Submission to NSW Law Reform Commission by
Fairfax Media Publications Pty Limited
Security for Costs and Associated Costs Orders

Fairfax Media Publications Pty Limited ('**Fairfax**') welcomes the invitation of Law Reform Commission ('**LRC**') to make preliminary submissions to its inquiry on whether the law and practice relating to security for costs and to associated costs orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending litigation.

Fairfax and its related entities publish in NSW *The Sydney Morning Herald, The Australian Financial Review*, regional newspapers, networked radio stations and internet news information and entertainment services.

As a leading publishing entity Fairfax makes this preliminary submission to the LRC based upon a broad experience of both the law and practice as a corporate Defendant in defamation cases commenced by individual Plaintiffs both in NSW and in a number of other jurisdictions in Australia and internationally.

Our preliminary submission follows.

Summary

- **The costs of defending unmeritorious defamation claims has significant adverse impact on the freedom of the press.**
- **A media organisation which has a viable defence should not be in a position where it feels compelled to capitulate in a defence with merit largely on the basis of costs.**
- **In any strategic commercial consideration of a defence a media organisation must weigh up the cost of its defence and the prospects of costs recovery if successful. In the absence of security for costs in certain cases, this consideration weighs heavily against ensuring that the public is properly informed about matters of public interest.**
- **The distinctive features and high cost of defamation defence proceedings, the availability of no-win-no-fee Plaintiff arrangements and the important countervailing interest in freedom of speech recommend careful consideration of security for costs in defamation hearings.**

1 Security for costs orders

1.1 The purpose of a security for costs order is to protect a defendant, in whose favour the Court has made an order for costs, from having that order frustrated by the inability of the plaintiff to satisfy it.[1]

1.2 Rule 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) (**'UCPR'**) sets out the power of the Court to make an order for security for costs:

> (1) If, in any proceedings, it appears to the Court on the application of a defendant:
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> (a) that a plaintiff is ordinarily resident outside New South Wales, or

[1] *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744.

(b) that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or

(c) that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or

(d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or

(e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so,

the Court may order the plaintiff to give such security as the Court thinks fit, in such manner as the Court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

(2) Security for costs is to be given in such manner, at such time and on such terms (if any) as the Court may by order direct.

(3) If the plaintiff fails to comply with an order under this rule, the Court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.

(4) This rule does not affect the provisions of any Act under which the Court may require security for costs to be given.

1.3 At common law, Courts have an inherent jurisdiction to order the provision of security for costs where that course is considered necessary or just[2], thereby providing for orders in situations not falling within the categories set out in UCPR 42.21. While the Supreme Court clearly has this power (arising from the inherent jurisdiction of a superior Court to control its own processes), the position as regards the inferior Courts (District and Local) is less clear.

2 Relevant factors

2.1 Within a Court's jurisdiction, its discretion to make an order for security for costs is broad, unfettered and exercised with regard to the facts of the case.

2.2 In contrast to the Queensland rules[3], relevant factors for exercising the discretion are not set out within the UCPR.

2.3 While the Courts have not exhaustively listed the circumstances in which the discretion should be exercised,[4] the following factors are regularly considered:

(a) the place of residence of the plaintiff;

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[2] *J H Billington Ltd v Billington* [1907] 2 KB 106 at 109-110, *Rajski v Computer Manufacture and Design Pty Ltd* [1982] 2 NSWLR 443 and *Morris v Hanley* [2000] NSWSC 957, *Byrnes v John Fairfax Publications Pty Ltd* [2006] NSWSC 251 at [17].

[3] Rule 672 *Uniform Civil Procedure Rules 1999* (Qld).

[4] *Spiel v Commodity Brokers Australia Pty Ltd* (in liq) (1983) 8 ACLR 410 at 415 (Bollen J).

(b) whether the plaintiff is a nominal plaintiff;

(c) the impecuniosity of the plaintiff, and the reason for any impecuniosity (noting that poverty is no bar to a litigant[5]);

(d) the strength and bona fides of the plaintiff's claim;

(e) the timing of the application (including any delay on the part of the defendant is making the application) and stage of the proceedings;

(f) whether the proceeding might raise matters of general public importance; and

(g) whether an order will stifle an action.

2.4 Ordinarily, none of these factors alone justifies or denies a basis for awarding security for costs. Rather, the Court adopts a balancing exercise based on factors relevant to the particular case. [6]

2.5 A Court will be reticent to make an order for security for costs if the order would shut out a plaintiff from proceeding with a claim that is bona fide, and not obviously frivolous or vexatious.[7] In determining whether an order would stifle a proceeding, the Court will inquire into a set of factors including the relative position of the parties,[8] and the timing of the application for security.[9]

3 Increasing prevalence of "no-win equals no-fee" representation

3.1 An internet search will reveal a number of legal practices who offer to provide services in defamation matters on a no-win no-fee basis. The arrangements in New South Wales for conditional fee arrangements allow a Plaintiff's lawyers to claim an uplift (in fact a "success fee" of up to 20%) in addition to their basic costs of their win. The arrangements also provide for fees to be paid out of settlements. In the same proceedings, a successful media Defendant will invariably be unable to recover its costs from an impecunious individual claimant.

3.2 In many cases impecunious Plaintiffs are encouraged to enter into such arrangements because they are at no risk if the case is lost. The Plaintiff's lawyers then use such impecuniosity to force a settlement.

3.3 The effect of no-win no-fee funding arrangements may be to undermine the important role of the media in reporting and providing a forum for the expression of opinion. This impacts upon both the prepublication process and the media's response to a complaint or commencement of proceedings, regardless of merit.

3.4 The alternative to self-regulation (through the implementation of a risk-averse approach to publication) or early capitulation, is to defend a claim where there are often no prospects of costs recovery, even if the defence succeeds, leading to a major cost burden for publishers and broadcasters such as Fairfax.

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[5] *Cowell v Taylor* (1885) 31 Ch D 34 at 38.
[6] *Strata Consolidated v Bradshaw* [2000] NSWCA 114.
[7] *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074.
[8] See eg *Shackles v Broken Hill Pty Co Ltd* [1996] 2 VR 427, 432-433 (Byrne J). Byrne J declined to order security against indigenous plaintiffs on the ground that it would impose great hardship on the plaintiffs who were already particularly vulnerable.
[9] If security is not applied for promptly, it will be more difficult to persuade the court that such an order is not unfair or oppressive. See *Bryan E Fencott and Assocs Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514 (French J).

4 Matters particular to defamation claims

4.1 It is well established in New South Wales that a factor relevant to the exercise of the Court's discretion in ordering or declining an application for security for costs is whether or not the making of an order would unduly stultify the Plaintiff's ability to pursue the proceedings[10]. This factor is commonly employed to resist an application by a media Defendant such as Fairfax for an order for security of its costs. In Fairfax's view, such an approach strikes a balance which unfairly favours plaintiffs with unmeritorious claims.

4.2 In Fairfax's view, the grounds specified in UCPR 42.21 are unfairly restrictive. They fail to taken into account a number of relevant matters affecting the defence of defamation proceedings which are particular to that cause of action. We submit that these matters warrant an extension to the grounds upon which a defendant may seek a security for costs order.

Lack of reasonable prospects

4.3 While the motivations of defamation plaintiffs and bona fides vary from case to case, there is no doubt some plaintiffs attempt to use defamation proceedings as a method of silencing or minimising future reporting on their activities, either on the basis that an ongoing claim is likely to have a practical impact upon media organisations' willingness to risk further reporting on the individual, or because the plaintiff may argue that further reporting on the matters the subject of the proceedings may constitute contempt (it is to be noted that juries may be elected by either party in defamation proceedings and usually are). For these reasons a plaintiff may commence defamation proceedings even where it is likely that a defence will be sustained. Recent case law illustrates that a number of defamation claims are made by plaintiffs suing upon defamatory imputations which the defendants are able to prove true.[11]

4.4 Defamation is a cause of action which also attracts a significant number of what might be considered regular or persistent litigants, sometimes where the claim is part of a greater legal battle the individual may be having with a person or entity. Often such claims lack any real prospects of success but it will not be possible, for various reasons, for the defendant to have summary judgment entered or for the proceedings to be dismissed as vexatious or frivolous.

4.5 In Fairfax's view, it is unfair to require defendants to defend defamation claims instituted without reasonable prospects while the absence of security may effectively preclude the defendant from being able to recover its costs against the plaintiff. This situation, for reasons outlined above, adversely impacts upon the media's ability to fulfil its role as a vital instrument in the free flow of information in society.

Relationship between likely damages and costs

4.6 In defamation proceedings there is often a complete lack of proportionality between damages which a plaintiff may be expected to receive and the costs involved for the parties in taking the matter to trial. It is well recognised that it is usually the

[10] See for example *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC245 at 31

[11] See, for example, *Snedden v Nationwide News Pty Ltd* [2009] NSWSC 1446, *Field v Nationwide News Pty Ltd* [2009] NSWSC 1285; *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750; *Gacic v John Fairfax Publications* [2009] NSWSC 1198

defendant that will bear the greatest burden of costs in defamation proceedings, because the onus on establishing any defence (including truth) is on the defendant and also because Plaintiffs are often able to find legal practitioners who will act on a conditional basis as referred to above.[12]

4.7 Defamation plaintiffs rarely sue in the Local Court, notwithstanding that a particular defamation may not be particularly hurtful or damaging and as such unlikely to result in an award of damages over the statutory jurisdiction of that Court. This is probably because juries are not available in the Local Court. This means defendants are usually faced with the higher costs which come with defending proceedings in the District and (more commonly) Supreme Court. In circumstances where a plaintiff is likely to receive only minimal damages (if ultimately successful), it is unfair for a defendant to incur the substantial costs of defending proceedings with little or no prospect of recovering costs if the defence is successful.

4.8 A defamation case in which the Court took the above matters into consideration was *Mentyn v Law Society of Tasmania (No 2)* [2004] TASSC 127. At [10], Blow J said:

> …I think I can properly take into account the fact that the plaintiff has a history of litigious failures, as evidenced by the costs orders that I have referred to, and the fact that his other claims in this action were all misconceived. Those matters strongly suggest that the defamation claim might fail. The fact that the plaintiff is an unemployed resident of New Norfolk suggests that, in the event of him recovering damages for defamation against some or all of the defendants, the damages awarded are quite likely to be somewhat small …[11] Because it is likely that any award of damages for defamation would be small, because of the matters suggesting there is a strong chance that the plaintiff's defamation claim will fail, and because of his apparent impecuniosity, I think it appropriate to make an order for security for costs, despite the fact that such an order is likely to frustrate his claim for damages for defamation

Proposed amendments

4.9 While the above matters may presently be relevant factors to be considered by the Court in the exercise of its discretion to grant an order for security for costs at common law, they are not grounds specified in the UCPR. While it is arguable that a defendant may apply to the Court pursuant to its inherent jurisdiction seeking an order for security for costs on the bases outlined above, this remains uncertain especially in the lower Courts.

4.10 It is submitted that an additional category should be introduced at UCPR 42.21 to allow defendants in defamation to seek an order for security for costs in situations where the claim:

(a) lacks reasonable prospects of success; or

(b) if successful, is likely to result in an award of damages to the plaintiff which is disproportionately low when compared to the defendant's likely costs of the proceedings up until the end of trial.

4.11 It is further submitted that it would be appropriate for these grounds to also apply in respect of injurious falsehood proceedings, in light of the similarities of that cause of action to defamation and its similar impact upon publication by media organisations.

[12] *Kennedy v Nine Network Australia P/L* [2008] QSC 134 at [54].

5 Security for costs orders where Plaintiff residing out of the jurisdiction

5.1 Where a plaintiff ordinarily resides outside the jurisdiction, security for costs may be ordered for the purposes of ensuring that a successful defendant will have assets available within the jurisdiction against which it can enforce the judgment for costs, so that a defendant does not bear the risk as to the certainty of enforcement in the foreign country and as to the time and complexity of the action there which might be necessary to effect enforcement.[13]

5.2 In *PS Chellaram v China Ocean Shipping* (1991) 102 ALR 321 McHugh J said (at 321):

> …for over 200 years, the fact that a party, bringing proceedings, is resident out of the jurisdiction and has no assets within the jurisdiction has been seen as a circumstance of great weight in determining whether an order for security for costs should be made. Indeed, for many years the practice has been to order such a party to provide security for costs unless that party can point to other circumstances which overcome the weight of the circumstance that that person is resident out of and has no assets within the jurisdiction.

5.3 The situation where a Plaintiff resides outside of Australia is a common one in defamation claims against media organisations. UCPR 42.21(1)(a) specifies the relevant ground which provides a defendant the right to seek an order for security for costs in this situation.

5.4 It is to be noted that the reference to "ordinarily resident outside New South Wales" in rule 42.21(1)(a) would appear to inaccurately reflect the correct position at law, which as a result of s 117 of the Constitution requires the rule to be read as meaning "ordinarily resident outside Australia": *Australian Building Construction Employees and BLF v Commonwealth Trading Bank* [1976] 2 NSWLR 371 at 373G, *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC 245 at [6]. This would seem a matter which ought to be addressed in any amendments to the rules.

5.5 There are two matters commonly arising in orders of this kind which are unsatisfactory.

Ensuring a defendant is aware of when an entitlement to seek security for costs arises

5.6 The first is where a plaintiff resides in the jurisdiction at the time of the commencement of proceedings, but moves residence during the course of the proceedings. The UCPR requires a plaintiff, in his or her originating process, to state his or her personal address, in addition to his or her solicitors' address (UCPR 4.2(g)). In an application for security for costs, the onus on establishing a plaintiff is ordinarily resident outside the jurisdiction is on the applicant for the order (i.e. the defendant)[14]. Whether a plaintiff is ordinarily resident outside the jurisdiction can be a matter of considerable argument (see, for example *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC 245). Some plaintiffs may have two or more residences (one inside Australia, another outside) and case law shows it may be difficult to establish where the plaintiff is ordinarily resident. There is also no obligation upon the plaintiff to advise the defendant of any change of residency, and even once it becomes apparent to the defendant that the plaintiff may reside outside the jurisdiction, it will always be in the interest of the plaintiff to present his or her residency in the light most favourable to him or her (i.e., that they are in fact

[13] *Kent Heating Ltd v Cook-on Gas Products Pty Ltd & Anor* (1984) 59 ALR 277 at p279.

[14] *Logue v Hansen Technologies Ltd* [2003] FCA 81 at [19].

ordinarily resident inside Australia). The defendant will not typically possess evidence that the plaintiff is in fact ordinarily resident outside the country.

5.7 If the defendant is not properly put on notice of the plaintiff's relocation, it is likely that the defendant will be unaware of its entitlement to bring an applicable for an order for security for costs pursuant to this rule. This unfairly prejudices defendants in the course of defending proceedings in that it continues to incur costs for which no security has been provided. Further, where a defendant becomes aware of the plaintiff's relocation late in the proceedings and where a trial is imminent, the Court will be less likely to make the order sought, often through no fault of the defendant.

5.8 As a side note, in Fairfax's view it is relevant that two alternative grounds for the grant of an order for security for costs deal with the plaintiff's personal address (UCPR 42.21(1)(b), (c)).

5.9 It is submitted that an onus should be placed upon the plaintiff to ensure his or her address as specified in the originating process is kept accurate, and that any change of residential address must be notified to the defendant within a reasonable period of time. A rule reflecting this requirement should in our submission be inserted in the UCPR as a new section 4.6A. Failure to comply with this requirement should be specified in UCPR 42.21 as a ground for an application for security for costs. Given the difficulties for defendants and the Court to establish whether a plaintiff will be considered ordinarily resident in the jurisdiction, in Fairfax's view consideration should also be given to specifying in the UCPR a test as to residency and putting the onus of proof on the plaintiff.

Whether enforceability of an Australian costs order in the foreign jurisdiction should be considered on security for costs applications

5.10 The second matter is the question of whether the enforceability of any order for costs in the jurisdiction of the plaintiff's residency is relevant to the determination of whether an order for security for costs should be made. This is question which appears to be approached in an inconsistent manner by the Courts.

5.11 It has been said that a litigant ordinarily resident outside Australia cannot resist an application for security for costs merely by showing, without more, that he or she is ordinarily resident in one of the countries specified in regulations made under the Foreign Judgments Act 1991 (Cth)[15]. In some cases, the question of enforceability is not or barely considered at all: see, for example, *Kennedy v Nine Network Australia P/L* [2008] QSC 134 (where the plaintiff was ordinarily resident in Singapore).

5.12 However, in other cases this question seems to assume a great deal of importance and extensive consideration is given by the parties and the Court to the relevant laws of the country of the plaintiff's residency regarding enforceability of costs orders made by Australian Courts in that country.[16]

5.13 This situation is illustrated by the defamation cases of *Ezzo v Grille* [2003] NSWSC 776, *Carrey v ACP Publishing Pty Ltd*, Supreme Court of Victoria, 6 February 1998 per Hedigan J.

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[15] *Logue v Hansen Technologies Ltd* [2003] FCA 81 at [40], applying Farmitalia Carlo Erba SRL v Delta West Pty Ltd (1994) 28 IPR 336

[16] See, for example, *Gerea Aopi v Howard Rapke* [2002] NSWSC 711.

5.14 In *Ezzo*, the question of enforceability was touched on only lightly, when Counsel for the defendant advised the Court that there appeared to be no enforcement agreement with the United States which would facilitate recovery against the plaintiff in the event that he was unsuccessful and required to pay costs, and declined to do so. The plaintiff took no objection to this information, and no contrary information was put before the Court. Accordingly, the question of enforceability assumed little importance and the Court ultimately made an order for security for costs.

5.15 In *Carrey*, however, a considerable amount of information was provided by the plaintiff's solicitors as to the procedure for registering foreign judgments in the United States under the Uniform Foreign Money Judgements Recognition Act for the State of California. The Court in that case ultimately ordered security to the limit of the cost of any necessary step taken to obtain enforcement of a judgment for costs in California. No consideration was apparently given by the Court to the practice of some Courts of the United States to refuse to register judgments of foreign Courts which apply different defamation laws that may be considered to conflict with public policy in the United States.

5.16 It is submitted that the question of enforceability has the potential to turn security for costs applications into lengthy considerations of treaties and local foreign practice and procedure of which the Court may not be fully informed. It is noteworthy that a decision on security for costs will likely be made well before a defendant may need to enforce a costs order in a foreign jurisdiction, during which time the laws of enforceability of foreign orders in that jurisdiction may change (in this respect we note the recent passing of "libel-tourism" laws in the United States).

5.17 In Fairfax's view, once it is shown the plaintiff is ordinarily resident outside Australia, the position is the defendant should not have to "bear the risk as to the certainty of enforcement in the foreign country and as to the time and complexity of the action there which might be necessary to effect enforcement". To get into arguments about the ability of the defendant to enforce a costs order in the foreign abode of the plaintiff obscures this principle and unduly complicates security for costs applications. The UCPR should be amended to make it clear that in granting an order pursuant to UCPR 42.21(1)(a), the Court is not to have regard to the potential for the defendant to enforce any costs order in the relevant foreign jurisdiction.

6 The categories contained at UCPR 42.21 should be amended to include where it is in the interests of justice for security for costs to be ordered

6.1 It has been the experience in various cases that a situation arises where it is appropriate for an order for security for costs to be made, but where the situation does not clearly fall within any of the five categories set out at UCPR 42.21[17].

6.2 In other jurisdictions, such as Queensland[18] and South Australia[19], the relevant rules provide a "catch-all" ground for an order for security for costs in circumstances where such an order is in the interests of justice. As already noted, the Supreme Court has an inherent power to make such an order.

6.3 Fairfax submits that in the interests of clarity (especially in establishing the District and Local Courts share this power), the UCPR should be amended to introduce a new

[17] For example, see *Byrnes v John Fairfax Publications Pty Ltd* [2006] NSWSC 251, where non-payment of a costs order was considered sufficient reason for an order for security for costs.

[18] Rule 671(h), *Uniform Civil Procedure Rules 1999* (Qld0.

[19] Rule 194, *Supreme and District Court Civil Rules 2006* (SA).

ground at UCPR 42.21(1)(f) in the terms "where it is in the interests of justice that an order for security for costs should be made".

7 An automatic stay should be imposed if security not provided

7.1 Pursuant to s 67 of the *Civil Procedure Act 2005* (Qld), the Court has the power to order a stay of proceedings. The Court may grant a stay of proceedings unless and until the security for costs is given.[20]

7.2 Unlike provisions in Queensland[21], UCPR 42.21 does not provide for an automatic stay if the security is not provided in accordance with the order. Accordingly, the defendant is still required to apply to the Court for any such stay. While UCPR 42.21 grants the Court the power to dismiss proceedings where there has been a failure by the plaintiff to provided security for costs as ordered, it is generally the case that the Courts will not dismiss the proceedings unless the same standards as apply in applications for dismissal for want of prosecution applications are met. This means any dismissal for failure to provide security is unlikely to be ordered before the passage of what may be a considerable length of time.

7.3 A Court, as part of its order for security for costs, may include an order that the proceedings will be stayed should the security not be provided, however there is no requirement that this be so included.

7.4 It is submitted that, as is the position in Queensland, the default position should be that where the plaintiff has not provided security in the manner ordered by the Court, a stay should automatically be imposed. This provides a degree of certainty to the parties as to the status of the proceedings once the date for the provision of security has passed, and avoids the need for listing the matter before the Court to seek orders for such a stay, thus minimising further costs to the parties and saving Court time. It will also assist in encouraging plaintiffs to comply with the Court's order in a timely fashion.

8 Conclusion

8.1 In Fairfax's view, the matters raised in this preliminary submission are important in ensuring fairness for defendants defending defamation actions in the operation of the security for costs regime.

8.2 We hope that this preliminary submission assists the LRC and that the LRC takes these matters into account when preparing the consultation paper.

[20] *Philips Electronics v Matthews* [2002] NSWCA 157 ; 54 NSWLR 598

[21] See for example rule 674(b) *Uniform Civil Procedure Rules 1999* (Qld).