Mr Paul McKnight
Executive Director
NSW Law Reform Commission
Level 13, Swire House
10 Spring Street
Sydney NSW 2000

Dear Mr McKnight,

Re: Security for costs – request for further information

Referring to your email on 8 August 2012, the Centre would like to make the following submission to the request for further information.

Can you provide examples of public interest law cases that have arisen in NSW courts, apart from environmental matters in the Land and Environment Court, where the potential for costs orders and/or security for costs were significant issues that may have prevented the litigation?

Whilst the Centre cannot cite public interest law cases that have arisen in NSW courts where the potential for costs orders and/or security for costs were significant issues that may have prevented the litigation, many issues in the public interest do not arise in courts at all because the litigants cannot afford, or cannot afford to risk, the costs implications of litigation. This is the whole point of suggested law reform in this area. Many public interest cases do no get off the ground due to the risk of an adverse costs order. This is particularly the case in public interest matters where the remedy sought is declaratory relief, and concerns no monetary interest. For examples of matters where costs exposure may have prevented litigation in the public interest, the Centre refers to the submissions made by the Public Interest Law Clearing House (Victoria) and the Public Interest Advocacy Centre to this inquiry.

Although low cost, easy access options have been provided through tribunals in areas where public interest issues may commonly arise (for example in discrimination law), matters in the public interest can be brought on appeal to the New South Wales Supreme Court.[1] As the several cases in the federal jurisdiction that have been brought to the Law Reform Commission's attention

[1] See for example OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155

demonstrate, many cases would not have proceeded to litigation without the availability or a protective costs order. [2]

Seeking protective costs orders in public interest litigation in Australia is a relatively new phenomenon,[3] and the issue has been considered by a higher court only once.[4] The jurisprudence with regard to costs in public interest litigation and the role of costs in access to justice in Australia is in its early stages of development. Accordingly, a culture of seeking public interest costs orders or protective costs orders has yet to develop amongst lawyers, law firms and public interest organisations engaging in public interest litigation.

In fact, informal consultations with representatives of plaintiff firms[5] also suggest that some matters in the public interest proceed to litigation on the basis of an expectation that in the event of an adverse costs order against the plaintiff, the respondent will not pursue that costs order. This is thought to be so because the defendant is often a government entity or a corporation weighing the costs of bad publicity against the costs that would be recoverable from often impecunious or disadvantaged plaintiffs. The Centre submits that simply relying on the 'goodwill' of the defendant when deciding to pursue litigation in the public interest is an unsatisfactory state of affairs and that legislative change is needed to facilitate access to justice.

Is the existing case law in relation to costs and security for costs in public interest cases deficient or otherwise in need of clarification? Please provide examples from your experience.

The Centre does not directly provide or make referrals for legal services in public interest litigation, and therefore makes the following general observations.

In jurisdictions where no special costs regime applies to public interest litigation, the general rule that costs follow the event ordinarily applies: see *Save the Ridge Inc v Commonwealth* [2006] FCAFC 51; (2006) 230 ALR 411 ('*Save the Ridge*') at 413 [6]. Black CJ, Moore and Emmet JJ noted in *Save the Ridge* at 413 [6]:

"[T]he courts have taken into account various factors in exercising their discretion not to award costs against an unsuccessful plaintiff in public interest litigation. As was said in *Ruddock v Vadarlis* (No 2) [(2001) 115 FCR 229] ('*Vardalis*') at [14] per Black CJ and French J, "The term [public interest] may best be seen as an envelope or class description for a

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[2] See *King v Jetstar Airways Pty Ltd* [2012] FCA 413, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, *Haraksin v Murrays Australia Ltd* [2010] FCA 1133

[3] The first time a protective costs order was made by the federal Court in a human rights case was in 2008, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864

[4] See *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263

[5] Telephone and email conversations with Elizabeth O'Shea, Social Justice Practice, Maurice Blackburn Lawyers

range of circumstances which, upon examination, may be found to be relevant to the question whether there should be a departure from the ordinary rule that costs follow the event."

In *Vardalis* the Full Court also acknowledges that on occasion, the successful party to litigation might be denied costs. However, the Full Court also quoted with approval the observation of the Full Court of the Supreme Court of Western Australia, in *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale*[6], that such an occasion "should continue to be a rarity". Their Honours noted that "[t]he fact that the [public interest litigant] sought no financial gain from the litigation is not, of itself, sufficient reason for departing from the usual order as to costs". As the Full Court further observed in *Vardalis*[7], the rule that costs follow the event has been applied on numerous occasions in litigation carried on by associations that might generally be said to be "public interest" associations. *Save the Ridge* further supports the postponing of the questions of costs until the end of the proceeding.[8]

The Centre refers to comments made in its submission to this inquiry and restates that legislation is needed to give courts express powers to make public interest costs orders, at any stage of the proceedings, including at the start of the proceedings.[9]

The Centre also supports the observations and comments made by the Public Interest Advocacy Centre (PIAC) in responding to this question.

If litigation in the public interest were made a relevant factor in decisions about cost capping, could the costs capping provision in 42.4 of the UCPR provide satisfactorily for costs in public interest cases?

Yes. The Centre believes that the costs capping provision in 42.4 of the *Uniform Civil Procedure Rules* (UCPR) could satisfactorily provide for costs in public interest cases.[10]

4 September 2012
National Pro Bono Resource Centre

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[6] *Buddhist Society of Western Australia (Inc) v Shire of Serpentine-Jarrahdale*[6] [1999] WASCA 55 at [11]
[7] at 415 [14]-[15]),
[8] See also Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs [2011] FCA 1206 at [26].
[9] National Pro Bono Resource Centre, Submission to the New South Wales Law Reform Commission, Consultation Paper 13, at 15-16.
[10] See Delta Electricity v Blue Mountains Conservation Society Inc [2010] NSWCA 263.