders, the UCPR provide the power for a court to specify the maximum costs that may be recovered by one party from another. These maximum costs orders, or 'protective costs orders' ('PCOs'), as set out in Rule 42.4 of the UCPR, enable a court to determine at the outset what the quantum of costs of proceedings will be, thereby giving some certainty to both parties and indicating to public interest litigants the extent of their likely costs liability if they are unsuccessful.

The EDO has to date acted on behalf of two community groups in environmental public interest litigation to make applications for PCOs in the LEC, utilising Rule 42.4 of the UCPR.

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[17] Section 49(2)(b), *Judicial Review Act 1991*.
[18] *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.
[19] (2002) QSC 174.

In *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150, the EDO acted on behalf of a community group that is bringing enforcement proceedings through open standing rules, to enforce certain provisions of the *Protection of the Environment Operations Act* 1997 (NSW). In determining the application for a PCO in the preliminary stages of the case, Pain J exercised her discretion available by virtue of Rule 42.2 and made a PCO in favour of the applicant in the order of $20,000. In making the order, Her Honour considered a number of factors, citing case law from the UK and the Federal Court of Australia that interpreted similar PCO rules.[20] These included whether the claim appeared arguable, whether the proceedings were in the nature of public interest litigation, whether the plaintiff had a private interest, whether the plaintiff's counsel were acting pro bono and whether the plaintiff would be able to continue the proceedings in the absence of an order.[21]

In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources* [2009] NSWLEC 165, the EDO acted for a community group that was challenging the grant of a mineral exploration license in the LEC. In considering the PCO application, Preston CJ discussed the factors considered in the *Blue Mountains* decision, and noted that while these criteria could be relevant on the facts of a particular case and provide guidance, they were not fixed criteria. Instead, the critical question for each case was whether making a PCO would facilitate access to justice in the particular circumstances. In that case, Preston CJ declined to make a PCO on the facts, based significantly on the fact that there was no evidence that the proceedings would be discontinued if the order was not made. His Honour thus concluded that a PCO was not necessary to facilitate access to justice for the applicant, but he did note that the decision would not prohibit the making of an 'own costs order' after the substantive proceedings concluded, nor would it prohibit a PCO being made at a later stage in the proceedings if circumstances changed.

In relation to the application of the maximum costs rule it is relatively early to make any considered judgment about its effectiveness in improving access to justice for public interest litigants. Further, these provisions have not yet been tested in the Court of Appeal, although we note that the *Blue Mountains* decision is currently on appeal to that court. However, as the UCPR and case law currently sits, the EDO submits that the current rule is appropriate in the way that it can provide some protection to public interest litigants. It can ensure they are able to access the LEC without fear of excessive legal costs in the event that they are unsuccessful, enabling potential public interest litigants to plan for and anticipate possible legal costs from an early stage in litigation.

However, it is important also to note that in both the *Blue Mountains* and *Caroona* decisions, the respondents argued (amongst other things) that the making of PCOs should be limited to circumstances where it is necessary to ensure proportionality of legal costs with the amount or issues in dispute. This had been argued by the respondents despite the fact that there is no limitation specified in the text of Rule 42.4. While the judges in the LEC did not agree that this was the only objective of the rule, for the avoidance of doubt the EDO submits that the UCPR should be amended to make explicit that the discretion to make a PCO is available in public interest proceedings.

'Public interest' costs orders

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[20] *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 4 All ER 1 (*Corner House*); *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008)

[21] Note, this decision is currently the subject of an appeal to the NSW Court of Appeal.

As discussed above, there are currently two ways that public interest environmental litigants can seek to minimise their legal costs: in certain circumstances: through 'own costs' orders as provided for by the LEC Rules, and through the making of a PCO as provided for by the UCPR.

Given the ongoing risk and uncertainty to public interest litigants of adverse costs orders being made against them, the EDO submits that the most appropriate response to ensure that access to justice is promoted by removing this risk, is the amendment of the UCPR to include broad provisions relating to 'public interest costs orders' ('PICOs'). This would create a statutory mechanism allowing litigants to apply at the commencement of proceedings for a declaration that their proceedings are 'public interest proceedings' and to receive a corresponding PICO.

Allowing litigants to apply for a ruling as to whether their case is a public interest proceeding would make it possible for litigants to know if they were at risk of exposure to the other party's costs and to make an informed decision about whether to proceed with the litigation. Given that an applicant can control their own costs, knowing the extent of their potential exposure should make it possible to make an informed decision about whether to proceed with the litigation. Similar considerations apply to respondents. An order specifying the applicant's potential liability will enable respondents to make a decision about what resources to devote to a particular matter.

By requiring the making of a PICO, a public interest litigant would, at a minimum, have the certainty of having their costs liability capped. This again makes it much easier for public interest litigants to make an informed decision about how they wish to proceed. It also enables a court to tailor the order to the degree of public interest in the case, potentially expanding the class of cases in which public interest costs orders will be made.

Indeed, a category of broad costs orders, 'Public Interest Costs Provisions' has been recommended by the ALRC in the past.[22] This proposal for Public Interest Costs Orders offers a comprehensive approach to addressing the difficulties with costs in public interest litigation. The ALRC recommended courts having a wide discretion in issuing a PICO, to be exercised with full regard to the circumstances of and surrounding proceedings. This kind of approach is also taken in the UK, where a party seeking a 'protective costs order' can apply on the basis of the documents commencing the judicial review application[23].

The EDO therefore submits that the UCPR should be amended to include a new part providing for 'public interest costs orders'. This would include defining what a 'public interest proceeding' is, and expressly requiring judges to make PICOs in public interest proceedings.

A two step process could be adopted consisting of the following:

- A mechanism permitting applicants to apply to the court for a decision on whether their proceedings are 'public interest proceedings' at any stage of those proceedings;

[22] Australian Law Reform Commission, "Costs Shifting: Who Pays for Litigation in Australia", Report No 75, 1995.

[23] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600; *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2009] C.P. Rep 8.

- If proceedings are declared to be public interest proceedings, then the court hearing the application cannot order that costs follow the event. Instead, it must make some form of PICO (i.e. a 'no costs' order, a capped costs order, a one-way cost shifting order or an indemnity). This order must be made at the same time as the ruling on whether proceedings are public interest proceedings.

'Public interest proceeding' could be defined in terms similar to the following:

> *'public interest proceeding' means a proceeding concerning a matter within the jurisdiction of the Court that is instituted by a person or persons whose predominant purpose is to advance or protect a perceived interest, including a non-financial interest, of members of the public generally or a significant segment of the public. A proceeding does not fail to be a public interest proceeding simply because the applicant or applicants, or some of them, share the public interest benefit in greater or lesser degree.*

Such orders could take the form of, for example:

- *"each party bear his or her own costs*
- *the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall*
    - *not be liable for the other party's costs*
    - *only be liable to pay a specified proportion of the other party's costs*
    - *be able to recover all or part of his or her costs from the other party*
- *another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties*"[24].

Such amendments would ensure that all public interest litigants in NSW, including those in the LEC, would have access to a variety of costs orders that could be tailored appropriately to each case.

2. Security for Costs

Security for costs involves litigants demonstrating at the beginning of proceedings that they will be able to pay the other party's costs in the event that they are unsuccessful. As a result, security for costs orders can be prohibitive of access to justice. Public interest litigants may be deterred from proceeding with their case, or may be unable to demonstrate that they will be able to pay the other side's costs if unsuccessful.

In the EDO's experience, many environmental litigants are poorly resourced and rely on ongoing fundraising to be able to continue their court cases. A successful application for security for costs may therefore have the effect of forcing a party to discontinue their action, simply because they do not have access to the necessary funds at the time that the order is made. In the absence of a right of appeal, such decisions can and do act as a significant barrier to environmental litigation, and indeed any public interest litigation. Potential public interest litigants, such as community and residents' groups, have

[24] ALRC Report 75 at [13.22]

reported that opposing parties seem to be using the threat of a security for costs order to intimidate them from pursuing judicial review in the LEC.

Accordingly, in our experience the LEC in particular is generally mindful of these issues when examining security for costs orders.[25] While in the past the LEC has applied security for costs orders in a number of cases,[26] more recently, the Court has moved away from making security for costs orders in public interest proceedings. This movement has been supported by amendment to the LEC Rules which now provide that 'the Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest'[27].

Some recent case law also indicates that the LEC is unlikely to make a security for costs order 'where to allow the claim to proceed without security would be an abuse of process.'[28] Justice Biscoe has stated that:

> *It is not considered to be an abuse of process for an applicant who is a natural person to pursue a genuine claim without providing security merely because the applicant is poor and could not satisfy an adverse costs order, even though it is unjust to a successful respondent left with unrecovered costs. The principle of access to justice trumps mere poverty.*[29]

In the EDO's opinion, the practice of the LEC has in most cases appropriately focused on the need to ensure access to justice for public interest litigants, ensuring that the grant of a security for costs order does not stifle public interest litigation. For example, in *Wayne Sales-Cini v Wyong City Council & Anor* [2009] NSWLEC 1388, the acting registrar of the LEC refused to make an order for security costs, determining that the applicant had arguable prospects of success in relation to some issues in the proceedings and that they were not an abuse of process.

Problematically, however, in a similar matter initiated by the same applicant seeking to protect Aboriginal cultural heritage, Pepper J in the LEC determined it was appropriate to make an order for security for costs in the order of $15,000[30], which has effectively halted that litigation due to the applicant's impecuniosity. Therefore, there remains considerable discretion in relation to security for costs orders. This is compounded by the difficulty of appealing to the NSW Court of Appeal on such discretionary, procedural matters[31]. As a result uncertainty remains in relation to security for costs, and it can still be utilised as a threatening 'tool' by respondents in public interest litigation, adding additional time and cost to litigation.

In these circumstances, the EDO submits that there should be a clearly defined exemption in the UCPR from security for costs orders for litigants who can demonstrate that they are taking action in the public interest. This would reduce

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[25] *Razorback Environment Protection Society Inc v Wollondilly Council* [1999] NSWLEC 8.
[26] *Diamond and Anor v Birdon Contracting Pty Limited and Anor* [2007] NSWLEC 92, and *Gunning Sustainable Development Association Incorporated v Upper Lachlan Council and Anor* [2004] NSWLEC 603, and *Donnelly and Anor v Capricornia Prospecting Pty Ltd and Ors* [1999] NSWLEC 39.
[27] Rule 4.2(2). This rule came into force in January 2008.
[28] *Sharples v Minister for Local Government* [2008] NSWLEC 67 at paragraph 8.
[29] *Sharples v Minister for Local Government* [2008] NSWLEC 67 at paragraph 8.
[30] *Sales-Cini v Wyong City Council* [2009] NSWLEC 201
[31] See for example the principles cited in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) CLR 170.

the uncertainty faced by public interest litigants, and would further reduce the use of security for costs applications by respondents as a deterrent against impecunious public interest litigants. Of course, if there was a 'public interest costs order' regime in place that enabled public interest litigants to obtain upfront costs orders (that is, to seek own party costs orders) or maximum costs orders, then the issue of security for costs would be less problematic.

3. Undertakings as to damages

A final barrier to public interest litigation to the EDO's clients is the necessity of entering an undertaking as to damages when seeking an injunction on an interlocutory basis.

Environmental public interest litigation is usually pursued in order to protect the environment from the potential harm of a development or use of land. Many of our clients seek to prevent environmental damage that is occurring or about to occur. To do so it is necessary to seek an injunction, often on an interlocutory basis. To obtain an interlocutory injunction it is often necessary to provide an undertaking as to damages, which is financially prohibitive to many parties who might otherwise seek an injunction against a potential environmental damaging action in the public interest in the LEC. Large development projects may give rise to claims for damages in the order of hundreds of thousands of dollars. A failure to give such an undertaking is often fatal to seeking an interim or interlocutory injunction. Yet without an interlocutory injunction, litigation protecting the environment can become futile as environmental damage is often unable to be remediated or ameliorated at a later point in time.

While the LEC's approach to undertakings as to damages indicates that in public interest proceedings it may be less appropriate to require them,[32] public interest litigants have no certainty that such an undertaking will not be threatened nor sought by respondents.

One way to address the issue of undertaking to damages is to contain a specific provision that prevents the LEC from requiring undertakings for damages in granting an interlocutory injunction. Prior to its amendment, section 478 of the *Environment Protection and Biodiversity Act 1999* (Cth) included such a provision:[33]

> *The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.*

Provisions such as section 478 would not diminish the LEC's power to strike out proceedings if they are vexatious, frivolous or constitute an abuse of process. However their presence enables public interest litigants to stop potential environmental damage, particularly in circumstances where open standing provisions enable them to commence enforcement proceedings, and where Government agencies have failed to do so themselves.

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[32] For example, in *Tegra (NSW) Pty Limited v Gundagai Shire Council and Anor* [2007] NSWLEC 806 (29 November 2007), Preston CJ states that 'the appropriateness of requiring an applicant to give an undertaking as to damages may vary depending upon the nature of the proceedings. In public interest, environmental proceedings, it may be less appropriate': at paragraph 29.

[33] Section 478 was repealed by the *Environment and Heritage Legislation Amendment Act 2006* No.165 Sch.1 at 763.

The EDO therefore submits that the LEC Rules should be amended to include a rule prohibiting the LEC from requiring a public interest litigant to give an undertaking as to damages as a condition of granting an interim injunction.

For further information about this submission or to discuss any matters related to the submission, please contact Rachel Walmsley, EDO Policy Director on (02) 9262 6989 or by email at rachel.walmsley@edo.org.au