THE LAW SOCIETY OF NEW SOUTH WALES
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Civil Litigation Committee
Environmental Law Committee

Submission to the New South Wales Law Reform Commission – Consultation Paper 13 (2011): Security for Costs and Associated Costs Orders

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The Committees

Membership of NSW Young Lawyers is open to young lawyers, either under the age of 36 or in their first five years of practice, and to law students. This submission is made on behalf of the Civil Litigation Committee and the Environmental Law Committee (together, the **Committees**).

The Civil Litigation Committee consists of members of NSW Young Lawyers who practice or have an interest in civil litigation.

The Environmental Law Committee consists of members of NSW Young Lawyers who practice or have an interest in environmental law.

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Issues addressed in this submission

The Committees have had the opportunity to read and consider *Consultation Paper No 13 (2011) – Security for Costs and Associated Costs Orders* (the **Consultation Paper**) published by the Administrative Review Council (the **Council**) New South Wales Law Reform Commission (the **Commission**) in May 2011.

In February 2010, each of the Committees made a preliminary submission in response to the Commission's terms of reference. The Committees build on their preliminary submissions in this submission.

Set out below are the Committees' views in response to the following discussion questions contained in the Consultation Paper.

Question 2.1

Should legislation provide a broad ground for courts to order security for costs where the order is necessary in the interests of justice? If so, should this be achieved by amending *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 or should such a provision be located in s 98 of the *Civil Procedure Act* 2005 (NSW)?

Question 2.2

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(a) be amended so that, instead of referring to a plaintiff ordinarily resident outside New South Wales, it provides 'that a plaintiff is ordinarily resident outside Australia'?

Question 2.3

Where the plaintiff is ordinarily resident outside Australia, should the enforceability of an Australian costs order in the plaintiff's country of residence be a relevant factor that courts may consider in assessing an application for security for costs? If so, should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to reflect such a principle?

Question 2.5

Are there other issues relating to grounds for ordering security specified in Uniform Civil Procedure Rules 2005 (NSW) r 42.21(1)?

Question 2.6

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to provide a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs? If so, should r 672 of the *Uniform Civil Procedure Rules 2009* (Qld) be used as the basis for such a list? If so, do you agree or disagree with any of the factors listed in r 672? Are there factors that are not listed in r 672 which should be included in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21? Should the list include the proportionality principle, that is, whether the security for costs applied for is

proportionate to the importance and complexity of the subject-matter in dispute? Should the list include public interest? If so, should the provision refer to 'public interest' or 'public importance'? Should the list include the impecuniosity of the plaintiff regardless of whether the plaintiff is a natural person or a corporation? Alternatively, would it be preferable to adopt a provision in the *Uniform Civil Procedure Rules 2005* (NSW), separate from the list of discretionary factors, stating the general rule that security for costs shall not be ordered merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs that may be awarded against him or her?

Question 2.7

If *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 were amended to include a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs, what should be the relationship of those factors with the jurisdictional grounds listed in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)? Should such a relationship be stated in U*niform Civil Procedure Rules 2005* (NSW) r 42.21 or should it be left for courts to develop?

Question 2.8

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(d) be amended to reflect the terms of s 1335(1) of the *Corporations Act 2001* (Cth)?

Question 2.9

Should corporate plaintiffs continue to be treated differently from plaintiffs who are natural persons in relation to security for costs?

Question 3.1

Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to include, as part of a list of discretionary factors relevant to the court's exercise of the power to order security, the consideration that the plaintiff is receiving funding from a litigation funder? If so, how should 'litigation funder' be defined?

Question 3.2

Should legislation be adopted to provide that, at the initial stage of a case management process, each party should disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order? If so, should the client legal privilege be expressly abrogated in relation to the disclosure requirement?

Question 3.3

Should legislation be adopted to give courts power to order costs against litigation funders?

Question 3.8

Is it desirable to permit costs orders to be made in favour of pro bono litigants on an indemnity basis? If so, should costs orders awarded be recouped by the practitioner or given to a pro bono litigation fund? Should courts be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis? Should s 99 of the *Civil Procedure Act 2005* (NSW) and s 348 of the *Legal Profession Act 2004* (NSW) be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis?

Question 4.1

Is there a need for new legislation to give courts the power to make public interest costs orders, or is the current law adequate?

Question 4.7

What is the appropriate scope and purpose of *Uniform Civil Procedure Rules 2005* (NSW) r 42.4? Should this rule be used more frequently in public interest proceedings?

Question 5.5

Should the *Uniform Civil Procedure Rules 2005* (NSW) set out a principle for dealing with appeals against security for costs orders? If so, what should that principle be? Are there any other issues relating to appeals against security for costs orders that need to be considered?

Question 5.6

Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to provide courts power to set aside or vary security for costs orders?

Question 2.1

A broad ground for courts to order security for costs?

The Committees take the view that a broader ground will supplement the existing five grounds in the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) r 42.21. If an amendment is made it would need to specify that such an order would be made in the interests of justice, or in the alternative, make reference to the just, quick and cheap resolution of disputes as required in the overriding purpose of the *Civil Procedure Act 2005* (NSW) under s 56 of the Act.

How should this be achieved?

UCPR r 42.21(1) provides an exhaustive list of circumstances where a security for costs order may be made. The discretion is currently limited. The Committees are of the view that UCPR r 42.21(1)(f) be inserted in the form: 'or any other ground in the interests of justice.'

This would be to provide the additional discretionary ground to order security for costs, but still operate within the framework of the existing system. The only potential drawback is that parties may use delaying or other tactics not within the intentions of the provision. The counter-argument to this is that UCPR r 42.21 is discretionary, and, as noted in the Consultation Paper at 21.1-5, the court has an inherent jurisdiction over security for costs, which includes preventing any abuse of process.

The Committees recommend that UCPR r 21.21 be amended to include a broad ground for courts to order security for costs in circumstances where it is in the interests of justice to make such an order.

This would reinforce the court's inherent jurisdiction to order security and provide litigants a single source to seek an order for security.

Question 2.2

Should the residency requirement in UCPR r 42.21(1)(a) refer to 'outside Australia'?

Yes.

Section 117 of the Federal Constitution prohibits disability or discrimination of residents of Australia on the basis of which state they live in. Section 117 extends to 'subject[s] of the Queen', being only natural persons and not corporations (see *Ceil Comfort Insulation Pty Ltd v ARM Equipment Finance Pty Ltd* [2001] NSWSC 28 at [9]-[26] (***Ceil***)).

The application of s 117 means UCPR r 42.21(1)(a) already effectively operates as 'outside Australia' rather than 'outside New South Wales' with regard to natural persons (see judgment of Helsham J in *Australian Building Construction Employees & Builders Labourers Federation v Commonwealth Trading Bank of Australia* [1976] 2 NSWLR 371).

In practice, this has also been the way UCPR r 42.21(1)(a) has been applied regarding corporations, as the exercise of discretionary factors have made it improbable that a security order against an interstate corporation would be made (we found no examples in the case law: see discussion at [57]-[61] in *Ceil*, noting that the now-repealed Pt 53 r 2(1)(a) of *Supreme Court Rules 1970* (NSW) is drafted in very similar terms to UCPR r 42.21 (1)(a)).

The suggested amendment providing that the plaintiff resides outside Australia rather than the State of New South Wales is desirable for several reasons, including:

- That the suggested amendment would remove the inconsistency whereby the current drafting only affects one class of plaintiff, being corporations, because of the protection afforded to natural persons by s 117 of the Constitution;
- That the courts have demonstrated that a corporation being domiciled in another state is not a factor taken into account when exercising the discretion to award security; and
- That the process of enforcing a judgment in Australia is largely unaffected by which part of Australia the judgment debtor resides in.

Question 2.3

Should enforceability outside Australia be a factor? Does this require amendment of the UCPR?

The potential duration and cost of overseas enforcement should be a relevant factor. While a judgment may be technically enforceable in an overseas jurisdiction, the fact that enforcement proceedings might take several years and/or cost a significant amount of money should be considered by courts in assessing whether to make an order for security for costs. Affidavit evidence from a local solicitor is usually sufficient to adequately inform the court of the potential difficulties, which may colour the process in the foreign jurisdiction (see *Castillejo v Botella* [2008] QSC 333 at [23]-[31])

At present, this is one of the many factors a court takes into account when exercising its discretion to award security. Amending the legislation to include this factor alone may elevate it above others, immediately making it the most important discretionary factor. Whether this is in the interests of justice needs to be thoroughly considered before any single factor, currently taken into account, is singled out in such a way. It may be more appropriate that any amendment includes all the discretionary factors taken into account by the courts. Please also see comments below in response to question 2.6.

Question 2.5

Other issues relating to grounds

The plaintiff has an information advantage over the defendant in relation to sub-section (a): a defendant will likely only know that a plaintiff has changed their residency status once the plaintiff informs them of that fact. A requirement that a plaintiff inform the defendant(s) in writing of that fact, within a reasonable period of time after the change in residency status is appropriate.

It may be advisable to also include such notice requirements for the other parts of sub-r (1).

Question 2.6

Should the UCPR include discretionary factors?

Yes.

To the extent that such a list would bring consistency and certainty, it is to be encouraged. However, given the wide discretion afforded to the court, it is appropriate the list is non-exhaustive. The weight placed on the factors listed will vary from case to case, to the extent that factors may be completely discounted in some cases.

In some areas, there may be particular factors of concern. For example, in the probate area, it is often more practical and economical for an estate to make a generous settlement payment to a litigant, even if they do not appear to have a *bona fide* claim, because of the additional costs to be borne in defending such a claim and the absence of any safeguards (in the form of assets or means) to satisfy a potential award of costs in favour of the estate. Any list of discretionary factors should take such concerns into account.

Should the Queensland rules be used as the basis for any amendment?

Yes.

Rule 672 of the Uniform Civil Procedure Rules 2009 (Qld) provides a list that reflects the factors the courts have taken into consideration in NSW when exercising the discretion to order security. The Committees agree that all of the factors listed in r 672 are relevant but would seek the following addition to sub-paragraph (l):

- 'including taking into account:
- Any agreements between New South Wales and/or Australia and the jurisdiction in relation to enforcement of judgments;
- The likely cost of enforcement within the jurisdiction;
- The likely length of time of enforcement proceedings within the jurisdiction;
- The stability of the jurisdiction, as a whole, and specifically, the justice system.'

The Committees would also seek to have the following factors added:

- The defendant's delay in bringing the application; and
- Whether the plaintiff is a 'flight risk' from their current jurisdiction, particularly where they have left New South Wales/Australia for a new jurisdiction after the instituting of proceedings.

Should the list include the proportionality principle?

Yes.

Should the list include public interest?

Yes.

Public interest is a legitimate factor to consider when applying the principles of security for costs; where a plaintiff's case is in the public interest it should be less acceptable that a security for costs order be allowed to hinder the continuation of the proceedings.

In balancing the rights of a defendant with the rights of a plaintiff when the usual factors leading to an order for security are in play, the Committees submit that the provision should refer to the higher threshold of 'public importance'. This factor should only be given consideration in respect of a test case that has actual public importance.

Should the list include the impecuniosity of the plaintiff?

Impecuniousity of the plaintiff should be considered irrespective of whether they are a natural person or a corporation. The Committees are of the view that this would be best included in the list of discretionary factors. This means that the courts would take it into account but that it would not be determinative of an order for security for costs. Therefore, it would be in line with the general rule that impecuniousity, on its own, is not a sufficient ground to order security for costs.

Question 2.7

Relationship between any discretionary factors and jurisdictional grounds

The list of discretionary factors should only be considered once the jurisdictional grounds have been met.

The Committees favour the approach taken by Queensland legislators, which list the jurisdictional grounds in r 671 of the *Uniform Civil Procedure Rules 1999* (Qld) and further provide: 'in deciding whether to make an order, the court may have regard to any of the following matters'.

An example of how this provision operates in practice with a court, only considering discretionary factors after the jurisdictional threshold has been surpassed, is seen in *Robson v Robson* [2010] QSC 378 at [37], where McMurdo J held: 'But as he is also ordinarily resident outside Australia, the operation of sub 617(e) [sic] is established and *thus there is power to order security for costs … I turn to the discretionary considerations*.' (emphasis added).

Question 2.8

Amendment to reflect terms of s 1335(1) of the *Corporations Act 2001* (Cth)

In the Committees' view, UCPR r 42.21(1)(d) should be amended to reflect the terms of s 1335(1) of the *Corporations Act 2001* (Cth).

UCPR r 42.21(1)(d) appears to be slightly less onerous due to the fact that s 1335(1) of the *Corporations Act 2001* (Cth) requires 'credible evidence' in determining the impecuniosity of a company. The Committees take the view that an amendment of UCPR r 42.21(1)(d) would remove constitutional issues arising from an inconsistency between state and federal laws. On this ground, an amendment of the rule to be consistent with s 1335(1) of the *Corporations Act* would be desirable. It would also be logical for the New South Wales rules to be amended to reflect the construction of the more wide-reaching Act.

However, members of the Committees did point out that the courts have consistently applied identical considerations when considering whether to order security under the UCPR and the *Corporations Act* for corporate plaintiffs, and that amendment would not result in any utility.

Question 2.9

Corporate plaintiffs

Some Committees' members considered that the current rules provide an unfair advantage to defendants of litigation brought by potentially impecunious corporate plaintiffs. For example, under the current rules, different treatment is given to a plaintiff sole trader as opposed to a corporate plaintiff in the same position, where there is otherwise no difference between the underlying merits of the action or circumstances.

However, the Committees' consensus is that corporate plaintiffs should continue to be treated differently from plaintiffs who are natural persons when orders for security are made. The limited liability of corporations contributes to their unique position. Companies have persons standing behind them in the form of directors and shareholders who may be in a position to put up security for costs. Further, there are requirements on companies regarding solvency.

Question 3.1

Litigation funders

In the Committees' view, the *Uniform Civil Procedure Rules 2005* (NSW) should be amended to include, as part of a list of discretionary factors relevant to the court's exercise of the power to order security, the consideration that the plaintiff is receiving funding from a litigation funder.

Reflecting the current law

The Committees note that under the current common law, as established in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 (***Green***), where a court is exercising its inherent jurisdiction to make security for costs orders, the court will more readily make a security for costs order where a litigation funder is involved in the proceeding. Accordingly, if the UCPR were to be amended so as to include a list of discretionary factors to be taken into account when determining whether to make a security for costs order, then the presence of a litigation funder should be included as a relevant factor in order to reflect, and retain continuity with, the current law.

The rationales for the court's approach to security for costs orders where litigation funding is involved

Further, in the Committees' view, the decision in *Green* that the involvement of a litigation funder will make the court more ready to order security for costs was sound in principle. Explaining this view requires a brief discussion of the judgment in *Green.*

The decision in *Green* appeared to rest on two separate rationales. The first is what one might call the 'public policy' rationale: the conviction that the court's primary role is to vindicate the legal rights, not facilitate private profit. This view was apparently endorsed by both Hodgson and Campbell JJA at [51], [82] and [88]. The second might be called the 'evading costs orders' rationale: the idea that even if a party receiving assistance from a litigation funder obtains an indemnity from the litigation funder to allow it to pay any adverse costs orders, the court should protect a defendant against the risk that such an indemnity will be difficult or impossible to enforce.

This view was endorsed in the following cases:

- Hodgson JA in *Green* at [52] (Campbell JA agreed with Hodgson JA's reasons in *Green* but made no further remarks on this point);
- Einstein J in first instance in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWSC 449 at [26];
- Judd J in *Buffalo Corp Pty Ltd v Prime Life Corp Ltd* [2009] VSC 171 at [74]; and
- Gilmour J in *Gurtler v Finance Now Pty Ltd* [2009] FCA 631 at [11].

The underlying rationale for security for costs is to protect against injustice to successful defendants caused by impecunious plaintiffs who are unable to meet costs orders (see *The Australian Derivative Exchange Ltd v Doubell* [2008] NSWSC 1174 at [13]). Accordingly, it is the Committees' view that the 'evading costs' rationale is more compelling than the 'public policy' rationale, because the 'evading costs' rationale is motivated by the object of securing the position of successful defendants and is therefore consonant with the underlying objects of security for costs.

In the Committees' view, there is a further, simpler reason for allowing a court to take into account whether litigation funding is involved when deciding whether to make security for costs orders. In security for costs orders, the party resisting the application may claim that, as a matter of fact, it would not be able to comply with an order for security for costs, and that therefore such an order will stultify the proceeding. Whether a litigation funder is assisting such a plaintiff is surely relevant to determining whether such a factual claim is

correct. Accordingly the court should be able to take the involvement of a litigation funder as a discretionary factor in determining whether to make a security for costs order.

Definition of 'litigation funder'

Rather than define 'litigation funder', the Committees recommend that the UCPR be amended to include a definition of 'funded proceedings', as follows:

> A person is carrying on funded proceedings if each of the following conditions are met:
>
> (i) the person is a party to the proceeding;
>
> (ii) the person has received financial assistance from a person who is not a party to the proceeding (the third party);
>
> (iii) in consideration for the financial assistance referred to at (ii) above, the third party will receive a sum of money (the return on investment) if the proceeding ultimately has a successful outcome for the person;
>
> (iv) one of the integers used in determining the amount of the return on investment is either the quantum of an order for the payment of money or the quantum of money received by the person pursuant to an agreed settlement of the proceeding;
>
> (v) the third party would have had no legal or beneficial entitlement to the return on investment but for its agreement to provide financial assistance to the person; and
>
> (vi) the third party has no non-financial interest in the proceeding (such as a personal interest) in the outcome of the proceeding.

In its preliminary submission, the Civil Litigation Committee offered a tentative definition of 'litigation funder' and stated that it would be interested in considering the suggested definitions of 'litigation funder' in other preliminary submissions. That suggested definition has been reproduced in the Consultation Paper (although with the word 'other' erroneously omitted following the word 'and/or').

The Committees are of the view that it may be more helpful to define what it means for a litigant to be conducting 'funded proceedings' rather than to define 'litigation funder', and that the definition could be made somewhat clearer than the Civil Litigation Committee's previous suggested definition. This is particularly so in light of the changing range of proceedings funded through litigation funding. For example, there has been some growth of litigation funding in the area of probate law.

Accordingly, the Committees recommend that the definition of 'funded proceedings' set out above be included in the UCPR.

The Committees make the following general comments about this proposed definition:

- This definition would not catch creditors of a litigant who fund litigation in order to recover monies owed to them by the litigant, which the litigant would not otherwise be able to pay. Such a scenario would not meet condition (iv) or (v).
- This definition would not catch solicitors acting on a 'no win no pay' basis or on a conditional costs basis that included an 'uplift fee' if the proceeding was successful. This is because in either case, although the amount received by the solicitors would be determined by whether the proceeding has a successful outcome (and therefore condition (iii) would be met), condition (iv) would not be met because the *quantum* of any order for the payment of money and the *quantum* of any agreed settlement would be irrelevant to the amount received by the solicitor.
- This definition would not catch banks lending money to litigants to be re-paid with interest calculated using a percentage rate.

As with the suggested definition in the Committees' preliminary submission, the Committees welcome comments as to the adequacy of this definition and would be interested in reviewing other suggested definitions.

Question 3.2

Disclosure of agreement with litigation funder

Legislation should be adopted to provide that, at the initial state of a case management process, any party that is running funded proceedings must furnish the court with an undertaking from the litigation funder to the effect that the funded party has been indemnified by the funder against any adverse cost order in the proceeding and that this undertaking will not be revoked without the court's consent.

Context

In the Consultation Paper, the Commission states at 3.43:

> There is support from one preliminary submission for disclosure of the terms of litigation funding agreements. The NSW Young Lawyers has recommended that the UCPR be amended to require plaintiffs who are assisted by a litigation funder to provide the court and the defendant with a deed pursuant to which the funder indemnifies the plaintiff against any adverse cost order that may be made against the plaintiff.

The recommendation referred to by the Commission is recommendation 2 in the Committees' preliminary submission. In order to understand this recommendation its context needs to be understood.

At the time of the Committees' preliminary submission, the state of the law in New South Wales was that litigation funders were not required to indemnify the funded parties against adverse costs orders, and at the same time the court generally had no jurisdiction to make costs orders directly against litigation funders (see *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75). This meant that litigation funders could, for their own profit, fund and exercise control over, a suit brought by an impecunious plaintiff without there being any possibility of having to answer for an adverse costs order made against the funded plaintiff.

The Committees took the view that this was an unjust outcome for the reasons outlined in its preliminary submission. In response, the Committees recommended two legislative responses, and stated that these responses could be implemented jointly or separately.

The first recommendation was recommendation 1 in the Committees' preliminary submission, which was that the court should be given the power to make costs orders against litigation funders. The second was recommendation 2 of the Committees' preliminary submission, which was that litigation funders should be compelled to provide the court with a deed pursuant to which the under indemnifies the plaintiff against any adverse costs order that may be made against the plaintiff.

As the Consultation Paper notes at 3.54, since the Committees' preliminary submission was published, UCPR r 42.3 has been repealed, and it would now appear that the courts covered by the UCPR now have power to orders costs against any person, including litigation funders. Accordingly, the objects to which the Committees' recommendation 2 were directed have now been substantially achieved by the implementation of the Committees' recommendation 1.[1]

[1] Although this was ultimately achieved by a different method than that which was recommended by the Committee. The Committee had recommended the variation of UCPR r 42.3 to vary the circumstances in which costs orders could be made. Instead, the whole rule was repealed, and the result appears to be that the Court's power to make costs orders under s 98 of the *Civil Procedure Act 2005* (NSW) is unfettered by the UCPR.

The rationales for requiring litigation funders to indemnify funded parties against adverse costs orders

Although the court may now make orders against litigation funders, in the Committees' view, a successful defendant should *always* be able to recover its costs from a litigation funder assisting an unsuccessful plaintiff, for substantially the same reasons discussed in the Committees' preliminary submission. Accordingly, the Committees are still of the view that litigation funders should be required to indemnify funded parties against any costs orders that may be made against them.

It is a failing of our civil justice system for successful defendants to be left out of pocket for costs where they have successfully defended litigation assisted by a litigation funder. The failing arises as:

- it is unjust for litigation funders to enable the litigation, with a view to a profit, and be able to walk away without repercussions, when making a profit is not the goal of the legal system; and
- litigation funders are, in some respects, a party to the litigation through their control of proceedings

Profit is not the primary goal of the legal system

As noted by Hodgson JA (at [51]) in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105, and approved by the High court in *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 ([35], [69]), the justice system is 'primarily there to enable rights to be vindicated rather than commercial profits to be made'. In the Committees' view, it would be unjust for a funder to be able to encourage litigation by a plaintiff, fund that litigation, and then walk away from the litigation whilst a successful defendant is left out of pocket. It is an especially absurd situation that this is the case, given that making a profit is certainly not the goal of the justice system. If litigation funders are to be permitted to use the justice system, a public resource, as a tool for private profit, then the Committees are of the view that, at the very least, the law should be careful to minimise the detrimental effect of such use, by protecting successful defendants.

In this regard, it should be noted that the costs that unsuccessful plaintiffs are ordered to pay are almost always calculated on a party-party basis rather than an indemnity basis. Accordingly, even a fully satisfied costs order would not normally put a successful defendant back in the position in which it would have been, but for the litigation.

Litigation funders are quasi-parties to the litigation

Further, the Committees note that funders often have a substantial influence in the manner in which proceedings are to be conducted. Control of the litigant's purse strings provides the funder with power over important decisions in the litigation. Over and above that, large commercial litigation funders may act as the architects of the litigation which they fund, and make day-to-day decisions regarding the conduct of the litigation. One of the factors often considered in making costs orders is the way in which the proceedings were conducted. If proceedings are conducted in an inefficient or inexpedient manner, this can have a consequence in costs orders eventually made.

In the Committees' view, allowing litigation funders to fund litigation without indemnifying funded parties against costs orders risks exactly the dangers against which the offences of maintenance and champerty were supposed to guard: namely, encouraging trafficking in litigation, and encouraging unmeritorious litigation (see, for example, *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380; *Findon v Parker* (1843) 11 M & W 675 at 682-683; and the overview of the history of champerty and maintenance in *Fostif* (2006) 229 CLR 386 at 426-431). As Einstein J noted in *Green (as liquidator of Arimco Mining Pty Ltd (in liq) v CGU Insurance* [2008] NSWSC 449 at [26], the court should be disinclined to 'permit a win-win situation for an outside party: that is to say to permit a lender who stands behind the liquidator awaiting to benefit from a success in the proceedings to avoid having a fair responsibility for the costs of the liquidator in the event that the proceedings fail.'

Accordingly, the Committees are of the view that a litigation funder must be required to be the guarantor of any costs orders made against the party that it funds.

Recommended procedural steps

The Committees now recommend a slightly different legislative response to this issue to that which they recommended in their preliminary submission. In the preliminary submission, the Committees recommended that the funded parties be required to furnish the court with a deed pursuant to which the funder indemnifies the plaintiff against any adverse costs orders. However, on reflection, it is the Committees' view that the important aspect is that the court is satisfied that such an indemnity exists; it is less important that the court actually receives the indemnity. Consonantly, the Committees recommend that litigation funders should not be required to provide any more information to the court than is strictly necessary. Rather than furnish the court with a deed of indemnity, any party that is assisted by a litigation should be required to furnish the court with an undertaking to the court from the litigation funder to the effect that the funded party has been indemnified by the funder against any adverse cost order in the proceeding, and that this undertaking will not be revoked without the court's consent.

Additionally, the Committees note that, by allowing the undertaking to be revoked with the court's consent, the court would be able to free the litigation funder from the indemnity if the circumstances justified it. The result would be that in the ordinary course, the litigation funder would be the ultimate guarantor for any costs orders in favour of a successful defendant, but the court would have the flexibility to release the funder from that obligation if unusual circumstances made it just to do so. For example, the court could grant relief from the undertaking if it becomes clear that the funded party has abundant funds and will have no difficulty meeting its adverse costs orders.

As the Committees suggested in their preliminary submission, this undertaking could be the subject of a standard form included in the UCPR.

Abrogation of client legal privilege

Client legal privilege should only be expressly abrogated if it is necessary to implement the Committees' proposed legislative response to question 3.2(1). Even then, any abrogation should only be to the extent required to compel funded parties to furnish the court with an undertaking from a litigation funder to the effect that the funded party has been indemnified against any adverse costs orders.

Otherwise, the Committees are unconvinced that litigation funders should be required to disclose the terms of their litigation funding agreements. The Committees note the problem encountered in *Green*: the funded party relied on the privilege to withhold from the court the percentage of the final judgment to which the litigation funder was entitled under a litigation funding agreement, and the court was not able to draw any adverse inference from reliance on the privilege. However, as *Green* demonstrated, although adverse inferences generally cannot be drawn from reliance on the privilege, it will usually be in the funded party's interest to disclose the contents of a litigation funding agreement if any question as to the agreement arises, rather than leave the court in situation where fundamental aspects of the agreement are uncertain. As a general proposition, the Committees see no compelling reason for a general rule that the terms of a litigation funding agreement should be disclosed.

Question 3.3

Costs against litigation funders

In the Committees' view, the court should have the power to order costs against litigation funders, and the current power conferred by s 98 of the *Civil Procedure Act* should neither be disturbed nor fettered.

The court should have the power to order costs against litigation funders for the reasons discussed in the Committees' preliminary submission and given in response at 3.2(1), namely that:

- it is unjust for litigation funders to fuel litigation, with a view to profit, and be able to walk away without repercussions, when making a profit is not the goal of the legal system; and
- litigation funders are, in some respects, a party to the litigation through their control of proceedings.

The Committees refer to and repeat their comments made at 3.2(1) in respect of these contentions.

The Committees note the concerns raised in 3.56 and 3.57 of the Consultation Paper that making costs orders against litigation funders may discourage litigation funding or raise its price. A price rise appears to entail litigation funders demanding a higher percentage of court-ordered payments from funded parties. The Committees acknowledge that both the power to make costs orders against litigation funders already conferred by the repeal of UCPR r 42.3, and the Committees' proposal that litigation funders be required to undertake to the court that they indemnify plaintiffs against adverse costs orders could have these effects. However, the Committees' view is that ultimately litigation funders should be answerable for the adverse costs orders of the parties whom they fund,[2] or at the very least, funders should be able to be required to pay costs orders. The Committees make the following comments about the concerns expressed at paragraphs 3.56-3.58 of the Consultation Paper.

The Committees agree that the existence of litigation funding is a beneficial development in New South Wales due its potential to improve access to justice. However, it is a mistake to assume that the current level of litigation funding in New South Wales is the ideal level. Litigation funding in New South Wales has been made possible by legislative accident; the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), which has enabled litigation funding in this state, was not intended to allow litigation funding and there has never been a proper consideration of the desirability and role of litigation funding in our justice system. One should not start from the premise that any reduction in the current level of litigation funding would be a bad thing.

To the extent that the possibility of having to pay costs orders will be built into, and increase, the cost of litigation funding, this would merely force litigation funders and funded parties to confront litigation's true cost. Consequently, funding riskier litigation with low prospects of success will become unattractive.

Requiring all litigation funders to be answerable for adverse costs orders avoids the prospect of a 'race to the bottom' of litigation funding terms and conditions. If funder A offered a potential plaintiff an indemnity for adverse costs orders but required 50% of a successful damages claim, and funder B offered no indemnity but required only 25% of a successful damages claim, then all other things being equal, it would be rational for a corporate plaintiff with no assets at all to choose funder B (since a costs order against an insolvent company will simply go unenforced). However, overall it would be preferable for the proposed plaintiff to choose funder A, since it avoids the possibility of a successful defendant receiving an unenforceable costs order.

[2] Subject to what is said at the end of part 3.2(1) of this submission about the ability of the court to release a funder from its undertaking to indemnify the funded party.

Question 3.8

Costs orders in favour of pro bono litigants

Indemnity costs

In the Committees' view, it should be permissible to award indemnity costs in favour of pro bono litigants.

The purpose of awarding indemnity costs is to encourage parties to proceedings to make reasonable offers to each other to settle the proceedings without the need to proceed to a hearing.[3]

The Committees submit that this rationale applies even when one of the parties is represented by pro bono solicitors. A party represented pro bono should not be disadvantaged by the fact that the other parties are under less pressure to accept reasonable settlement offers due to a lack of indemnity costs.

Who should recoup funds

Traditionally, parties represented by pro bono practitioners are not awarded costs in order to avoid a party receiving a windfall gain, that is receiving more than they have to pay their solicitors. It would be consistent with this principle if a practitioner acting on a pro bono basis were permitted to recoup costs (whether paid on an indemnity basis or not).

This could be a factor which encourages practitioners to act on a pro bono basis, particularly where a matter has the potential to be time-consuming (either in relation to the intensity of the work required or the length of time over which assistance is provided).

Security for costs in favour of a party represented pro bono

Impecunious litigators should not be encouraged to commence litigation against defendants who are impecunious themselves in the hope that the defendant will not be able to afford legal representation. Accordingly, courts should be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis.

Exemption from costs orders for pro bono practitioners

Section 99 of the *Civil Procedure Act* and s 348 of the *Legal Profession Act 2004* (NSW) should not be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis.

These sections set a high threshold for the award of these costs and provide the court with the discretion to determine whether exercising these powers is appropriate in the circumstances. The courts have also exhibited great reluctance to award costs. The courts have held that these type of statutory powers are only to be exercised in clear cases and only with careful consideration,[4] recognising that that 'it is not an effect of s 99 that a legal practitioner must give up a case if it has difficulties or serious difficulties.'[5]

Pro bono legal practitioners are still officers of the court and thus owe a duty to the court to conduct themselves appropriately. Given these considerations, the Committees submit that pro bono legal practitioners should not be exempted from the application of these sections.

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[3] Division 3 of the Uniform Civil Procedure Rules 2005; *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404; *Fotheringham v Fotheringham (No 2)* (1999) 46 NSWLR 194; [1999] NSWCA 21.

[4] *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300; [2005] NSWCA 153.

[5] *European Hire Cars Pty Ltd v Beilby Poulden Costello* [2009] NSWSC 526 at [60].

Question 4.1

Public interest costs orders

Cases brought in the public interest are an essential part of a healthy legal system that provides access to justice for the community. Those 'David' parties wishing to bring cases without fear that on losing they will be required to pay the hefty legal fees of their opposing 'Goliaths' should have a clear recourse for doing so. The question asked in this submission is whether they already do.

It is the Committees' submission that new legislation that grants power to the courts to make a public interest costs order (PICO) is not necessarily going to be an improvement on current law. On one hand, it will give more direction and guidance for parties wishing to bring cases in the public interest if they have more certainty about what 'public interest' means. Parties may not have to take a chance on costly litigation based on unclear definitions of what the 'public interest' actually is. However, a definition is one thing. Giving courts the power to make a PICO based on a legislative mandate is another. It introduces an extra level of confusion, rather than clarity, as judges would be required to enter into the realm of statutory interpretation.

Current state of the law

Public interest has been described as a 'nebulous'[6] concept by the High Court. That does not ordinarily mean that one should not attempt to delimit it by legislation. The difficulty is that public interest, as a concept, is quite a unique creature. How does the court test what is 'public'? How does it measure a 'significant number'[7] as affected and therefore with a public interest? Indeed, at which point should the proposed legislation measure the public interest? Is it necessary to examine it from the point of view of the defendants or respondents?[8] Or should legislation consider the purpose of the party bringing the proceedings?

These are questions that statute cannot easily answer. It is our submission that the court in the case of *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280; [2010] NSWLEC 59 ('*Caroona Coal*') has already wrestled with and come to a relatively settled conclusion on the approach to be taken.

In *Caroona Coal*, Preston CJ outlined the current state of case law defining public interest. His Honour noted that when exercising the discretion afforded by UCPR r 42.1, judges have tended to use a three step process by asking:

- Can the matter be characterised as in the public interest?
- Is there something more than mere characterisation as in the public interest?
- Are there any countervailing circumstances which speak against departure from the usual costs rule?[9]

Is the current state of the law adequate?

The first question is of particular relevance. Preston CJ made the point that there are different perceptions of public interest from each party's viewpoint. It is not just the obvious definition; that is, David against Goliath in which David is the only party capable of acting in the public interest. Public interest can also be found in relation to wealthy

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[6] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 152 ALR 83, [1998] HCA 11 at [30].

[7] *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, [2010] NSWLEC 59.

[8] *Latoudis v Casey* (1990) 170 CLR 534 at 542, 97 ALR 45, [1990] HCA 49.

[9] *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, [2010] NSWLEC 59 at [13].

corporations that aim to uphold the public interest of 'economic development' or 'social development', not only environmental protection (for example).

It is still submitted that the current law is adequate and fairly comprehensive. See, for example, the five point test in *Darlinghurst Residents' Association v Elarosa Investment (No 3)* (1992) 75 LGRA 214, which has provided guidance to the courts for some time. Does this need to be enshrined in legislation? The discretion already granted to the courts by UCPR r 42.1 gives judges the power to make an order for departure from the usual rule that 'costs follow the event' if a matter is in the public interest. To determine when a matter falls within the definition of 'public interest', judges turn to case law. This provides quite extensive jurisprudence on the issue and provides much assistance in responding to the problem of definition.[10]

On the other hand, the definitions extracted above have only developed quite recently. In *Caroona Coal*, the applicants were a group of residents potentially affected by mining operations in the Liverpool Plains. They lost in both the Land and Environment Court and the Court of Appeal and were refused an order for public interest costs. The Environmental Defender's Office ('EDO') (which has recommended a legislative provision for PICOs) were the solicitors for the applicants. The EDO conducts proceedings as 'a not-for-profit community legal centre specialising in *public interest* environmental law' (emphasis added).[11]

Plainly, a major part of advising clients in relation to potential costs consequences when a matter may be in the public interest and is brought by a marginalised or economically disadvantaged group is making a judgment on whether a costs order will be made against the party. Relying on the discretion in UCPR r 42.1 and court rules such as the Land and Environment Court Rules r 4.2(1) to determine whether a costs order will be made is inherently unpredictable, even in the context of a public interest organisation that is familiar with running public interest cases regularly. This is an argument in favour of legislative amendment in relation to PICO. It would mean that organisations, groups or individual litigants could more accurately determine whether it is viable to see a case through without incurring a costs order. In other words, it would make the financial risks of litigation more visible to the punters.

Recommendation

This raises the question of whether a clearer view of the likelihood of achieving a PICO will encourage public interest litigants to proceed. If litigants are unlikely to bring a case because the legislative definition of public interest is too restrictive, there is little room to raise an issue that could very well be characterised as 'in the public interest' through rigorous interrogation by the judiciary. The Committees submit that there may be some merit in legislation that states a maximum costs order is in, or is available in, the 'public interest', and that the concept of public interest is otherwise defined by the courts. Such a regime may provide more certainty, thus potentially encouraging applicants to apply for such an order.

In other words, while the current case law may be inadequate in the sense that it creates uncertainty, the lack of stern definition may allow more 'wriggle room' for public interest applicants. However, with a view to the overall concept of providing access to justice, applicants may also have some trepidation as to whether they will receive a costs order. On balance, the Committees:

- recommend that a PICO provision be inserted into relevant legislation; but
- that this provision is referable to the courts and common law for interpretation.

[10] *Oshlack v Richmond River Council* (1998) 193 CLR 72, 152 ALR 83, [1998] HCA 11; *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, [2010] NSWLEC 59; *Darlinghurst Residents' Association v Elarosa Investment (No 3)* (1992) 75 LGRA 214.

[11] See http://www.edo.org.au/edonsw/site/default.php.

Question 4.7

UCPR r 42.4 – appropriate scope, purpose and use

UCPR r 42.4 provides for the court to make an order specifying the maximum costs that may be recovered by one party from another. The rule does not state that the maximum costs order must apply to both parties, but can 'be unidirectional, bi directional, multidirectional [and] the court may specify any one or more of the parties be protected by a maximum costs order.'[12] The rule also does not discriminate between public interest or private interest litigation, but instead provides for a limited range of circumstances in which an order may not be made (UCPR r 42.4(2), (3) and (4)). In particular, UCPR r 42.4(4) provides that a maximum cost order may be varied if 'there are special reasons, and it is in the interests of justice'.

Few cases have successfully sought maximum cost order applications under UCPR r 42.4 and no orders have been made on the basis of the court's own motion. In NSW the predominant application of the rule has been in relation to family law and environmental law cases. Environmental action groups often form associations to engage in litigation and have limited funds to pay costs orders. Justice Maloney in *Citizens Airport Environment Association v Maritime Services Board of New South Wales* (1993) 79 LGERA 254 at 282 warned that the power to grant a maximum costs order must be used responsibly:

> The legislation allows — it may contemplate — that members of the public may take proceedings without the result that ordinarily obtains, namely, that if they fail they must pay the costs of the defendants who may have been involved in the delay and cost of litigation. To this end, the Land and Environment Court has, I think, accepted that proceedings may be commenced and injunctions obtained by corporations which have been formed for the purpose of the proceeding or cognate purposes and which, sometimes by design, have no funds from which the costs of successful defendants may be ordered. These may arguably be seen as wise provisions. I make no criticism of them.
>
> However, proceedings designed to be used for such purposes may be abused or, at least, may produce results which the legislature did not contemplate. The power to bring proceedings of this kind carries with it an obligation to use that power responsibly.

On one view, the court's limited diversion from the usual costs order,[13] and therefore the higher risk of a costs order against an applicant, means that proceedings are more likely to be legitimately commenced.

However, the Committees submit the existing case law, and the interpretation of the rule, currently restricts access to justice for legitimate litigants. The paucity of applications for a maximum cost order indicates that applicants either do not know about the rule or consider themselves unlikely to benefit from it.

In the recent case of *Caroona Coal Action Group v Coal Mines Australia Limited and Minister for Mineral Resources*,[14] his Honour, Chief Justice Preston indicated with regards to the operation of UCPR r 42.4, that:[15]

> [t]he power of the court to make a maximum costs order is discretionary. The discretion is to be exercised judicially. The exercise of the discretionary power must have a proper factual foundation, must be explicable according to legal principle and accord with the dictates of procedural fairness. The court must also seek when exercising the

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[12] *Caroona Coal Action Group v Coal Mines Australia Limited and Minister for Mineral Resources* [2009] NSWLEC 165.

[13] *Anderson on Behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272; *Caroona Coal Action Group v Coal Mines Australia Limited and Minister for Mineral Resources* [2009] NSWLEC 165, [2010] NSWLEC 59, *Sales-Cini v Wyong City Council* [2009] NSWLEC 201.

[14] [2009] NSWLEC 165.

[15] [2009] NSWLEC 165 at [11].

> discretionary power to give effect to the overriding purpose (see s 56(2)), the dictates of justice (see s 58) and proportionality of costs (see s 60).

At present, despite the broad scope of the rule, it appears it only applies to proceedings that offer a number of factors that justify a departure from the usual costs order that 'costs follow the event'. These factors have included, but are not limited to:

- whether the proceedings are in the public interest;
- the quantum involved;
- the complexity (or not) of the issues;
- environmental risk;
- whether there are a large number of people or over a large area that will be affected;
- whether the party is impecunious;
- whether the proceedings have been brought in self interest, public interest or pure altruistic reasons;
- whether the proceedings have a likelihood of success;
- whether the proceedings involve a novel question of law;
- whether an important aspect of public law needs to be determined;
- whether the proceedings involve statutory construction; or

whether the proceedings further the pursuit of the objects of an Act.

The Committees consider the court's requirement for multiple factors to justify a departure from the usual costs order imposes a high threshold that is particularly prohibitive to an applicant's access to justice in public interest cases.

Even if a party has exceptional circumstances that merit the grant of a maximum costs order, the broad nature of the discretion means that a party cannot predict 'a party can have little confidence in predicting whether the court will consider that they justify a departure from the usual costs order.'[16] And because of this broad discretionary power, litigants may be turned away. Indeed, courts have shown little desire to depart from the traditional costs rule.[17] This reluctance means that public interest litigation is effectively restricted to those who can afford the significant financial risk, which diminishes access to justice.

The Committees submit that UCPR r 42.4 should encompass not only its current broad discretionary power, but also recognise that the purpose of the rule is to support access to justice, by either including access to justice as a mandatory consideration in the operation of the discretion, or creating an additional Public Interest Costs Order section for the express purpose of encouraging public interest litigation.

At present, UCPR r 42.2(4) provides for the court to vary a protection order according to 'special reasons, and … in the interests of justice'. However, this goes to the variation rather than the initial making of a maximum costs order.

[16] Gary Cazalet, 'Unresolved issues: costs in public interest litigation in Australia' 2010 29(1) *Civil Law Quarterly* 108-123 at 122.

[17] Ibid at 123.

Question 5.5

Appeals against security for costs orders

The Committees do not support any express rules being included in the UCPR in relation to appeals against orders for security.

The courts should continue to determine, in their sole discretion, whether special circumstances exist to warrant a party's appeal from the interlocutory order for security.

The Committees are concerned that if a rule prescribing an appeal against orders for security is included in the UCPR, it may create the perception that an appeal from a security for costs order should readily be considered by parties. It is well established law that a security of costs order is a matter of practice and procedure and special stringency and caution must be applied. In addition, the inclusion of the substantial injustice ground for such an appeal would serve to create uncertainty as substantial injustice is difficult to define and highly dependent upon particular circumstances.

The Committees are of the view that the current common law principles regarding appeal from discretionary decisions are sufficiently well-established and stringent to provide recourse in the event of substantial, material or manifest injustice or wrong.

Provision of security when an appeal of a security for costs order is under way

The plaintiff should not have to comply with a security for costs order against it where it has appealed that decision, particularly when an impecunious claimant is appealing. The result would be the stifling of potentially worthy proceedings.

It is also inappropriate for the respondent to order further security for costs in relation to an appeal for security of costs. The costs of the respondent having to defend itself in the appeal proceedings would more appropriately be addressed in an application for variation of the security for costs order should the claimant be unsuccessful in their appeal

Time limits

The normal limit of 14 days should be maintained to ensure a just and quick determination of interlocutory appeals and prevent the claimant from delaying the proceedings through an appeal procedure.

Question 5.6

Revocation or variation of security for costs orders

The litigation process is uncertain. Invariably, in the Committees' experience, things do not go to plan or issues arise which were not originally contemplated by the parties at the time that an application for security for costs is made, and an order for security is granted. Regrettably, the costs of litigation will generally increase to account for complexities that may arise during proceedings.

In the Committees' view, an unsuspecting defendant should not bear the risk of an order for security which becomes insufficient or redundant given the effluxion of time or circumstances beyond the control of that defendant.

In light of the above comments, the Committees are of the view that a litigant should be readily able to apply to have an order for security set aside or varied.

Courts generally have inherent jurisdiction to control their own procedural issues to prevent abuse of process and injustice.[18] It is therefore arguable that the courts already have jurisdictions to set aside or vary interlocutory orders such as security for costs orders.[19] However, the extent and limitations of this power have not been defined. To this end, the Committees recommend that the UCPR be amended to provide courts with the power to set aside or vary an order for security. An express power in the UCPR would provide clear guidance for parties and encourage them to select the most efficient and effective way forward.

The Committees would support an amendment to the UCPR which prescribes that a 'material change of circumstances' standard applies to assess an application to set aside or vary a security for costs order. This standard would sufficiently address the eventualities of litigation as identified by the Committee above.

Some Committee members supported the alternative wording 'special circumstances' and the associated jurisprudence of 'new material with evidence of additional facts which has arisen or been discovered since the order was made'.[20] Concern was expressed over the possible interpretation of pre-existing defects, such as a fraud was found in the original application, under 'material change of circumstances'.

The Committees are of the view that the rule should not include a list of factors for determining whether any material change of circumstances has occurred to justify the security order being set aside or varied. Including such a list of factors may fetter the court's discretion. In addition, the Committees suspect that there is an increased risk that applications to set aside or vary may be tailored by litigants to fit within the list of factors.

Lastly, the Committees submit that the requirement that leave be sought to vary or set aside an order for security is unnecessary. Such an application for leave would, in the Committees' view, increase the time and costs involved in the conduct of proceedings.

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[18] *Jago v District Court of NSW* [1978] HCA 46; *Hamilton v Oade* [1989] HCA 21.

[19] *Goodman v Lorenzen* [2000] QCA 11.

[20] Ibid.