
# Submission to the New South Wales Law Reform Commission:

# Consultation Paper 13: Inquiry into Security for Costs and Associated Costs Orders

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**About the National Pro Bono Resource Centre**

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendations by the National Pro Bono Task Force to the Commonwealth Attorney-General. The Centre exists to support and promote the provision of pro bono services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

The Centre is an independent, non-profit organisation that aims to:

- Promote pro bono work throughout the legal profession;
- Undertake research and projects to inform the provision of pro bono legal services;
- Provide practical assistance to pro bono providers (including information and other resources);
- Develop strategies to address legal need; and
- Promote pro bono law to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth and States' and Territories' Attorney-General's Departments, and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, Community Legal Centres (**CLCs**), pro bono referral schemes, Legal Aid, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and produces resources of immediate benefit to the legal profession and community sector.

## Executive Summary

*Justice is open to all, like the Ritz Hotel*[1]

This submission examines the issues of costs in public interest proceedings, protective costs orders and the law and practice regarding costs and pro bono legal work.

The issue of costs permeates the whole of the administration of civil justice. It affects access to justice because costs can place the courts beyond the reach those who cannot afford, or cannot afford to risk, the costs implications of resolving disputes.[2] The risk of an adverse costs order can deter litigants and their representatives from pursuing meritorious public interest matters and enforcing their rights. The deterrent is even more substantial where the matter concerns an unresolved area of law and legal representatives cannot provide a clear indication of the likely outcome of the case. As a result of these barriers, important legal issues affecting the community may not be debated and resolved.

Pro bono legal work is work done for the public good. This work makes legal services available to low-income and disadvantaged individuals who generally do not qualify for legal aid and organisations who work on behalf of low income or disadvantaged members of the community which would not otherwise have access to justice. Accordingly, greater pro bono participation should be encouraged. Despite this, the current law and practice relating to costs orders contains notable constraints and risks to pro bono participation and public interest litigation and therefore restricts access to justice.

These barriers to public interest litigation and pro bono participation need to be reduced.

The Centre refers to the comments made in its preliminary submission to this inquiry, submitted in February 2010, and makes comments in relation to the following questions presented in Consultation Paper 13:

## On Lawyers Acting Pro Bono:

**Question 3.8**

(1) Is it desirable to permit costs orders to be made in favour of pro bono litigants on an indemnity basis?
(2) If so, should costs awarded be recouped by the practitioner or given to a pro bono litigation fund?
(3) Should courts be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis?

**Question 3.9**

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?

[1] Lord Justice Matthew, 19th Century Jurist
[2] Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (2009).

## On Public Interest Proceedings:

**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 4.2**

(1) Should any proposed legislation establishing public interest costs orders define public interest proceedings?
(2) If so, what should the definition be?

**Question 4.3**

Should the legislation establishing public interest costs orders provide that courts may make an order at any stage of the proceedings, including at the start of the proceedings?

**Question 4.4**

(1) Should the legislation giving courts the power to make public interest costs orders contain a list of discretionary factors that courts may take into account when determining whether to make public interest costs orders?
(2) If so, what should these factors be?

**Question 4.5**

If the court is satisfied that there are grounds for making a public interest costs order, what are the types of orders that it should be able to make?

**Question 4.6**

Should the provisions giving courts power to make public interest costs orders be located in statute or in the *Uniform Civil Procedure Rules 2005* (NSW)?

## On Protective Costs Orders:

**Question 4.7**

(1) What is the appropriate scope and purpose of *Uniform Civil Procedure Rules 2005* (NSW) r 42.2?
(2) Should this rule be used more frequently in public interest proceedings?

**Question 4.8**

Should the provisions on courts' power to specify the maximum costs that may be recovered by one party from another, which are currently located in *Uniform Civil Procedure Rules 2005* (NSW) r 42.2, be relocated into s 98 of the *Civil Procedure Act 2005* (NSW)?

**Question 4.9**

Should New South Wales establish a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interest?

## Acknowledgements

The Centre recognises that numerous pro bono organisations, community legal centres and private law firms[3] are advocating for legislative reform in the area of costs in public interest and pro bono litigation. The Public Interest Clearing House (PILCH) (Vic) has made submissions to both the Victorian and the Commonwealth Attorneys-General on the Recovery of Costs in Pro Bono Matters[4] and to the Commonwealth Attorney-General on Protective Costs Orders[5], and has recently published a jurisprudence review on Protective Costs Orders in Public Interest Litigation[6]. The Queensland Public Interest Law Clearing House (QPILCH) has prepared a comprehensive research paper entitled 'Costs in public interest proceedings in Queensland'[7]. The Centre generally endorses these submissions, reports and reviews; calls for law reform in this area and acknowledges that parts of this submission rely on those submissions, reports and reviews and the substantial amount of research that has been made available by public interest organisations.

## Definition of pro bono

There is no universally accepted definition of what is meant by pro bono. For the purposes of this submission the Centre defines pro bono legal work[8] as time spent by lawyers:

1. Giving legal assistance for free or at a substantially reduced fee to:
   (a) individuals who can demonstrate a need for legal assistance but cannot obtain Legal Aid or otherwise access the legal system without incurring significant financial hardship; or
   (b) individuals or organisations whose matter raises an issue of public interest which would not otherwise be pursued; or
   (c) charities or other non-profit organisations which work on behalf of low income or disadvantaged members of the community or for the public good;

[3] See, for example DLA Phillips Fox: *Inquiry into access to Justice: Submission to the Senate Legal and Constitutional Affairs Committee* at 31, available at: http://www.aph.gov.au/SENATE/COMMITTEE/legcon_ctte/access_to_justice/submissions.htm

[4] Public Interest Law Clearing House (Vic): *Submission to the Commonwealth and Victorian Attorneys-General on Recovery of Costs in Pro Bono Matters(Lucy McKernan & Gregor Husper)* April 2009

[5] Public Interest Law Clearing House (Vic): *Submission to the Commonwealth Attorney-General on protective Costs Orders (Lucy McKernan & Gregor Husper)* April 2009, available at: http://www.pilch.org.au/Assets/Files/PILCH - submission to Cth AG re PCOs

[6] Public Interest Law Clearing House (Vic): *Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2011*, 28 February 2011, available at: http://pilch.org.au/Assets/Files/PILCH%20PCO%202011%20Jurisprudence%20Reveiw%20FINAL%2017mar11.pdf

[7] Queensland Public Interest Clearing House, *Costs In Public Interest Proceedings In Queensland*, (2005), available at: http://www.qpilch.org.au/_dbase_upl/Costs_pi_litigation.pdf

[8] This definition is used in the National Pro Bono Aspirational Target and used in the Centre's surveys of pro bono legal work.

2. Conducting law reform and policy work on issues affecting low income or disadvantaged members of the community, or on issues of public interest;

3. Participating in the provision of free community legal education on issues affecting low income or disadvantaged members of the community or on issues of public interest; or

4. Providing a lawyer on secondment at a community organisation (including a community legal organisation) or at a referral service provider such as a Public Interest Law Clearing House.

Pro bono legal work is not:

1. Giving legal assistance to any person for free or at a reduced fee without reference to whether he/she can afford to pay for that legal assistance or whether his/her case raises an issue of public interest.

2. Free first consultations with clients who are otherwise billed at a firm's normal rates;

3. Legal assistance provided under a grant of legal assistance from Legal Aid;

4. Contingency fee arrangements or other speculative work which is undertaken with a commercial expectation of a fee;

5. The sponsorship of cultural and sporting events, work undertaken for business development and other marketing opportunities; or

6. Time spent by lawyers sitting on the board of a community organisation (including a community legal organisation) or a charity.

## Access to Justice - Costs exposure as a deterrent to pro bono participation

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## Current Approaches

### The Indemnity Principle

Section 98 (1) (a) of the *Civil Procedure Act* (*2005*) (CPA) provides that the costs are in the discretion of the court. Rule 42.1 of the *Uniform Civil Procedure Rules2005* (NSW) (UCPR) however recognises the general law presumption that unless some other order should be made, 'costs follow the event'[9] and in general they are assessed on an ordinary basis.[10] The purpose of a costs order is to compensate the successful party in litigation for those costs necessarily incurred to obtain justice, known as the indemnity principle.[11] However, where a successful litigant is under no obligation to pay his lawyer, there is no scope for the indemnity principle to operate. [12] This is a key concern in the context of pro bono representation without there being an appropriate solicitor/client agreement since the successful party does not need to be compensated where no loss has been incurred.[13]

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[9] *Ritter v Godfrey* [1920] KB 47; *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd v Lane Industries Pty Ltd)* (1993) 26 PR 261.

[10] *Uniform Civil Procedure Rules 2005* (NSW) r42.2.

[11] Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (2009) at 87.

[12] *Baker & Anor v Kearney* [2002] NSWSC 746 (total estimate of the costs to be paid by the client was furnished by counsel, but the agreement did not oblige the payment of fees).

[13] "Where a party to an action has an agreement with their legal adviser that they do not have to pay any costs, then the general law principle states that that party cannot recover party and party costs against their adversary": *McCullum v Ifield* [1969] 2 NSWR 329 at 330 per Taylor J citing *Gundry v Sainsbury* [1910] 1 KB 645

The current structure places pro bono advocates in the compromised position of acting for free and not for personal gain while assuming the risk of an adeverse costs order against their client. The existence of limitations resulting from the principle's compensatory structure was recognised by Kirby J in *Oshlack v Richmond River Council*.[14]

Additionally, while the indemnity principle is clear, its application is ad hoc. The extent to which the indemnity principle permits costs recovery in pro bono cases is uncertain, especially considering existing case law[15].

In *Wentworth v Rogers*[16] the New South Wales Court of Appeal has stated that "the indemnity principle continues to exist but should be applied flexibly rather than made into a rigid rule."[17] The court considered the application of the indemnity principle to a costs agreement which stated that counsel's services were provided on a "pro bono basis", with an obligation to pay arising only upon "costs being successfully recovered from the other party". The costs agreement in question also contained a residual obligation to make a payment where no such recovery was made, by way of undertaking to "pay... when and if...in a position to do so."[18]

The judgements in *Wentworth*[19] make it clear that where a party has no obligation to pay his solicitor, the indemnity principle cannot be applied.[20] In his substantive judgement Santow JA commented:

> "The ultimate application of the indemnity principle will depend on the content and proper construction of the costs agreement."[21]

The judges however took different approaches on what satisfies the indemnity principle's requirement that there be an obligation to pay an advocate. Santow JA found a conditional costs agreement met this threshold. Commenting on the policy behind this conclusion, he noted that conditional costs agreements facilitate access to justice[22]:

> "It is reasonable...to recognise in a costs agreement that the unsuccessful party who is subject to a costs order may defeat or delay recovery. Hence predicating payment on successful recovery is not unreasonable.....this gives no unjustified bonus to the successful party nor does it impose any punishment on the losing one, so as to invoke the rationale behind the indemnity principle."[23]

Basten JA imposed a higher standard than Santow JA for conditional cost agreements. While both agree that a legal liability to pay costs is prima facie required, Basten JA explored the temporal nexus between the existence of the obligation to pay and when the costs order is sought.[24] He held there must be a "contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome."[25] This means that the obligation to pay

[14] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 134. Hereon, *Oshlack*.
[15] *Wentworth v Rogers* [2006] NSWCA 145 at 132.
[16] *Wentworth v Rogers* [2006] NSWCA 145. Hereon, *Wentworth*.
[17] *Wentworth v Rogers* [2006] NSWCA 145 at 50.
[18] Ibid at 52.
[19] [2006] NSWCA 145 at 132.
[20] Ibid at 45.
[21] Ibid at 49.
[22] Ibid at 51.
[23] Ibid at 54.
[24] Ibid at 51, 127.
[25] Ibid at 133.

must be created through the solicitor's retainer and any attempts to release the litigant from his duty to pay his advocate may be effected through a condition subsequent.

In the present case, where the obligation materialised only when recovery of costs was made possible, Basten JA held there was no obligation with respect to which an indemnity could operate.[26] Basten JA formulated his approach on the basis that

> "it is not possible to make the existence of a right to charge dependent on recovery of the moneys from which the charges would be paid."[27]

## Problems with the current approach

### An uneven playing field

A costs order is not meant to punish, nor is it meant to be a dividend. The possibility of having to pay one's opponent's legal costs discourages unjustified litigation. It also encourages parties to refrain from incurring unnecessary costs, and acts as an incentive for settlement.

Under the current system a litigant who is represented pro bono may not be able to recover their costs even if their claim is successful, whilst still being liable for the other party's costs if their case is unsuccessful. The reverse is that an opponent of a litigant who is represented pro bono may benefit from not having to pay their opponent's costs, even if they are unsuccessful.[28]

The judgements in *Wentworth*[29] reveal how the current costs framework, built on the indemnity principle, leave pro bono advocates exposed to costs in the event of a loss and precariously positioned to recoup their expenses if successful.

Pro bono involvement in the community takes on different forms. While it would be ideal if all lawyers could freely contribute their time, the system needs to acknowledge the varying risks and costs a lawyer is willing to write off. Accommodating those lawyers who are willing to provide services on a speculative fee arrangement (e.g. a conditional fee basis that maintains their ability to recover costs if successful) is important for encouraging greater access to legal services in the community. And while aiming to comply with Basten JA's more stringent threshold seems to be the prudent path for lawyers keen to keep open the possibility of recovering costs, the lack of judicial unanimity on the issue begs legislative reform.

Attempts have been made through the use of clauses similar to those found in conditional fee agreements to address this inequity.[30] The agreements require the client to pay the advocate in the

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[26] Ibid at 112.
[27] Ibid at 133.
[28] *The Final Report of the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice* ("*2004 Senate Report")*, available at: www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/ch09.htm, referred to anecdotal information that suggested that some lawyers use delaying tactics against pro bono litigants, thus recommending that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation.
[29] [2006] NSWCA 145 at 132.
[30] See the sample letters of engagement in the Australian Pro Bono Manual for examples of this At http://www.nationalprobono.org.au/probonomanual/Precedents_ProForma_03.doc

event of being successful and being awarded a costs order.[31] This is in line with *Griffiths v Boral Resources (Qld) Pty Ltd*,[32] where the court held

> "the ***better*** view is that the practitioner is entitled to recover his or her costs from the assisted litigant for whom the practitioner acts, rather than from the party ordered to pay the costs."

While the case of *Wentworth*[33] appears to have endorsed such an approach, Basten JA[34] noted that notwithstanding any pro bono label, the terms of such a scheme may suggest it has left the realm of pro bono and is more accurately construed as a speculative fee arrangement. Thus, if the legal representation is taken to be provided on a fee for service basis, albeit speculative, the client would likely be unable to take advantage of any provisions that protect a pro bono matter.

Certain benefits that accrue to a costs system based on the indemnity principle are also unavailable to a pro bono litigant. When both parties are fearful of an adverse costs order, litigants conduct their cases expediently and the risk functions as a deterrent against running those cases comprising little merit. In some cases, the prospect of an adverse costs order encourages litigants to settle out of court. In the context of pro bono representation however, where the opposing party knows that, based on the doctrine of compensation, they will not be liable for a costs order, such cost deterrents do not exist. Thus the pro bono litigant is in the disadvantageous position of having this vulnerability exploited.[35]

Law reform is needed to clearly distinguish between no win/no fee matters and those done on a pro bono basis. At present, from the perspective of cost recovery, there is little difference in the solicitor/client agreements as the uncertainty has forced pro bono solicitors to adopt clauses similar to those found in no win/no fee cost agreements.

The decision in the Canadian case of *PHS Community Services Society v Canada (Attorney General)*[36] provides an important counterpoint, functioning as a working example of achieving equity by going around the general costs rule. There Justice Pitfield awarded special costs on a full indemnity basis to pro bono advocates in a public interest matter, acknowledging:

> "The defendant should not derive a windfall because of the fact that a third party has underwritten the costs of the litigation."

**Court pro bono referral schemes**

In addition to inequitable outcomes that depend on who the court participants are, there is also inconsistency when recovering costs in different courts. When providing legal assistance under the Pro Bono Assistance Schemes in each of the Federal Court, Federal Magistrates Court and the Supreme Court of NSW, the advocate is entitled to recoup from the losing party the amount of any costs recovered through a costs order. However lawyers acting through other pro bono referral schemes do not share this entitlement. There is no rationale for this disparity. In both cases, legal

[31] John Corker, 'Funding Litigation: The Challenge' (2007) *UNSWLRS* 2.
[32] *Griffiths v Boral Resources (Qld) Pty Ltd (No 2)* [2006] FCAFC 196 at 31 per Collier J.
[33] [2006] NSWCA 145 at 132.
[34] *Wentworth v Rogers* (2006) NSWCA 145 at 130-132.
[35] The *2004 Senate Report* referred to anecdotal information that suggested that some lawyers use delaying tactics against pro bono litigants, thus recommending that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation**:** above n 27, 178-179.
[36] *PHS Community Services Society v Canada (Attorney General)*, 2008 BCSC 1453.

services are extended to the community. Rectifying these discrepancies would further assist with the goal of providing greater access to justice.

**Question 3.8**

(1) Is it desirable to permit costs orders to be made in favour of pro bono litigants on an indemnity basis?
(2) If so, should costs awarded be recouped by the practitioner or given to a pro bono litigation fund?
(3) Should courts be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis?

(1) In its preliminary submission to this inquiry, the Centre recommended that the indemnity principle be abrogated, to the extent necessary, to ensure that litigation costs can be awarded in pro bono cases, regardless of whether or not a litigant has been referred for assistance through a court-based pro bono referral scheme. The Centre resubmits this recommendation.

(2) The United Kingdom Parliament addressed the 'uneven playing field' problem by introducing s 194 of the *Legal Services Act 2007* (UK), which provides for 'pro bono costs orders'. These orders are available when the successful party has been represented pro bono and require the other party to make a payment to a charity prescribed by the Lord Chancellor. Since its establishment in 2008, payments have been made to the prescribed charity, 'The Access to Justice Foundation'. This foundation enables the provision of more legal services through distributions to Regional Legal Support Trusts, national pro bono organisations, and strategic projects.[37]

In its preliminary submission to this inquiry, the Centre stated that:

> "The UK approach achieves a balance between competing policy considerations. The spirit of pro bono is maintained because advocates who agree to work pro bono do not later receive a fee while unsuccessful litigants are not relieved of the obligation to compensate the successful party; thereby ensuring cost deterrents continue to have a role."

Contrary to what the NSW Law Reform Commission has stated in paragraph 3.101 of Consultation Paper 13, the Centre did not support or recommend the establishment of a fund similar to the one in United Kingdom.[38]

The Australian Legal Profession, and its pro bono culture, differs from its UK counterparts. Whilst no pro bono litigation fund exists in Australia, in the few cases where costs have been recovered, they have been used by the firm to pay disbursements (usually counsel's fees,

[37] Access to Justice Foundation, *Frequently Asked Questions: Section 194 'pro bono costs' orders*, The Access to Justice Foundation http://www.accesstojusticefoundation.org.uk/downloads/FAQs_Section_194.pdf at 25 February 2010.
[38] See NSW Law reform Commission, Consultation Paper 13, paragraph 3.101 at 78 and The Centre's preliminary submission to the Inquiry on Costs and Associated costs orders at 9.

then other disbursements), and any remaining balance has been put back into a firm's pro bono program.

The issue of where recovered funds are directed has different implications depending on whether the lawyer acting pro bono is engaged by a law firm, or is a barrister.

Larger law firms provide opportunities for their lawyers to do pro bono work in a structured way at a cost to the firm. Consistent with the spirit of pro bono, these firms' pro bono policies have recognised that when costs are recovered in pro bono litigation, which is not very often, they should be put back into their pro bono programs to facilitate greater pro bono activity by that firm. Barristers on the other hand, take pro bono matters on at a direct 'opportunity cost' to themselves and to the Centre's knowledge in the few pro bono cases where costs have been recovered, the solicitor involved has paid counsel's fees as a disbursement. This encourages and makes it possible for that barrister to undertake more matters on a pro bono basis.

Consistent with the voluntary nature of pro bono, it is suggested that pro bono lawyers should have the freedom to determine where any costs recovered are directed.

(3) Pro bono legal services are free legal services provided by lawyers and law firms to disadvantaged and marginalised individuals who would not otherwise be able to access justice. Pro bono work is also done for not-for-profit organisations that work to support disadvantaged and marginalised members of society. Pro bono assistance is generally available only where an individual is not able to receive assistance through a Legal Aid Commission, and meets strict means and merits tests applied by law firms and/or pro bono referral schemes. Pro bono assistance is used to 'plug the gaps' in the justice system and to address unmet legal need in the community.

This means that a party in litigation whose lawyer is acting on a pro bono basis, is generally of very limited means, and without pro bono legal assistance would not be able to access justice.[39]

There is a fundamental rule that "a natural person who sues will not be ordered to give security costs, however poor." This was further articulated in *Hession v Century 21 South Pacific (In Liq)*[40]where the court commented that a claim which is not vexatious should not be disadvantaged by the litigant's impecunious status. However this position is not absolute, and there is judicial discretion to do justice between the parties through the use of security for costs orders. Thus there is a constant tension between ensuring adequate protection to the defendant from vexatious claims and trying to avoid locking out impecunious plaintiffs from legitimate claims.

Impecunious plaintiffs are particularly disadvantaged in accessing justice due to the costs associated with litigation. The risk of a substantial adverse costs order functions as an impediment to the claimant and may result in their abandonment of the claim. In *Schou v*

[39] Some exceptions to this may be larger not-for profit organisations or charities, for which some law firms provide pro bono legal services. This is done because the law firms believe that the resources available to any charity or not-for-profit organisation are best used assisting people in need rather than on legal services. Added to this, many not-for profit organisations are poorly funded, and could not afford to pay for legal representation.

[40] *Hession v Century 21 South Pacific (In Liq)* (1992) 28 NSWLR 120

*State of Victoria (Dept of Victorian Parliamentary Debates)*,[41], a case with issues of considerable public interest, the plaintiff was unable to apply for special leave to the High Court due to the significant risk of an adverse costs order. In these circumstances, the plaintiff's right to pursue a legitimate claim is sacrificed in favour of the defendant's interest in ensuring that he is not unduly exposed to the costs of defending the litigation.

Whilst the Centre recognises that litigants may bring claims that are merely vexatious or harassing, such abuses of court process can be effectively dealt with through dismissal of the proceedings. However, if a security for costs order is awarded it may lead to a plaintiff being unable to continue with the proceedings despite the matter having strong prospects of success. This is so particularly in public interest litigation where the plaintiff is likely to be impecunious and/or have difficulty in raising what is often a significant sum of money at short notice. For this reason the current framework needs adjustment, as reflected by Young CJ in *Melville v Craig Nowlan & Associates Pty Ltd*,[42] that impecuniosity is "merely one of the factors the court takes into account when making its final assessment as to whether the proceedings, without security for costs, would be an abuse of the court's process".[43]

Litigants who are the recipients of legal aid are currently protected from security for costs orders under the *Legal Aid Commission Act 1979* (NSW) s 47 and relevant case law, however similar protection is not offered to pro bono litigants. There is no reasonable rationale for this distinction, particularly when the role of pro bono is often to further augment legal aid's ability to assist the community in accessing the courts. Because security for costs creates such a formidable hurdle for the plaintiff, the Centre submits that pro bono litigants should be extended the same protection as legal aid recipients against security for costs orders.

## Lawyers and costs – exemption from personal costs orders

### The current approach

Section 99 of the *Civil Procedure Act 2005* (NSW) (CPA) and section 348 of the *Legal Profession Act 2004* (NSW) (LPA) provide for costs to be ordered against a legal practitioner personally. This legislation raises two important and competing public interests. Firstly, lawyers should not be deterred from fearlessly pursuing the interests of their client and secondly, financial consequences caused by unjustified litigation should be discouraged. The danger of making a costs order against a lawyer and the effects it might have on his or her perceived duty to his or her client were well summarised by Hamilton J in *Pinebelt Pty v Bagley*:[44]

> "There are grave dangers in the too ready imposition of personal costs orders against practitioners...A feeling of threat of personal liability arising from decisions, some rivalling in themselves and many necessarily taken in the sometimes white hot caldron of litigation, has the potential to paralyse the decisive and fearless conduct which advocates are daily called upon to engage in."[45]

[41] *Schou v State of Victoria (Dept of Victorian Parliamentary Debates)* (2000) EOC 93-101
[42] *Melville v Craig Nowlan & Associates Pty Ltd* (2001) 54 NSWLR 82
[43] Ibid at 136.
[44] [2000] NSWSC 665 at 28.
[45] Dorne Boniface and Miiko Kumar, *Principles of Civil Procedure in New South Wales* (2009) at 67.

This effect is even more marked in pro bono matters as no financial gain for the lawyer is available to be weighed in the balance. The prospect of a personal costs order has a real chilling effect.

**Problems with the current approach**

Sections 347 and 348 of the LPA set out restrictions on commencing proceedings without reasonable prospects of success and detail a lawyer's personal liability for costs when the court deems that reasonable prospects of success are not present. In cases where a litigant's claim raises matters of great public interest, a lawyer may choose to represent the litigant on a pro bono basis. However, the obligation to satisfy an adverse costs order may be placed upon the lawyer if the plaintiff's claim is deemed to be without a reasonable prospect of success. This can have a deterrent effect upon lawyers who are considering whether to undertake test cases, where the prospect of success is difficult to ascertain with certainty. Public interest litigation remains an important avenue of law reform by provoking a review of whether the legal framework is achieving the policy goals. Even though the courts have developed tests to determine whether there are "reasonable prospects of success"[46] and any order to make a legal practitioner pay the costs of the proceedings in which they have provided legal services must be made 'with care and discretion and only in clear cases'[47] - the risk still remains.

In *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd,*[48] the court recognised that the Civil Procedure Act must not be construed so as to deny parties a chance to litigate those issues that are real and salient. While the development of a case may reveal issues that are not central to its resolution, the court encourages the litigation of issues that, on proper grounds, show themselves to be relevant. The threat of a costs order is thus exacerbated where a pro bono advocate is involved since the personal nature of any costs order awarded would likely limit the advocate's propensity to fully litigate all issues.

**Question 3.9**

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?

Section 99 of the Civil Procedure Act 2005 (NSW) deals with the liability of legal practitioners for unnecessary costs. All lawyers, whether acting pro bono or not and whether litigating a public interest matter, should be held to a high standard of professional conduct. Therefore there should be no exemption to s 99 for lawyers acting pro bono.

Section 348 of the Legal Profession Act provides for costs orders to be made against practitioners who commence proceedings for damages without reasonable prospects of success. Part (a) of the section anticipates an order whereby the lawyer must repay the 'party to whom the services were provided' that would seem to be the pro bono client and (b) envisages an order to indemnify the other party against their costs. There are few public interest matters that claim damages as a remedy so the possible application of this provision is quite limited. However, the prospect of such an order against a lawyer who is considering whether to act pro bono has a chilling effect on their

[46] See *Firth v Latham*[2007] NSWCA 40.
[47] *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 at 92 per McColl JA.
[48] *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2006] NSWSC 583 at 28-29.

willingness to take on a matter, would be meaningless as against their own pro bono client and be grossly unfair as regards being ordered to indemnify the other party against their costs. Accordingly it is submitted that there should be an exception for a lawyer acting pro bono.

## Public Interest Proceedings

From the perspective of a marginalised or disadvantaged litigant, the exposure to adverse costs orders and the uncertainty of this risk in test cases is a significant barrier to accessing justice. According to the Public Interest Law Clearing House Victoria, nine times out of ten the risk of an adverse costs order results in meritorious public interest matters not being pursued:

> "This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case."[49]

Such litigation, ranging from issues of national security to the efficient administration of justice, is of significant benefit to the community through increased accountability to the public and should thus not be impeded by the costs allocation rules.[50]

### What are public interest proceedings?

The Centre acknowledges that the concept of 'public interest' is broad and difficult to define. No clear legal definition of the term exists. A matter is generally considered to be in the 'public interest' if it affects a significant amount of people, raises a matter of broad public concern or has an effect on disadvantaged and marginalised members of the community. A number of criteria have been defined by the courts, including criteria such as whether the case has been brought 'selflessly' and conducted 'in a manner that was wholly commendable' and whether the case raises 'a novel question of much public importance and some difficulty'.[51]

## The power of courts to make costs and associated orders

### The current approach

The rules on costs and security for costs that apply to civil proceedings also apply to public interest proceedings. In *Oshlack*[52], which is considered to be the leading Australian judgement regarding the award of costs in public interest proceedings, the High Court confirmed that in exceptional public interest cases it may be appropriate for a court to make no costs order. This decision restored the order of Stein J of the NSW Land and Environmental Court, in which Stein J accounted for the 'public interest' nature of the litigation among other special factors in deciding to make no order as to costs. However, this endorsement from the High Court came about through a slim majority (3:2) and the

[49] PILCH (Vic), *Submission to the Commonwealth Attorney-General on Protective Costs Orders*, (2009) at 4.
[50] ALRC, *Costs Shifting- Who pays for litigation*, Report 75 (1995).
[51] Victorian Law Reform Commission – Civil Justice Review: Report, at 670
[52] (1998) 193 CLR 72.

judgments offer little guidance as to how much weight a court should place on public interest considerations in making public interest costs orders[53].

Gummow and Gaudron JJ refer to Stein J's analysis that 'something more' than mere characterisation as public interest litigation is required for a successful defendant to deny costs.[54] Kirby J suggests public interest litigation is just one category into which particular kinds of cases may be grouped, that will sometimes warrant departure from the general rule.[55] His argument is based more on the breadth of the discretion conferred by the statutory power.

**Problems with the current approach**

No legislation exists regarding public interest costs orders. The court has noted the blurred boundaries when defining public interest. This suggests that if there is reform to offer a package of protections to public interest litigants, a more articulate framework (that maintains flexibility and allows for the expansion of what constitutes 'public interest') is required. Significantly, the United Kingdom's Court of Appeal has explicitly recognised public interest as one of the principal considerations for courts in exercising their discretion to award Protective Costs Orders.[56]

**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?

In the Victorian Law Reform Commission's (VLRC) Civil Justice Review (May 2008)[57], the Commission proposed that:

> "There should be express provision for courts to make orders protecting public interest litigants from adverse costs orders in appropriate cases, including orders made at the outset of the litigation. The fact that a litigant may have a pecuniary or other personal interest in the outcome of the proceeding should not preclude the court from determining that the proceedings are in the public interest. "[58]

The VLRC further concluded that express provisions should be made for courts to make orders protecting public interest litigants from adverse costs orders, when appropriate, and that it should include orders made at the outset of the litigation. [59]

The Centre submits that the current law regarding public interest costs orders is not adequate. New legislation is needed to give courts the express powers to make a variety of public interest costs orders as set out in Rec 45 of ALRC report 75 as follows:

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[53] The scope of the *Oschlack* decision was defined by Kirby J some weeks later in *South West Forest Defence Foundation v Department of Conservation and Land Management (No 2),* where His Honour said: "Nothing in the recent decision in *Oschlack v Richmond River Council* requires that every time an individual or body brings proceedings asserting a defence of the public interest and protection of the environment, a new costs regime is to apply exempting that individual or body from the conventional rule. To suggest that would be to misread what the court decided in Oschlack. It would require legislation to afford litigants such a privileged position so far as costs are concerned. NO such general legislation has been enacted."

[54] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 49.

[55] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 143

[56] *R (Corner House Research) v Secretary for State for Trade and Industry* [2005] 1 WLR 2600.

[57] Victorian Law Reform Commission Civil Justice Review (May 2008)

[58] Victorian Law Reform Commission – Civil Justice Review: Report, at 675

[59] Victorian Law Reform Commission – Civil Justice Review: Report, at 676

A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that

• the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community

• the proceedings will affect the development of the law generally and may reduce the need for further litigation

• the proceedings otherwise have the character of public interest or test case proceedings.

A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.

**Question 4.2**

(1) Should any proposed legislation establishing public interest costs orders define public interest proceedings?
(2) If so, what should the definition be?

(1) No. As stated above, the concept of what constitutes 'public interest' is complex and difficult to define. In the Centre's view, a strict definition enshrined in statute of what constitutes public interest is not desirable. For the sake of clarity however, legislation setting out factors that the court should have regard to in making its decision on whether a case has been brought in the 'public interest' is desirable. This would allow litigants (or potential litigants) to more easily determine whether their case would be considered to be in the public interest by the court, and what the potential costs implications might be. The Centre believes that setting such legislative criteria will also assist in creating a common law understanding of 'public interest litigation' over time.

**(2)** In its 1995 report on costs [60], the Australian Law Reform Commission made a recommendation as to the factors that should be taken into consideration when a court is determining whether a matter is in the public interest. The Centre submits that relevant factors to be stated in legislation should be extracted from existing jurisprudence and case law, taking into consideration the recommendations as to criteria made by experienced public interest organisations in their submissions to this inquiry

**Question 4.3**

Should the legislation establishing public interest costs orders provide that courts may make an order at any stage of the proceedings, including at the start of the proceedings?

Yes. As stated above, the risk of an adverse costs order often results in meritorious public interest cases not being pursued in the courts.[61] Legislation ensuring that a court may make an order as to

[60] Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation,* Report 75 (1995) [13.16]
[61] See ibid at 43.

costs at any stage of the proceedings, particularly at the start of the proceedings would allow for all litigants to make an informed decision on whether to continue with the matter and may expedite the resolution of certain matters.

**Question 4.4**

(1) Should the legislation giving courts the power to make public interest costs orders contain a list of discretionary factors that courts may take into account when determining whether to make public interest costs orders?
(2) If so, what should these factors be?

As set out above in answer to question 4.2, the Centre submits that the legislation should specify factors that the court **should** take into account in determining whether to make a public interest costs order.

The legislative criteria should be extracted from existing jurisprudence and case law, taking into consideration the recommendations as to criteria made by experienced public interest organisations in their submissions to this inquiry, particularly the Environmental Defender's Office.

**Question 4.5**

If the court is satisfied that there are grounds for making a public interest costs order, what are the types of orders that it should be able to make?

Legislation and rules of court should not restrict the courts' discretion to make appropriate costs orders having regard to the facts and circumstances of each individual matter. However, there may be merit in prescribing certain types of costs orders so as to make clear the width of the discretion as to costs orders once it has been established that a public interest costs order should be made. On this question the Centre endorses the submission made by Environment Defenders Office (Victoria) Ltd to this inquiry[62], and submits that a court may make any of the following orders:

- That no order be made as to costs;
- That the party applying for the public interest costs order not be liable for the other party's costs, regardless of the outcome of the case;
- That a party may only be liable for a specified amount of the other party's costs
- That a party may be able to recover all or part of their costs from the other party; or
- That another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties. [63]

[62] Environment Defenders Office (Victoria) Ltd, *Costing the Earth? The case for public interest costs protection in environmental litigation,* September 2010, at 25.
[63] This recommendation was also made by the Australian Law Reform Commission in *Costs Shifting – Who Pays for Litigation,* Report 75 (1995), Recommendation 47 (paragraph 2).

**Question 4.6**

Should the provisions giving courts power to make public interest costs orders be located in statute or in the *Uniform Civil Procedure Rules 2005* (NSW)?

Numerous public interest organisations, as well as the Australian Law Reform Commission, have long called for law reform in the area of costs in public interest litigation.[64] There is ample evidence to demonstrate the difficulties faced by those seeking to commence and pursue litigation in the public interest by the current costs regime. To introduce specific public interest costs order provisions would represent a new policy position although arguably all the 'public interest' costs orders set out above could be made now under existing rules. In that sense it is more appropriate that new provisions be put in legislation. However, all Australian courts have costs powers located partly in legislation and partly in court rules. The Centre submits that the provisions giving courts the power to make public interest costs orders should be located in a manner that is consistent with the location of costs powers for all other major courts in Australia.

## Protective Costs Orders

### The Current Approach

Rule 42.4 of the UCPR allows for courts to make Protective Costs Orders (PCOs). The rule is not confined to public interest proceedings, and in fact makes no direct mention of the public interest. In the 11 years since the introduction of the rule, it has been applied in only one case, *Blue Mountains Observation Society Inc v Delta Electricity*.[65]

**Question 4.7**

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

(1) The Centre concurs with Justice Beazley's finding in *Delta Electricity v Blue Mountains Conservation Society Inc* that r 42.4 of the UCPR is a "broad discretionary power to be exercised in the overriding statutory purpose of the CPA and the UCPR..."[66] and that "...the preferable approach to the discretion conferred is to determine whether, having regard to the particular circumstances of the case, an order should be made."[67]

[64] See ibid at 3,4,5,6 and 7.
[65] *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 150; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263.
[66] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 [134] (Beazley JA, in dissent)

[67] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 [138] (Beazley JA, in dissent)

(2) The Centre submits that the mechanism of a protective costs order provided in r. 42.4 UCPR is perfectly suited to public interest litigation – it is surprising that it has been used only once in 11 years and perhaps strengthens the argument for more legislative specificity in this area so as to make clear that this provision can be used to provide greater certainty as to costs outcomes in appropriate cases. With any introduction of special public interest costs orders, it is anticipated that PCOs would become more common. A PCO provides a fairer outcome as it would still permit a successful party in litigation to recover some of their costs, without preventing important issues of public interest to be resolved by the courts. However, it is important to note that a PCO can have the potential of becoming analogous to a strike out order if it is impossible for an applicant to meet the amount, unless the courts have regard to the financial resources of the applicant.

**Question 4.8**

Should the provisions on courts' power to specify the maximum costs that may be recovered by one party from another, which are currently located in *Uniform Civil Procedure Rules 2005* (NSW) r 42.2, be relocated into s 98 of the *Civil Procedure Act 2005* (NSW)?

As above under question 4.5, the Centre submits that the provisions giving courts the power to make public interest costs orders should be located in a consistent manner with all other major courts in Australia.

**Question 4.9**

Should New South Wales establish a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interests?

A public interest fund providing financial assistance to cover the legal costs of, and adverse costs orders against persons or organisations in public interest litigation needs to be considered as one of the mechanisms to facilitate such litigation. Many factors such as legal aid, contingency fees, insurance, fighting funds and tax deductibility might be at play in determining the ability of a party to pay legal costs. A public interest litigation fund would be an important addition to the ways in which these costs are met.

**National Pro Bono Resource Centre**
**19 August 2011**