NSW GOVERNMENT

New South Wales
Law Reform Commission

Consultation
paper
13

Security for costs and associated costs orders

May 2011
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About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

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Terms of reference

The Attorney General, the Hon John Hatzistergos, issued the following terms of reference (received on 8 December 2009):

i) pursuant to section 10 of the Law Reform Commission Act 1967 (NSW), the Law Reform Commission is to inquire into and report on whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation. In undertaking this review, the Commission is to consider in particular whether or not the law and practice:

   a) is consistent with modern notions of access to justice;

   b) adequately takes into account the strength of the plaintiff's case and whether the litigation is in the public interest;

   c) applies satisfactorily in the case of incorporated plaintiffs, impecunious plaintiffs, self-represented litigants, and plaintiffs who are supported by legal aid;

   d) operates appropriately where solicitors are acting on a speculative fee; where parties are funded by third parties; in representative proceedings; and in cross-border litigation;

   e) contains adequate procedures for making and determining applications for relevant orders – for example, in respect of timing, and in respect to their expeditious and efficient disposition; and

   f) requires any modifications in respect of appeals; and

ii) the Commission is also to consider whether the Uniform Civil Procedure Rules 2005 in relation to Security for Costs and associated orders are adequate, and any related issue.

Questions

1. Introduction

Purpose, scope and background of this inquiry

1.1 The purpose and scope of this inquiry are set out in the terms of reference given to the Commission by the Attorney General, which are as follows:

i) pursuant to section 10 of the Law Reform Commission Act 1967 (NSW), the Law Reform Commission is to inquire into and report on whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation. In undertaking this review, the Commission is to consider in particular whether or not the law and practice:

a) is consistent with modern notions of access to justice;

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e) contains adequate procedures for making and determining applications for relevant orders - for example, in respect of timing, and in respect to their expeditious and efficient disposition; and

f) requires any modifications in respect of appeals; and

ii) the Commission is also to consider whether the Uniform Civil Procedure Rules 2005 in relation to Security for Costs and associated orders are adequate, and any related issue.

1.2 The background to this inquiry is canvassed in a speech made by the then Attorney General in response to a question in Parliament about the Government's efforts to balance the financial interests of litigants in court proceedings. He said that there is "some disquiet about whether the existing approach to security for costs and related orders achieves the right balance between the competing interests of the defendant and plaintiff and, more broadly, whether the current regime is consistent with genuine access to justice".[1]

1.3 The Attorney General mentioned two developments of particular significance. First, the spate of recent litigation in environmental matters has prompted appeals for reform to ensure corporate defendants are not left out-of-pocket by unsuccessful litigation; as well as calls for greater use of protective costs orders whereby the court places a cap on the amount of costs that can be recovered by one party against the other in public interest litigation.

1.4 Secondly, the growth in litigation funding has given rise to some problems. The Attorney General cited the case of *Jeffrey & Katauskas v SST Consulting*[2] where the High Court held that the Supreme Court did not have power to order costs against a litigation funder, which resulted in the defendant in that case being out of pocket for its costs by around $450,000.[3]

1.5 The Attorney General concluded his speech with an announcement that, given the complexity of the issues relating to security for costs and the potential effect on access to justice, he had asked the Commission to examine the law and practice relating to security for costs and other related orders.

What is security for costs?

1.6 In civil proceedings in New South Wales,[4] the court has a broad discretionary power to decide who will pay the parties' litigation costs (including lawyers' fees and other

1. NSW, *Parliamentary Debates*, Legislative Assembly, 3 December 2009, 20524 (John Hatzistergos, Attorney General).
2. (2009) 239 CLR 75.
3. See Chapter 3, para 3.48–3.59 for a discussion of this case.
4. See *Civil Procedure Act 2005* (NSW) s 3, which defines civil proceedings as "any proceedings other than criminal proceedings".

disbursements) after judgment has been given.[5] The general rule regarding litigation costs in New South Wales is stated in r 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"), which provides that "the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs".[6] This means that courts generally order the losing party to pay the winning party's costs. However, the costs recoverable by the successful party, in normal circumstances, will only constitute a partial indemnity for the fees and disbursements they will be required to pay to their lawyers.

1.7 Where a defendant, prior to judgment, is concerned that its litigation costs might not be paid if it wins the case,[7] the defendant may apply to the court for an order for security for costs. The court will usually decide whether or not to order security by considering a number of factors developed by case law.[8] If the court decides to grant the defendant's application, it will order the plaintiff to provide security for the defendant's costs in the form of money, a bond, or some other acceptable form.[9] The court will also usually order a stay of proceedings until the security is given, and if the plaintiff does not comply with the order, the court may dismiss the proceedings.

1.8 Hence, security for costs is money that a plaintiff is ordered to give to the court as a condition of continuing with a claim. The main purpose of security for costs is to ensure that if the plaintiff is unsuccessful, payment of the defendant's costs is secured.[10]

Costs and other orders associated with security for costs

1.9 The focus of the inquiry is security for costs. However, in some instances we will also examine issues relating to costs because the two issues are inextricably intertwined and because both issues give rise to the problems that prompted this inquiry.

1.10 The Attorney General's speech mentioned above referred to two areas that require reform. In both cases, the problem relates primarily to costs. The Attorney General mentioned *Jeffrey & Katauskas v SST Consulting*[11] where the plaintiff gave a security for costs, which turned out to be insufficient to pay for the defendant's costs. The defendant sought a costs order against the litigation funder for the shortfall but both the Court of Appeal and the High Court held that the Supreme Court did not, as a general rule, have power to order costs against a non-party to the proceedings, such as a litigation funder. This left the defendant to foot the bill for a substantial amount of costs. The key rule of court in *Jeffrey & Katauskas v SST*

5. *Civil Procedure Act 2005* (NSW) s 98.
6. *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.
7. For example, because the plaintiff has insufficient funds, or does not ordinarily reside in NSW, or due to some other ground recognised in case law or statute: see Chapter 2, para 2.11–2.55.
8. These case law factors are discussed in Chapter 2, para 2.57–2.57.
9. Chapter 5 discusses the forms of security at para 5.26–5.33.
10. *Jodast Pty Lod v A & J Blattner Pty Ltd* (1991) 104 ALR 255, 255 (Hill J).
11. (2009) 239 CLR 75.

Consulting which prohibited courts in New South Wales from ordering costs against non-parties has since been repealed. However, there is no law expressly giving courts power to order costs against litigation funders. Chapter 3 of this paper examines the arguments for and against granting courts such power. The chapter also examines the relevance of a litigation funding agreement to an application for security for costs.

1.11 Costs in public interest proceedings is another area identified by the Attorney General as requiring consideration. Costs are a significant issue for the litigants involved in these proceedings. It is common for those who bring or are intending to bring public interest proceedings not to have the resources to mount and maintain a court case. This would be a concern for defendants who may have to bear the costs of defending the court case if the plaintiff is unable to pay an adverse costs order. For the plaintiff, or someone contemplating bringing a case that is in the public interest, the prospect of an adverse costs order is a significant deterrent to bringing and maintaining the case. Chapter 4 examines how these concerns could be addressed through the concepts of public interest costs orders and protective costs orders.

1.12 There are other sections of this paper where our inquiry is not confined to security for costs but extends to costs. The discussion above makes it apparent that costs and security for costs are intertwined. Further, the terms of reference of this inquiry do not confine our work to security for costs but state that the Commission is to inquire into the "law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders".

Balancing of various interests

1.13 In examining the law and practice relating to security for costs and associated orders, it is important to be mindful of a number of underlying issues. The first is access to justice. There is a public interest in endeavouring to give everyone, including those with limited financial resources to fund litigation, access to the court system. Courts have recognised this interest by formulating a general rule regarding security for costs "that poverty is no bar to a litigant".[12] Justice Biscoe has gone as far as to state that in examining applications for security for costs, "the principle of access to justice trumps mere poverty."[13] If courts were to routinely order security for costs on the ground of impecuniosity, access to justice would be frustrated because such orders would deny the impecunious the opportunity to secure their legal rights.[14]

1.14 There are, however, other interests to consider. These include the interest in protecting defendants by ensuring that there are funds available to cover costs if a case is successfully defended.

12. *Cowell v Taylor* (1885) 31 Ch D 34, 38.
13. *Sharples v Minister for Local Government* [2008] NSWLEC 67, 8 (Biscoe J).
14. *McSharry v Railway Cmrs* (1897) 18 LR (NSW) L 33, 37 (Darley CJ); *Fletcher v Commissionerr of Taxation* (1992) 23 ATR 555, 558 (Hill J).

1.15 There is an interest in avoiding abuse of the court's processes by "preventing impecunious persons from litigating without responsibility",[15] discouraging the filing of unmeritorious and frivolous claims,[16] and averting the plaintiff from frustrating court orders (in particular, costs orders).

1.16 Courts have recognised the need to balance these various interests in the exercise of their discretion to order security. In undertaking this balancing exercise, courts may take into account a number of factors, which are discussed in Chapter 2.[17]

Costs of litigation

Components of litigation costs

1.17 Security for costs is intended to ensure payment of the defendant's litigation costs if the court awards costs in his or her favour, which usually occurs if the defendant is successful in defending the case. The costs incurred during litigation fit broadly into two categories:

- legal advice and assistance; and
- disbursements.[18]

Legal advice and assistance

1.18 The category of advice and assistance includes fees payable by a litigant to his or her lawyer for legal services (i.e. barristers' and solicitors' fees).[19] New South Wales previously had a scale of fees for lawyers, which gave an indication of the amount that litigants would pay their lawyers for services rendered in relation to litigation. In 1994 the scaled fees were abolished and replaced with a costs disclosure system.[20] There is therefore no readily available source of information about the fees that lawyers charge in civil proceedings.

Disbursements

1.19 The category of disbursements includes payments made to a third party on behalf of the client by the legal practitioner as agent, and expenses incurred on behalf of the client.[21] Examples of disbursements include expert reports, witness' expenses, interpreters' service fees, printing and photocopying services, and court fees.

15. *Re Marriage of MA and Brown* (1991) 15 Fam LR 69.
16. S Colbran, "The Origins of Security for Costs" (1993) 14 *The Queensland Lawyer* 44.
17. Para 2.57–2.67.
18. See Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) [3.7].
19. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report No 92 (1999) [16.1]; Gordon Salier, "The Costs of Legal Services" (2004) 27 *UNSW Law Journal* 13.
20. See Bob Debus, "Directions in Legal Fees and Costs" (2004) 27 *UNSW Law Journal* 200.
21. Marija Johnson, "Notes on Legal Costs: Bill of Costs and Statement of Account" (2000) 74 *Law Institute Journal* 78.

1.20 Court fees include court filing fees, the cost of issuing and obtaining court documents, the cost of starting proceedings, and fees incurred for costs assessment.[22]

1.21 In New South Wales the standard fee for filing an originating process is $894 (or $2,142 for corporations) in the Supreme Court, $779 (or $1,558 for corporations) in the Land and Environment Court, $555 (or $1,110 for corporations) in the District Court, and $205 in the Local Court.[23]

Other costs

1.22 It should be noted that there are a range of costs that litigants cannot recover through a costs order.[24] These include the personal time and resources litigants expend in instructing lawyers and attending court, as well as the opportunity costs of not being able to attend work or other commitments due to involvement in litigation.

Factors that impact on costs

1.23 The costs incurred by parties vary greatly because of a number of factors. In a 1999 study by the Australian Law Reform Commission ("ALRC") of costs incurred in proceedings before the federal courts, it found that the factors which impact on legal costs involve the complexity of the case, settlement outcomes, the number and nature of case events, length of hearing, expenditure on discovery and experts, and the lawyer's charging practices.[25]

1.24 The ALRC identified the following to be significant drivers of costs in the Federal Court. It quantified the amount by which each factor affected the total costs:

- Number of parties; $10,014 per party.
- If the "end of discovery" was reached; $85,629.
- Number of experts used; $28,817 per expert.
- Number of court events (hearings); $2,761 per event.
- Use of alternative dispute resolution by the parties, which on Federal Court figures had a high success rate for matters referred by a judge, reduced the costs by $63,552.[26]

22. Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report No 75 (1995) [3.7]–[3.9]; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report No 92 (1999) [16.1].
23. *Civil Procedure Regulation 2005* (NSW) sch 1, pt 1–4.
24. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) [3.17].
25. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) [4.2].
26. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) [4.8]–[4.9].

1.25 The ALRC also found significant differences in costs depending on the mechanism used by the lawyers to assess charges for services; that is, whether the lawyers charged according to item-based scale rates prescribed by the court, or by reference to the time spent on the matter. Its data on family law proceedings showed that solicitors' fees and disbursements were significantly lower when the Family Court scale was used, as compared with cases where costs agreements were calculated by reference to time spent or some other basis. The median solicitors' fees charged at scale were $1730, while the median fees for charging on a time basis under a written costs agreement were $3000.[27]

Illustrative cases

1.26 Below are some cases illustrating the amount of costs incurred in different court proceedings.

1.27 In *April Fine Paper v Moore Business Systems*,[28] the Supreme Court considered the costs that the parties would likely incur in the course of litigation in the context of determining the amount of security to be ordered. The plaintiff was a foreign company that was claiming $US477,491 for paper it sold and delivered to the defendant. Justice White noted that the case was "typical" and that it did "not appear to be at all complex".[29] In the face of competing estimates about the prospective costs of litigation, the court ultimately adopted the estimate of the plaintiff's costs consultant, who stated:

> In my experience and opinion, I would expect to draw a party/party bill (on the usual order basis) for a commercial recovery of this type, with 2 parties, no cross-claims, standard directions/interlocutory proceedings and run for 2 to 4 days on final hearing in the Supreme court, in the range of $150,000 to $170,000 exclusive of GST. This would then be reduced, potentially, on assessment to $120,000 to $140,000 (approximately 15% to 20% reduction). This is a very general summation of my experience and expectation for costs only and there are of course many variables that would affect those costs – for example – different hourly rates being charged by law firms and use of 'teams' of solicitors. It is still a useful yardstick to use in comparing figures generated by other methods.[30]

1.28 In *Owners Strata Plan No 56059 v MI-OK Pty Ltd,*[31] the plaintiff ("Owners Corporation") brought a claim before the Local Court in the Small Claims Division for the recovery of outstanding strata levies of $2,459.80 against the defendant ("MI-OK"). MI-OK filed a defence and cross claim claming $3,850, which it alleged it had incurred for repairs carried out following failure by the Owners Corporation to carry out the repairs. The Owners Corporation succeeded in the claim for $2,459.80 plus interest and solicitors' costs of $427.20. On the cross claim, there was a verdict in favour of MI-OK in the sum of $998 plus solicitors' costs of $284.80. The costs

27. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) [4.11].
28. [2009] NSWSC 867.
29. *April Fine Paper v Moore Business Systems* [2009] NSWSC 867, [6].
30. *April Fine Paper v Moore Business Systems* [2009] NSWSC 867, [31].
31. [2007] NSWLC 31.

allowed were the maximum amount allowable under the rules of the Local Court (Small Claims) for the claim and cross claim.

1.29 The solicitors acting for the Owners Corporation charged them an additional $8,876.80 for their costs in defending the Owners Corporation from the cross claim.

1.30 The Owners Corporation filed another statement of claim with the Local Court seeking to recover that amount from MI-OK. The basis used by the Owners Corporation for this claim was s 80 of the *Strata Schemes Management Act 1996* (NSW), which states:

> An Owners Corporation may recover as a debt a contribution not paid at the end of one month after it becomes due and payable together with any interest payable and the expenses of the Owners Corporation incurred in recovering those amounts.

1.31 The Local Court held that s 80 did not permit the Owners Corporation to recover the costs it incurred in defending the defendant's cross claim. The court went on to comment that the $8,876.80 costs and disbursements charged by its solicitor were not fair and reasonable. It gave two examples of fees charged by the solicitors to support its conclusion:

- For attending a hearing, the solicitor charged a time of five hours, twenty minutes and a fee of $1,125.
- For preparing an affidavit consisting of 15 pages and 18 annexures, the solicitor charged $1,280.

The court concluded that even if s 80 did allow the Owners Corporation to recover the $8,876.80 costs and disbursements charged by its solicitor, it would dismiss the claim on the basis that the costs were not fair and reasonable.

Rising costs of litigation

1.32 There is a lack of current statistical information about the costs of civil litigation in Australia.[32] However, there is some evidence that the costs of litigation have been increasing. The Law and Justice Foundation of NSW conducted a study that revealed that litigant costs in the District Court had "increased significantly": the litigation costs for that jurisdiction rose by a quarter on average over the years 1994–1997.[33] For example, the average litigation costs incurred by plaintiffs in non-motor accident proceedings increased from $12,193 to $14,781 during this period, while those of defendants increased from $8,241 to $13,864.[34]

32. See Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) [3.59]–[3.61].
33. Ann Eyland et al, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms*, Law and Justice Foundation of NSW (2003) 64, 102; Ann Eyland, "Legal Costs and Case Management" (2004) 10 *UNSW Law Journal Forum* 25, 27.
34. Ann Eyland et al, *Case Management Reform: An Evaluation of the District Court of NSW and County Court of Victoria 1996 Reforms*, Law and Justice Foundation of NSW (2003) 65, Table 7.

1.33 Multiple external factors have contributed to this broadly acknowledged rise in litigation costs.[35] These include:

- the rising costs of discovery procedures due to broader practices of electronic record-keeping;[36]
- the recent implementation of case management procedures and their focus upon reducing delay in the court system;[37]
- rising practitioner fees;[38]
- taxation incentives for businesses to litigate;[39] and
- rising costs of expert witnesses.[40]

1.34 Court fees have also been rising steadily, which no doubt contributes to the overall increase in litigation costs. For example, in 2002 the fee for filing an initiating process in the Supreme Court was $574 for an individual and $1,148 for a corporation,[41] compared with $638 for an individual and $1,276 for a corporation in 2005,[42] and $894 for an individual and $2,142 for a corporation in 2011.[43] Further, the fee in 2002 for a hearing allocation date in the Supreme Court was $1,092 for an individual and $2,318 for a corporation,[44] compared with $1,786 for an individual and $3,569 for a corporation in 2011.[45]

1.35 Similar increases appear to have broadly occurred across Australia, which has led to a comment by the Western Australian Law Reform Commission that the cost of litigation is now "beyond the means of many members of the community".[46]

1.36 It should be noted, however, that some measures have been adopted in an attempt to address the rising costs of litigation. Most significantly, costs have been capped

35. See, eg, Chief Justice James Spigelman AC, "Access to Justice and Access to Lawyers" (Speech delivered at the Australian Legal Convention, Sydney, 24 March 2007).
36. Chief Justice James Spigelman AC, "Access to Justice and Access to Lawyers" (Speech delivered at the Australian Legal Convention, Sydney, 24 March 2007).
37. Chief Justice James Spigelman AC, "Opening of Law Term 2004" (Speech delivered at The Law Society of NSW, Sydney, 2 February 2004).
38. Legal Fees Review Panel, NSW Office of the Legal Services Commissioner, *Legal Costs in New South Wales* (2005) 6–7.
39. Legal Fees Review Panel, NSW Office of the Legal Services Commissioner, *Legal Costs in New South Wales* (2005) 18–19.
40. Legal Fees Review Panel, NSW Office of the Legal Services Commissioner, *Legal Costs in New South Wales* (2005) 19.
41. Supreme Court of New South Wales, *Filing Fees as at 1 July 2002* <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_filingfees2002>.
42. Supreme Court of New South Wales, *Filing Fees as at 1 July 2005* <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_filing_fees_1july2005>.
43. Supreme Court of New South Wales, *Filing Fees as at 18 October 2010* <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_courtfees#3>.
44. Supreme Court of New South Wales, *Filing Fees at 1 July 2002* <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_filingfees2002>.
45. Supreme Court of New South Wales, *Filing Fees as at 18 October 2010* <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_courtfees#3>.
46. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Final Report No 92 (1999) [16.1].

for personal injury claims of up to $100,000 at the lower of either 20% of the amount recovered or sought to be recovered, or $10,000.[47]

Assistance with litigation costs

1.37 Litigation is not always financed by plaintiffs or defendants. In practice, litigation may be financed in whole or part through a number of other sources. This is mainly due to litigation being too costly for many litigants, and sometimes due to the nature of the claim (such as personal injury claims where the defendant's insurer pays the litigation costs). Where a plaintiff is receiving assistance with the costs of litigation, there are often implications for security for costs and costs orders. Chapter 3 of this paper examines the principles and reform issues in this context.

Lawyers acting on speculative and contingency fee agreements

1.38 One way that plaintiffs can obtain funding for litigation is by entering into a contingency fee agreement with their lawyer. The effect of such an agreement is that the plaintiff is only under an obligation to pay the lawyer's fees if the litigation succeeds.[48] The plaintiff may nevertheless still be liable to pay the other party's costs if the litigation is unsuccessful.[49]

1.39 There are three kinds of contingency fee agreements:[50]

(1) **Speculative fee agreement**: the lawyer takes his or her usual fee if the action succeeds.

(2) **Uplift fee agreement**: the lawyer takes his or her usual fee plus an agreed amount or percentage of this usual fee ("uplift") if the action succeeds.

(3) **Percentage fee agreement**: the lawyer takes a fee calculated by reference to a percentage of the amount recovered in the successful action.

1.40 In New South Wales, statute law allows lawyers to make speculative fee agreements with their clients.[51] The *Legal Profession Act 2004* (NSW) calls these agreements "conditional costs agreements", though they are more commonly

47. *Legal Profession Act 2004* (NSW) s 338.
48. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) [3.22].
49. Law Society of NSW, *How Solicitors Charge Their Clients* (2009) <http://www.lawsociety.com.au/community/thelawyerclientrelationship/Howsolicitorschargefees/index.htm>; Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) [3.22].
50. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [3.41].
51. *Legal Profession Act 2004* (NSW) s 323(1).

known as "no win, no fee" agreements.[52] Under such an agreement, the plaintiff may nevertheless have to pay disbursements if the litigation does not succeed.[53]

1.41 The *Legal Profession Act 2004* (NSW) also allows for uplift fee agreements provided that certain conditions are satisfied. First, it is prohibited to enter into an uplift fee agreement in relation to a claim for damages.[54] Second, in litigious matters the uplift fee cannot exceed 25% of the legal costs otherwise payable.[55]

1.42 Both statute and case law prohibit percentage fee agreements.[56] However, a law practice can enter into a costs agreement that adopts a "fixed costs provision" under which the amount payable to the practice is calculated by reference to the amount of an award or settlement that is recovered.[57]

Legal aid

1.43 The *Legal Aid Commission Act 1979* (NSW) establishes the Legal Aid Commission of New South Wales ("Legal Aid NSW"), an independent statutory body that provides legal services to disadvantaged people.[58] A plaintiff can obtain legal aid assistance in a civil law matter if the matter comes within the Legal Aid NSW policies, satisfies the relevant merit and availability of funds tests, and the plaintiff meets the relevant means test.[59]

1.44 Legal aid for civil, non-family law matters is only available in limited cases, for example:[60]

- breaches of civil liberties;
- consumer protection matters;
- environment matters;
- human rights matters;
- mental health matters;
- loss of home; and
- migration matters.

52. Law Society of NSW, *How Solicitors Charge Their Clients* (2009) <http://www.lawsociety.com.au/community/thelawyerclientrelationship/Howsolicitorschargefees/index.htm>.
53. *Legal Profession Act 2004* (NSW) s 323(3)(b).
54. *Legal Profession Act 2004* (NSW) s 324(1).
55. *Legal Profession Act 2004* (NSW) s 324(5).
56. *Legal Profession Act 2004* (NSW) s 325; *Smits v Roach* [2004] NSWCA 233.
57. *Legal Profession Act 2004* (NSW) s 325(2). "Fixed costs provision" is defined in s 302(1). See also G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [3.54].
58. See Legal Aid NSW, *About Us* <http://www.legalaid.nsw.gov.au>.
59. Legal Aid NSW, *Legal Aid NSW Policy*, Chapter 6 [6.2]. <http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=751&cid=993&policyid=1&chapterid=3>.
60. Legal Aid NSW, *Legal Aid NSW Policy*, Chapter 6 [6.3].

1.45 In most civil law matters, the legally assisted person is asked to pay an initial contribution towards the cost of legal services. At the end of the matter, the law provides that Legal Aid NSW must again consider whether the assisted person should pay a contribution.[61]

1.46 In 2009–2010, Legal Aid NSW represented clients in 41,436 matters.[62] However, only 1,727 representations were made for civil law matters, representing merely 4.2% of the matters for which Legal Aid NSW provided representation in the 2009-2010 period.[63] Contrast this with the provision of representation for criminal and family law matters for the same period, where representation was provided for 24,177 and 15,532[64] cases respectively.

Lawyers acting pro bono

1.47 Plaintiffs who do not qualify for legal aid may be able to find a lawyer to act for them on a "pro bono" basis. A lawyer acts "pro bono" when he or she gives a client legal assistance for free or at a substantially reduced fee.[65]

1.48 Some of the pro bono schemes operating in New South Wales include the NSW Bar Association Legal Assistance Referral Scheme[66] and the Law Society of NSW Pro Bono Scheme.[67] In addition, the *Uniform Civil Procedural Rules* provide for a court-based pro bono scheme. Under this scheme, the Supreme Court, District Court and Local Court can refer a litigant to a barrister or solicitor on the court's Pro Bono Panel.[68] The lawyer then acts for the litigant pro bono, although if an order for costs is made in favour of the assisted litigant, the lawyer may be entitled to recover that amount.[69]

1.49 Aside from these pro bono schemes, many law firms in Australia do a significant amount of pro bono work. In 2009–2010, 24 Australian law firms did a total of 322,343 hours of pro bono work — an average of 6,199 hours of pro bono work each week. The average number of hours per lawyer across these firms was 29 hours. Some firms were able to provide a remarkable amount of pro bono

61. *Legal Aid Commission Act 1979* (NSW) s 46; Legal Aid NSW, *Legal Aid NSW Policy*, Chapter 6 [6.2.3]–[6.2.4].
62. Legal Aid NSW, *Annual Report 2009-2010 - Overview*, 9, <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/79699001291157013876.pdf>.
63. Legal Aid NSW, *Annual Report 2009-2010 – Section 1: Client Services,* 20, <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/69390001291157053020.pdf>.
64. Legal Aid NSW, *Annual Report 2009-2010 – Section 1: Client Services,* 22, 24 <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/69390001291157053020.pdf>.
65. National Pro Bono Resource Centre, *What Is Pro Bono?* <http://www.nationalprobono.org.au/page.asp?from=3&id=189>.
66. New South Wales Bar Association, *Learn More About LARS* <http://www.nswbar.asn.au/docs/legal_assist/LARS_130910.pdf>.
67. The Law Society of New South Wales, *Pro Bono Scheme* <http://www.lawsociety.com.au/community/findingalawyer/probono/index.htm>.
68. *Uniform Civil Procedure Rules 2005* (NSW) r 7.36.
69. *Uniform Civil Procedure Rules 2005* (NSW) r 7.41(2).

assistance. Two Australian firms provided around 40,000 hours each during this period.[70]

Commercial litigation funders

1.50 Plaintiffs can also enter into contractual agreements with commercial litigation funders. Under these contracts, the litigation funder agrees to pay the plaintiff's costs (including lawyers' fees) in return for a percentage of the litigation proceeds.

1.51 Litigation funding is a growing industry and revenues have grown enormously in recent years. Nevertheless, the plaintiffs who benefit from litigation funding are largely those involved in commercial litigation, insolvency claims, and class actions.[71] Litigation funding therefore will not assist plaintiffs in the vast majority of civil actions that come before Australian courts. It is limited mainly to commercial matters in the Federal Court and Supreme Courts of each state.[72]

Insurance

1.52 A high proportion of personal injury or property damage claims in the Supreme Court and District Court involve an insured defendant.[73] Under these insurance policies, the defendant's insurance company pays the plaintiff's costs if the court makes an adverse costs order. Furthermore, after-the-event litigation insurance, which covers opponents' costs and sometimes own-side disbursements,[74] is available in Australia for some family law disputes.[75]

1.53 Other forms of defendant funding provided by insurers pursuant to policies of indemnity include motor vehicle insurance, employers' indemnity, public indemnity, workers compensation, aviation and maritime insurance, product liability, professional indemnity, and directors' and officers' insurance.[76] The net premiums paid by potential Australian defendants to obtain indemnities and manage the risks of litigation have been said to be in excess of $15 billion per year.[77]

1.54 Insurance can also take the form of legal expense insurance ("LEI") schemes. LEI schemes are designed to provide insurance cover, upon the payment of a premium,

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70. National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian Firms with More than Fifty Lawyers — Final Report* (December 2010) [4.3.1]-[4.3.2] <http://www.nationalprobono.org.au>.
71. Standing Committee of Attorneys-General, *Litigation Funding in Australia* (Discussion Paper, 2006) [1.1].
72. Simon Dluzniak, "Litigation Funding and Insurance" (Paper presented at Insurance Law Seminar, March 2009) [5.1]-[5.2] <http://www.imf.com.au/get_pdf.asp?docid=Paper - Dluzniak>.
73. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) [3.21].
74. Richard Buxton Solicitors (UK), *Insuring Costs in Litigation* <http://www.richardbuxton.co.uk/v3.0/node/277>.
75. Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper (May 2006) [3.4].
76. Simon Dluzniak, "Litigation Funding and Insurance" (Paper presented at Insurance Law Seminar, March 2009) [1.10] <http://www.imf.com.au/get_pdf.asp?docid=Paper - Dluzniak>.
77. Simon Dluzniak, "Litigation Funding and Insurance" (Paper presented at Insurance Law Seminar, March 2009) [4.13] <http://www.imf.com.au/get_pdf.asp?docid=Paper - Dluzniak>.

for the cost of specified legal services.[78] These have been successfully implemented in various European jurisdictions, although they are not widespread in Australia.[79] The Law Foundation of NSW and the Government Insurance Office in NSW established a LEI project in 1987 that ultimately failed to sell many policies and ended in 1995. Nevertheless, in 2001 it was estimated that there were between 100,000 and 150,000 people in Australia who were insured under LEI policies.[80]

Self-represented litigants

1.55 There are litigants who, from choice or because of the prohibitive costs of litigation, appear in court without legal representation.[81] We refer in this paper to these litigants as "self-represented litigants" even though the literature uses various other terms such as "unrepresented litigants", "litigants in person", or "pro se litigants".[82]

1.56 There is no comprehensive set of data on self-represented litigants in New South Wales. The Supreme Court, for example, does not regularly keep statistics on self-represented litigants who appear before the court. The lack of reliable data on self-represented litigants is not confined to NSW,[83] and has been raised in several inquiries as requiring attention.[84] We echo the previous calls by other law reform agencies for courts to have a comprehensive system for collecting and publishing data on self-represented litigants that will enable policy makers to assess and address the issues relating to this group of litigants.

New South Wales courts

1.57 Although limited, there is some available data on self-represented litigants in New South Wales. In 2002, it was reported that the proportion of self-represented

78. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report No 75 (1995) [3.32].

79. Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper (May 2006) [3.4]; Francis Regan, "Whatever Happened to Legal Expense Insurance?" (2001) 26 *Alternative Law Journal* 293.

80. Francis Regan, "Whatever Happened to Legal Expense Insurance?" (2001) 26 *Alternative Law Journal* 296.

81. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 359–360; Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice* (2004) [10.15].

82. M Pearlman and N Pain, "The Dilemma Presented by the Self-Represented Party" (Speech delivered at the Australian Conference of Planning and Environment Courts and Tribunals, 5 September 2002) <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_05Sept02_PearlmanCJ.pdf/$file/Speech_05Sept02_PearlmanCJ.pdf>.

83. See Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice* (2004) [10.4]; Stephen Parker, Australian Institute of Judicial Administration, *Courts and The Public* (1998) 107; Justice Robert Nicholson, "Australian Experience with Self-Represented Litigants" (2003) 77 *Australian Law Journal* 820; Australian Institute of Judicial Administration Courts and the Public Committee, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001); Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Consultation Papers (June 1999) [2.10].

84. See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 29; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*: *Final Report*, Project No 92 (1999).

litigants appearing before the Local Court was around 47%.[85] In 2001–2002, 12% of cases finalised in Classes 1–5 of the jurisdiction of the Land and Environment Court (which comprise more than 80% of its jurisdiction) involved self-represented litigants.[86]

1.58 These statistics suggest that self-represented litigants constitute a significant proportion of litigants in two New South Wales jurisdictions, the Local Court and the Land and Environment Court.

Federal courts

1.59 There are also a substantial number of self-represented litigants who appear before federal courts.

- **High Court.** In the High Court, the proportion of self-represented litigants filing for special leave is quite high and has increased steadily in the past decade. The proportion of applications filed by self-represented litigants was 25% in 1999–2000.[87] By 2002-2003 the proportion of special leave applications filed by self-represented litigants had increased to 42%,[88] and reached a peak of 67% in 2007–2008. While this figure has decreased since 2008, it remains high at over 50%.[89]

- **Federal Court.** The number of self-represented litigants coming before the Federal Court is also substantial. The proportion of filings in which at least one party was a self-represented litigant was 28% in 1998, 41% in 2001–2002, and 38% in 2002-2003.[90]

85. Kim Cull, "A Profession Defined by Trust" (2002) 40 *Law Society Journal* 60, 63; J W Shaw, "Self-Represented Litigants" (Address to the conference dinner of the Consumer, Trader and Tenancy Tribunal, Sydney, 20 November 2003) 1. The Law Reform Commission of Western Australia, in the context of Western Australian courts, has noted that the "Local Court is the civil jurisdiction in which most disputes involving self-represented litigants are heard": Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*: *Final Report*, Project No 92 (1999) [18.15].

86. M Pearlman and N Pain, "The Dilemma Presented by the Self-Represented Party" (Speech delivered at the Australian Conference of Planning and Environment Courts and Tribunals, 5 September 2002). Classes 1-5 of the LEC's jurisdiction comprise: environmental planning and protection appeals; local government and miscellaneous appeals and applications; land tenure, valuation, rating and compensation matters; environmental planning and protection civil enforcement; environmental planning and protection summary enforcement: *Land and Environment Court Act 1979* (NSW) s 17–21.

87. High Court of Australia, *Annual Report 2002-2003*, 9; see also Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) [10.6].

88. High Court of Australia, *Annual Report 2002-2003*, 9; see also Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) [10.6].

89. High Court of Australia, *Annual Report 2008-09*, 17.

90. Federal Court of Australia, *Annual Report 2002-2003*, 47 Figure 3.3; Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Report: Inquiry into Access to Justice* (2009) [10.8].

- **Family Court.** In the Family Court, the proportion of cases that involved at least one party who was self-represented ranged from 40% to 27% during 2002-2010.[91]

- **Federal Magistrates Court.** In the Federal Magistrates Court, 26.7% of cases in 2008-2009 involved at least one self-represented party.[92]

1.60 There are principles relating to security for costs that are of particular relevance to self-represented litigants, including the general rule that mere poverty is no bar to litigation. Another relevant principle is the frustration (or "stultification") principle, which applies when a court considers whether the making of a security order is likely to stifle or put an end to the claim because the plaintiff does not have the financial resources to comply with the order. Chapter 2 discusses these principles as they relate to self-represented litigants.[93]

Consultations

Preliminary submissions

1.61 To assist in identifying problems relating to security for costs and associated orders, the Commission invited and received very useful preliminary submissions from the following:

- NSW Land and Environment Court;
- NSW Bar Association;
- Environmental Defender's Office NSW;
- Slater & Gordon Lawyers;
- Law Institute of Victoria;
- National Pro Bono Resource Centre;
- Mr Stephen Epstein SC;
- Ms Yvonne Elliot;
- Insolvency Practitioners Association of Australia;
- LawCover Pty Limited;
- Maurice Blackburn Lawyers;

91. See Justice Robert Nicholson, "Australian Experience with Self-Represented Litigants" (2003) 77 *Australian Law Journal* 821; Family Court of Australia, *Annual Report 2007-2008*; Law Council of Australia, *Inquiry into Alternative Dispute Resolution in the Civil Justice System: NADRAC Issues Paper — Response by the Law Council of Australia Alternative Dispute Resolution Committee* (2009) 6; Family Court of Australia, *Annual Report 2009-2010*, 58.
92. Federal Magistrates Court, Answer to Question on Notice (7 August 2009) 1; Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Report: Inquiry into Access to Justice* (2009) [5.34].
93. See para 2.58, 2.61, 2.78–2.88.

- NSW Young Lawyers, Civil Litigation Committee;
- NSW Young Lawyers, Environmental Law Committee;
- Public Interest Advocacy Centre;
- Fairfax Media Publications Pty Limited;
- Public Interest Law Clearing House NSW; and
- Mr Malcolm Arthur.

1.62 The Commission is grateful for the input of these individuals and organisations. Their submissions have been very useful in identifying some of the problems relating to security for costs, which are canvassed in this paper.

Further consultations

1.63 This consultation paper is intended to indicate some of the major issues, and to encourage people to make submissions on the questions raised in the paper, as well as on any issues that they think are important but which may not have been addressed. The Commission will also be conducting consultation meetings and will use this paper as a basis for discussions. The submissions it receives will assist in developing the final recommendations.

Structure of this paper

1.64 The substantive part of this consultation paper begins in Chapter 2, which examines the sources of courts' jurisdiction to order security for costs, particularly r 42.21 of the UCPR and s 1335(1) of the *Corporations Act 2001* (Cth). The chapter focuses on gaps in these statutory provisions. We examine, among other things:

- whether legislation should provide courts with a broad ground for ordering security for costs, in addition to the specific circumstances where courts may order security listed in UCPR r 42.21;
- whether UCPR r 42.21 should be amended to provide a non-exhaustive list of factors that courts may take into account when deciding whether or not to order security for costs; and
- whether corporate plaintiffs should continue to be treated differently from plaintiffs who are natural persons in relation to security for costs.

1.65 Chapter 3 canvasses the principles on security for costs where the plaintiff is funded or assisted by third parties, including:

- commercial litigation funders;
- lawyers acting on a conditional costs basis;
- legal aid; and
- lawyers acting pro bono.

1.66 Chapter 4 deals with security for costs in public interest proceedings, which are those that involve issues that relate not just to the plaintiff's private interest but are being pursued in the interest common to other members of the community. The main issue is whether it is desirable to adopt legislation giving courts power to make public interest costs orders, which may include exempting the plaintiff from paying the costs of the defendant if it loses the case.

1.67 Chapter 5 considers issues relating to procedures and appeals. The chapter outlines how courts determine the amount and form of security to be ordered, as well as the various procedures available to stay or dismiss proceedings when a security order is not complied with, and suggests possible reforms to the law in these areas. It discusses possible improvements to the law with respect to appeals against security orders, the procedures available for varying or setting aside security orders, how security is finalised, and security for costs in the context of appeal proceedings.

2. Jurisdiction to order security for costs

Introduction

2.1 This chapter examines the jurisdiction or power of courts to order security for costs, and identifies some issues that potentially require law reform.

2.2 The first part of the chapter canvasses the main sources of power to order security for costs, which are:

- the inherent jurisdiction of the Supreme Court;
- an implied power of statutory courts that have power to stay proceedings;
- r 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"); and
- s 1335(1) of the *Corporations Act 2001* (Cth) ("Corporations Act").

2.3 The second part of the chapter examines in detail UCPR r 42.21, which is the main rule of court in New South Wales relating to security for costs. UCPR r 42.21(1) specifies the following five grounds for which a court may order security for costs:

(a) that a plaintiff is ordinarily resident outside New South Wales;

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

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

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

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

2.4 One question raised in relation to UCPR r 42.21 is whether it is desirable to provide a broad ground for ordering security for costs; that is, a provision allowing courts to order security for costs outside of the five specific grounds listed in UCPR r 42.21(1).

2.5 In relation to ground (a), the question raised is whether this provision should be amended to refer to a plaintiff who is ordinarily resident outside Australia, instead of New South Wales, in order to avoid a question of constitutionality, as outlined below. In relation to ground (c), the question asked is whether the plaintiff should be required to notify the defendant if he or she changes address, given there is currently no such requirement.

2.6 The third part of the chapter looks at factors that courts may take into account when exercising their discretion to order security for costs under UCPR r 42.21. The case law and the rules of court of other Australian jurisdictions have identified such factors. The main question asked on this topic is whether UCPR r 42.21 should be amended to provide a list of factors that courts may consider when exercising their power to order security for costs.

2.7 The fourth part of the chapter considers security for costs orders against corporate plaintiffs. Section 1335(1) of the Corporations Act gives courts power to order security for costs against a corporate plaintiff "if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence". UCPR r 42.21(1) has a similar but

not identical provision (ground (d)). One question raised is whether UCPR r 42.21(1)(d) should be amended to use the same wording as s 1335(1) of the Corporations Act to clarify that the same principles apply to both provisions.

2.8 The other questions raised in relation to corporate plaintiffs are:

- Should corporate plaintiffs continue to be treated differently from plaintiffs who are natural persons in relation to security for costs? For a natural person, the basic rule is that he or she will not be ordered to give security for costs, however poor he or she is, unless an exception recognised by law applies. In the case of a corporation, this basic rule does not apply. The separate legal personality of companies is the reason for treating corporate plaintiffs differently from plaintiffs who are natural persons. However, it may be argued that the non-application of the basic rule to corporate plaintiffs tips the balance too far in favour of defendants.

- Should UCPR r 42.21 be amended to include a procedure allowing defendants to request that a corporate plaintiff disclose its overall financial status? This question is raised in view of the difficulty in obtaining evidence about a corporation's financial position to satisfy the court that an order for security for costs is appropriate.

- Should UCPR r 42.21(1)(d) be amended to make it inapplicable in cases where a corporation is suing former directors, controlling shareholders or officers of the corporation where the corporation is under administration or liquidation? A preliminary submission has argued that former company directors, officers and shareholders who are sued by insolvent companies over whose affairs they have presided, should not have the benefit of the "predisposition" of courts to order security for costs against corporate plaintiffs.[1]

2.9 The existence of a Commonwealth law relating to security for costs in cases involving corporate plaintiffs has constitutional implications for any reform of New South Wales law. The chapter canvasses the mechanisms in the Corporations Act for avoiding constitutional problems if a New South Wales law on security for costs were amended in a way that is inconsistent with s 1335(1) of the Corporations Act.

2.10 The final part of the chapter examines the power of courts to order security for costs against defendants. The general rule is that courts will not order security against parties who are defending themselves. However, the case law has recognised that where the defendant is in fact pursuing a claim as, in substance, the claiming party, the court may order security for costs against the defendant. Some Australian jurisdictions have provisions in their rules of court that reflect the principle developed in case law. The question that arises is whether the rules of court in New South Wales (in particular UCPR r 42.21) should have a provision confirming that courts may order security for costs against a person who is making a cross or counter-claim even though that person is not designated as the plaintiff.

1. S Epstein SC, *Preliminary Submission PSC3,* [17]–[19].

Sources of jurisdiction

Inherent jurisdiction of the Supreme Court

2.11 The Supreme Court's inherent power to regulate its procedures and prevent abuse of its processes includes the power to make security for costs orders.[2] Superior courts have considered the power to order security for costs to be part of their inherent jurisdiction since at least 1786.[3]

2.12 The inherent jurisdiction of the Supreme Court is confirmed by s 23 of the *Supreme Court Act 1970* (NSW), which provides that the court has "all jurisdiction which may be necessary for the administration of justice in New South Wales." The case law has recognised that this provision holds relevance with respect to the inherent power of the Supreme Court to order security for costs.[4]

Implied power of statutory courts

2.13 Unlike the Supreme Court, the District Court and other statutory courts like the Local Court do not have inherent jurisdiction to order security for costs.[5] However, in *Philips Electronics Australia Pty Ltd v Matthews*,[6] the Court of Appeal held that the District Court had a power to order security for costs that was implied from its statutory power to stay proceedings.

2.14 The Court of Appeal confirmed that the District Court did not have inherent jurisdiction order security for costs.[7] It noted that the *District Court Act 1973* (NSW) ("District Court Act") contains no provision giving the District Court express power to make security for costs orders. However, the Court of Appeal held that s 156 of the District Court Act, which grants the District Court a general power to stay proceedings, "is wide enough to give the District Court power to make an order staying proceedings unless and until security for costs is given, where the judge considers this reasonably necessary in order to do justice between the parties".[8]

2.15 The consequence of *Philips Electronics Australia Pty Ltd v Matthews* is that courts that have a statutory power to stay proceedings, including the District Court and Local Court,[9] have an implied power to order security for costs.

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2. *Martin John Green in his capacity as liquidator of Arimco Mining Pty Limited v CGU Insurance Limited* [2008] NSWSC 449, [12]; *Rajski v Computer Manufacture and Design Pty Ltd* [1982] 2 NSWLR 443, [447]–[448]; *Bhattcharya v Freedman* [2001] NSWSC 498, [27].
3. *Pray v Edie* (1786) 99 ER 1087; K Mason, "The Inherent Jurisdiction of the Court" (1983) 57 *Australian Law Journal* 449, 455.
4. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [20] (Hodgson JA). But see *Holman v Dynabuild Pty Ltd* [1975] 2 NSWLR 334 where Slattery J held that s 23 of the *Supreme Court Act 1970* (NSW) does not give the Court power to order security for costs in an arbitration proceeding.
5. *Philips Electronics Australia Pty Ltd v Matthews* [2002] NSWCA 157, [45].
6. [2002] NSWCA 157.
7. *Philips Electronics Australia Pty Ltd v Matthews* [2002] NSWCA 157, [45].
8. *Philips Electronics Pty Ltd v Matthews* [2002] NSWCA 157, [47].
9. The Local Court's power to stay proceedings is found in *Local Court Act 2007* (NSW) s 64.

The *Uniform Civil Procedure Rules 2005* (NSW)

2.16 The statutes that create the courts in New South Wales give them power to make rules governing their practices and procedures.[10] The courts previously had separate rules relating to security for costs. Since the adoption of the *Civil Procedure Act 2005* (NSW) there are now common court rules on security for costs. These are located in the UCPR.[11]

2.17 The UCPR apply to the Supreme Court, District Court, Land and Environment Court, Local Court, Dust Diseases Tribunal, Industrial Court, and Industrial Relations Commission.[12] However, they do not apply to a number of other bodies, such as the Administrative Decisions Tribunal, Children's Court, Consumer, Trader, and Tenancy Tribunal, Guardianship Tribunal, and Mental Health Review Tribunal.

2.18 The most significant rule regarding security for costs in the UCPR is r 42.21.[13] This rule applies to all courts governed by the UCPR and enumerates the circumstances in which the court has statutory jurisdiction to order security for costs:

> **42.21 Security for costs**
> (1) If, in any proceedings, it appears to the court on the application of a defendant:
>
> (a) that a plaintiff is ordinarily resident outside New South Wales, or
>
> (b) that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or
>
> (c) that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or
>
> (d) that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so, or
>
> (e) that a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so,
>
> the court may order the plaintiff to give such security as the court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and that the proceedings be stayed until the security is given.

10. For example, *Supreme Court Act 1970* (NSW) s 124; *District Court Act 1973* (NSW) s 161*; Local Courts Act 2007* (NSW) s 26; *Land and Environment Court Act 1979* (NSW) s 74.
11. For a discussion on the policy or philosophy behind the Act, see John P Hamilton, "The NSW Civil Procedure Bill 2004 and the Uniform Civil Procedure Rules" (Paper delivered at the 22nd Australian Institute of Judicial Administration Annual Conference, 17–19 September 2004, Sydney).
12. *Civil Procedure Act 2005* (NSW) sch 1.
13. The other rules in the UCPR on security for costs are r 50.8 (appeals); r 51.50 (proceedings in the Court of Appeal); r 5.6 (application for preliminary discovery); and r 39.17 (costs of the sheriff upon execution of a judgment).

> (2) Security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
>
> (3) If the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
>
> (4) This rule does not affect the provisions of any Act under which the court may require security for costs to be given.

2.19 In this chapter, we examine UCPR r 42.21(1), which contains the "jurisdictional provisions" or grounds upon which courts may order security for costs. In Chapter 5, we examine UCPR r 42.21(2) and (3), which outline various security for costs procedures.

2.20 UCPR r 42.21 lists five grounds for ordering security for costs. These provisions do not limit the Supreme Court's inherent jurisdiction to order security for costs.[14] Section 5(1) of the *Civil Procedure Act 2005* (NSW) confirms this principle by providing that "[n]othing in the Act or the uniform rules limits the jurisdiction of the Supreme Court".

2.21 This means that although UCPR r 42.21(1) prescribes five circumstances in which a court has jurisdiction to order security, the Supreme Court has power to order security for costs pursuant to its inherent jurisdiction in cases falling outside those specified in UCPR r 42.21(1).[15] It has been said that the Supreme Court's inherent jurisdiction is quite broad and is not limited to cases involving abuse of the court's process. The only limitation is that the discretion be exercised by determining how "on the whole, justice will be best served".[16]

2.22 The principle is the same with respect to the implied power of the District Court and other statutory courts like the Local Court that have power to stay proceedings. These courts have power to order security for costs outside of the grounds listed in UCPR r 42.21(1) by using their implied power to order security for costs.

2.23 In *Philips Electronics Australia Pty Ltd v Matthews*, the Court of Appeal discussed the relationship between the District Court Act and the then District Court rule in Pt 40 r 1, which was in similar terms to UCPR r 42.21. The Court of Appeal specifically considered the issue of whether Pt 40 r 1 was exhaustive — that is, whether it limited the District Court's power to order security for costs only to those cases specified in the court rule. In his leading judgment, Justice Hodgson held that the rule was not exhaustive. His reasons for his decision were as follows:

> A rule made with respect to prescribing the cases or circumstances in which security may be required does not necessarily have to prescribe the *only* cases or circumstances in which security may be required. Part 40 r 1 itself does not purport to do so. It purports to set out a number of circumstances in which such an order can be made, without either expressly or impliedly stating that no order having the effect of requiring security for costs may be made in any other

14. See *Rajski v Computer Manufacture and Design Pty Ltd* (1983) NSWLR 443.
15. *Bahr v Nicolay (No 1)* (1987) 163 CLR 490, 494 (Toohey J); *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502, 510-511 (Kirby J); *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [35].
16. *Charara v Integrex Pty Ltd* [2010] NSWCA 342, [17].

> circumstances. Plainly, the rule is not intended to displace other statutory sources of orders for security for costs.[17]

2.24 The Court of Appeal thus held that the District Court's power to order security for costs, implied from s 156 of the District Court Act, was not limited to the circumstances specified in Pt 40 r 1.

2.25 Similarly, it is likely that UCPR r 42.21, which is framed in similar terms as the former Pt 40 r 1, does not limit the District Court's power under the District Court Act. The *Civil Procedure Act 2005* (NSW), under which authority the UCPR were adopted, provides that the "Act does not limit the operation of any other Act with respect to the conduct of civil proceedings".[18] Further, UCPR r 42.21(4) states the rule "does not affect the provisions of any Act under which the court may require security for costs to be given". The result is that the District Court (and other statutory courts like the Local Court that have power to stay proceedings) can order security for costs outside the circumstances specified in UCPR r 42.21(1) where an order is "reasonably necessary in order to do justice between the parties".[19]

Section 1335(1) of the Corporations Act 2001

2.26 Section 1335(1) of the Corporations Act provides another source of power for courts to order security for costs.[20] We examine this statutory provision in detail later in the chapter from para 2.96.

Terminology

2.27 UCPR r 42.21(1) outlines the situations where the court can exercise its discretion to order security. We refer to these situations as "grounds".

2.28 However, since the court's power under UCPR r 42.21 is discretionary — the rule specifies that "the court *may* order the plaintiff" to give security — it is also necessary to canvass the law on the considerations that courts regard as relevant to the exercise of this discretion. We refer to these considerations as "discretionary factors", which we canvass in para 2.56–2.88.

Jurisdictional grounds for ordering security

2.29 This section examines some questions of reform arising from the jurisdictional grounds for ordering security for costs under UCPR r 42.21(1).

17. *Philips Electronics Pty Ltd v Matthews* [2002] NSWCA 157, [51].
18. *Civil Procedure Act 2005* (NSW) s 4(5).
19. *Philips Electronics Pty Ltd v Matthews* [2002] NSWCA 157, [47].
20. For a recent survey of the principles and practice relating to s 1335(1) of the Corporations Act, see Hugh Stowe, "Security for costs against impecunious plaintiffs" (Summer 2010–2011) *Bar News* 86.

A broad ground for ordering security

2.30 As mentioned above, UCPR r 42.21(1) provides five grounds upon which courts may order security for costs. However, as examined above in para 2.11–2.15, the Supreme Court, District Court and Local Court can order security for costs on other grounds: at the Supreme Court level, where a security order would prevent an abuse of process, and where "on the whole, justice will be best served";[21] at the District Court and Local Court level, where a security order is necessary to do justice between the parties.[22]

2.31 The issue that arises is whether UCPR r 42.21(1) should be amended to expressly provide that a ground for ordering security is that the justice of the case requires making the order.

2.32 Such an amendment would confirm the Supreme Court's inherent jurisdiction to order security, and would remove the need for other statutory courts to rely on their power to stay proceedings to imply an authority to make security for costs orders.

2.33 The counter-argument is that this is unnecessary because the case law already gives the Supreme Court and other statutory courts sufficient discretion to order security for costs. Further, it may be argued that including a broad ground in the UCPR would create uncertainty for litigants, in that it would make it difficult for them to know when the court would make a security order. However, this "uncertainty" argument is intrinsic in any broad discretion, including in the inherent power of the Supreme Court and the implied power of other statutory courts, to order security for costs.

2.34 The Commission has received preliminary submissions suggesting such amendment based on the view that UCPR r 42.21 is inadequate because it does not confer a general discretion to make an order for security against a natural person.[23]

2.35 In particular, the NSW Bar Association has recommended the amendment of UCPR r 42.21(1) so as to confer on all courts an express power to make orders for security for costs "whenever it appears to them that such an order is required in the interests of justice, taking into account a list of discretionary factors". [24]

2.36 Fairfax Media Publications Pty Limited ("Fairfax Media") similarly suggested that a new ground should be added to UCPR r 42.21(1) giving courts the power to make a security order "where it is in the interests of justice that an order for security for costs should be made". It argued that a broad ground is necessary because in some situations it is appropriate for a security for costs order to be made even though the case does not clearly fall within any of the categories set out in UCPR r 42.21(1).[25]

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21. *Charara v Integrex Pty Ltd* [2010] NSWCA 342, [17].
22. *Philips Electronics Pty Ltd v Matthews* [2002] NSWCA 157, [47]
23. NSW Bar Association, *Preliminary Submission PSC10*, [20(a)], [20(b)]; Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, [6.1]–[6.3].
24. NSW Bar Association, *Preliminary Submission PSC10,* [21(a)(i)].
25. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13,* [6.1]–[6.3].

2.37 The court rules in some jurisdictions contain a broad ground for ordering security for costs:

- In Queensland and the Australian Capital Territory, the uniform court rules give applicable courts discretion to order security for costs if "the justice of the case" requires the order to be made.[26]
- In South Australia, the Supreme Court civil rules give the Court discretion to order security for costs if "the order is necessary in the interests of justice".[27]

2.38 Courts have used these broad provisions to make orders for security for costs.[28]

2.39 An alternative to inserting a similar broad ground in UCPR r 42.21 would be to add such a provision into s 98 of the *Civil Procedure Act 2005* (NSW), which gives courts a general power to order costs. Section 98 provides that "[s]ubject to the rules of court", "costs are in the discretion of the court" and "the court has full power to determine by whom, to whom and to what extent costs are to be paid".[29]

2.40 However, since s 98 does not expressly refer to security for costs, it is uncertain whether this general power to order costs extends to order security for costs. Although no cases have explicitly considered this issue, recent Supreme Court decisions appear to treat s 98 as relevant only to the issue of costs while regarding UCPR r 42.21 as the relevant provision on security for costs.[30]

2.41 The benefit of adding a broad ground into s 98 would be that the section would then provide a complete general discretion to order costs and security for costs. Nevertheless, it could be argued that there is no need for a section that is complete in this way, because courts can simply refer to the provisions of the UCPR in order to deal with security for costs issues.

Question 2.1

(1) Should legislation provide a broad ground for courts to order security for costs where the order is necessary in the interests of justice?

(2) 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)?

Non-resident plaintiff

2.42 Pursuant to UCPR r 42.21(1)(a), it is a ground for ordering security for costs that "a plaintiff is ordinarily resident outside New South Wales". The problem that this provision addresses is that a non-resident plaintiff, particularly one without assets in

26. *Uniform Civil Procedure Rules 1999* (Qld) r 671(h); *Court Procedure Rules 2006* (ACT) r 1901(h). The Queensland rules apply to the District, Magistrate and Supreme Courts, while the rules in the Australian Capital Territory apply to the Supreme Court and Magistrates Court.
27. *Supreme Court Rules 2006* (SA) r 194(1)(e).
28. See for example, *Mbuzi v Hall* [2010] QSC 359; *Baronglow Pty Ltd v Willing And Thomas* [2010] SADC 163; *Moir v Vodafone* [2009] SASC 234.
29. *Civil Procedure Act 2005* (NSW) s 98(1)(a)-(b).
30. See *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [46]–[47].

this jurisdiction, could avoid liability for an adverse costs order because his or her non-residence would make it difficult for the defendant to enforce the order.[31]

2.43 There has been judicial debate about whether UCPR r 42.21(1)(a) is consistent with s 117 of the *Australian Constitution* ("Constitution"), which reads:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

2.44 In *Australian Building Construction Employees and BLF v Commonwealth Trading Bank*,[32] Justice Helsham held that the then equivalent of UCPR r 42.21(1)(a) was inconsistent with the prohibition in s 117 in so far as it relates to a resident of another State. He reasoned that the rule could not be read "other than as imposing upon such a resident a discrimination, namely the liability to an order for security, which would not be imposed upon him if he were a resident in New South Wales".[33] Based on this decision, counsel for both sides in a more recent case agreed that s 117 of the Constitution requires r 42.21(1)(a) to be read down to mean "ordinarily resident outside Australia".[34]

2.45 However, in *Rajski v Computer Manufacture & Design Pty Ltd,* Justice Holland disagreed with the decision in *Australian Building Construction Employees and BLF v Commonwealth Trading Bank*, and concluded that "there is no discrimination between residents of different States involved in the inherent jurisdiction of the Court to award security for costs as that case seems to suggest".[35] Hence, the constitutionality of UCPR r 42.21(1)(a) remains unsettled.

2.46 However, the practical significance of this issue may be queried in light of s 105 of the *Service and Execution Process Act 1992* (Cth). This section allows a person in whose favour a judgment is given in a State or Territory Supreme Court to register that judgement in the Supreme Court of the other Australian States and Territories so that it may be executed in any part of the Commonwealth. Hence, there is a mechanism for enforcing an adverse costs order against a plaintiff who resides in another Australian State or Territory. However this requires an additional step and additional costs.

2.47 The question that arises is whether UCPR r 42.21(1)(a) should be amended as follows: "that a plaintiff is ordinarily resident outside Australia".[36] A revised rule in these terms would avert constitutional difficulties. It would also recognise that there is no longer a problem with enforcing an adverse costs order against someone who resides in an Australian jurisdiction outside New South Wales. Finally, it would

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31. See *Barton v Minister for Foreign Affairs* (1984) 2 FCE 463, 469 (Morling J), which discusses the Federal Court rule that is the equivalent of UCPR r 42.21(1). The relevant Federal Court rule gives the court power to order security for costs where "an applicant is ordinarily resident outside Australia".
32. [1976] 2 NSWLR 371.
33. *Australian Building Construction Employees and BLF v Commonwealth Trading Bank* [1976] 2 NSWLR 371, 373.
34. *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC 245, [6].
35. *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443, 451.
36. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13,* [5.4].

provide consistency with other jurisdictions that have similar rules, such as the Federal Court, the Queensland and Australian Capital Territory courts, and the South Australian Supreme Court.[37]

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"?

Enforcement procedures in the plaintiff's country of residence

2.48 Courts have said that the ease and convenience of enforcement procedures in the plaintiff's country of residence is a primary consideration in deciding whether or not to order security.[38] Courts have held that where a judgment regarding costs would be simple to enforce in the foreign jurisdiction, this weighs powerfully against the making of a security order.[39] A relevant consideration in any such determination is whether the foreign jurisdiction in question has legislation entitling judgments of Australian courts to be registered and enforced in that jurisdiction.[40] The lack of any such legislation is a weighty factor inclining the court in favour of an order for security.[41]

2.49 In a preliminary submission, Fairfax Media has suggested that the question of enforceability of judgments in the plaintiff's country of residence should not be a factor that courts should consider. It said that "the UCPR should be amended to make it clear that in granting an order pursuant to UCPR 42.21(1)(a), the Court is not to have regard to the potential for the defendant to enforce any costs order in the relevant foreign jurisdiction".[42]

2.50 This proposal is based on two arguments. First, allowing submissions about the ability of the defendant to enforce a costs order in the foreign abode of the plaintiff unduly complicates security for costs applications and may turn them into lengthy considerations of treaties and foreign court procedures. Secondly, "a decision on security for costs will likely be made well before a defendant may need to enforce a costs order in a foreign jurisdiction, during which time the laws of enforceability of foreign orders in that jurisdiction may change".[43]

37. *Federal Court Rules* O 28 r 3(1)(a); *Uniform Civil Procedure Rules 1999* (Qld) r 671(d); *Supreme Court Civil Rules* (SA) r 194(b); *Court Procedure Rules 2006* (ACT) r 1901(e).
38. *Jalfox Pty Ltd v Motel Assn of New Zealand Inc* [1984] 2 NZLR 647, 649 (Ongley J); *Nasser v United Bank of Kuwait* [2002] 1 All ER 401, 419–420 (Mance LJ); *Betz v Parker* [2005] NSWSC 660.
39. See, for example, *Knott v Signature Security Group Pty Ltd* [2001] NSWIRComm 12 (Wright J).
40. Such legislation exists in Australia: see *Foreign Judgments Act 1991* (Cth) s 5(1), which provides that judgments of the courts of another country can be registered and enforced in Australian courts if there is reciprocity with that other country in this respect.
41. See, for example, *Energy Drilling Inc v Petroz NL* (1989) ATPR 40-954, 50422 (Gummow J); *Hotline Communications Ltd v Hinkley* [1999] VSC 74 (Warren J).
42. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, [5.17].
43. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, [5.16]–[5.17].

Question 2.3

(1) 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?

(2) If so, should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to reflect such a principle?

(3) If not, should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to provide that courts should not take into account the enforceability of an Australian costs order in the plaintiff's country of residence?

Change of address

2.51 UCPR r 42.21(1)(c) provides that one of the grounds for ordering security for costs is "that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings".

2.52 Rule 4.2(1)(g) of the UCPR requires a plaintiff to state his or her personal address in the originating process.[44] There is, however, no obligation for the plaintiff to advise the defendant of any change of residency subsequent to the commencement of the proceedings.[45] The defendant will not typically obtain evidence that the plaintiff has changed residence or has in fact become ordinarily resident outside the country. If the defendant is not notified of the plaintiff's relocation, the defendant will be unaware of its ability to bring an application for an order for security for costs based on the ground specified in UCPR r 42.21(1)(c).

2.53 Fairfax Media has argued that this unfairly prejudices defendants in the course of defending proceedings since they continue to incur costs for which no security has been provided. Further, it argued that "where a defendant becomes aware of the plaintiff's relocation late in the proceedings and where a trial is imminent, the Court will be less likely to make the order sought, often through no fault of the defendant".[46]

2.54 Fairfax Media proposed that there be an obligation on the part of the plaintiff to ensure his or her address as specified in the originating process is kept accurate, and to notify the defendant within a reasonable period of time of any change of address. Further, it proposed that failure to comply with this requirement should be specified in UCPR 42.21 as a ground for an application for security for costs.[47]

44. *Uniform Civil Procedure Rules 2005* (NSW) r 4.2(1)(g).

45. However, a person may change his or her address for service by filing a notice of the change showing his or her new address for service and serving the notice on all other active parties: UCPR r 4.6.

46. Farifax Media Publications Pty Limited, *Preliminary Submission PSC13,* [5.6]–[5.7].

47. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13,* [5.9].

Question 2.4

(1) Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to require the plaintiff to ensure his or her address as specified in the originating process is kept accurate, and to notify the defendant within a reasonable period of time of any change of address?

(2) If so, should failure to comply with such requirement be specified in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 as a ground for an application for security for costs?

Other issues relating to the grounds in UCPR r 42.21(1)

2.55 Apart from the questions so far raised about the grounds for ordering security specified in UCPR r 42.21(1)(a) and (c), the Commission invites further submissions on any problems or issues that may arise with respect to the other grounds in this rule. For example, does UCPR r 42.21(1)(e) — regarding claims brought by the plaintiff for the benefit of another — adequately cover the situation where an insurance company that issued a policy brings or defends proceedings in the name of the insured? It should be noted, however, that we discuss UCPR r 42.21(1)(d) below in the section on s 1335(1) of the Corporations Act.

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)?

Discretionary factors

2.56 The power to order security for costs is a discretion that the court may exercise having regard to the facts of each case.[48] In exercising this discretion, courts usually take into account a number of factors.

Discretionary factors identified by case law

2.57 While there is no exhaustive list of matters that courts may take into account when exercising their discretion on security for costs, there are a number of factors that courts have regarded as relevant.[49] These include the following:[50]

The impecuniosity of the plaintiff

2.58 Although there is a general rule that poverty is not a bar to a litigant, the impecuniosity of the plaintiff remains relevant to the exercise of the court's

48. *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, [47].

49. Public Interest Advocacy Centre, *Preliminary Submission PSC14*, 8; Slater & Gordon, *Preliminary Submission PSC8*, 3–4; Maurice Blackburn Pty Ltd, *Preliminary Submission PSC5*, [2.5].

50. See generally *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 197–198 (Beazley J); G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [29.13]–[29.132]; *NSW Civil Practice & Procedure* (Thomson Reuters, 2005) [r 42.21.110].

discretion as a factor to be weighed in all the circumstances of the case.[51] Since, however, the general rule against poverty barring litigation may be especially important where the plaintiff is self-represented, courts are reluctant to order security against a self-represented impecunious plaintiff unless he or she has adopted a vexatious mode of conducting litigation.[52] We discuss the issues surrounding the plaintiff's impecuniosity in more detail at para 2.78–2.88.

The causation factor

2.59 A court may order security for costs if, among other things, the plaintiff's impecuniosity has been caused, or contributed to, by the defendant. An example is where there is a strong probability that the plaintiff's poor financial position arose out of misrepresentations made by the defendant that constituted the basis for the action.[53]

2.60 However, in many cases where a plaintiff has alleged that its impecuniosity has been caused by the conduct of the defendant, the court has not been satisfied of the relevant causation.[54] This is because courts are wary of attempts by plaintiffs to cast upon defendants the consequences of their financial woes because these are often due to multiple causes. Where, for instance, the evidence shows the plaintiff has been in a poor financial position for a significant time, it will be difficult to draw the conclusion that its lack of funds has been substantially caused by the defendant.[55]

The frustration ("stultification") factor

2.61 Consistent with the principle that poverty is no bar to a litigant, a court will be hesitant to make an order for security for costs if it would force the plaintiff to abandon a claim that is bona fide and not obviously frivolous or vexatious.[56] This factor is of particular importance in proceedings involving self-represented litigants, who as discussed in Chapter 1 constitute a significant proportion of litigants.[57] In *Morris v Hanley*, in the course of considering a security for costs application against a self-represented plaintiff, the Supreme Court stated that the "fact that the action

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51. *Lucas v Yorke* (1983) 50 ALR 228, 228 (Brennan J).
52. See *Mbuzi v Hall* [2010] QSC 359, [70]; *Bhattacharya v Freeman* [2001] NSWSC 498, [29]. Courts are likely to be particularly mindful of whether proceedings brought by self-represented litigants are vexatious because these litigants, unless they are themselves legal practitioners, are not bound by the restrictions imposed by s 345 and 347 of the *Legal Profession Act 2004* (NSW) regarding commencing proceedings without reasonable prospects of success.
53. *Lynnebry Pty Ltd v Farquhar Enterprises Pty Ltd* (1977) 3 ACLR 133. See also *Octocane Pty Ltd v SRJ Development Pty Ltd* [1999] SASC 231.
54. See, for example, *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194, 198 (Master Cohen QC); *Drumdurno Pty Ltd v Braham* (1982) 42 ALR 563, 571 (Sweeney J); *APEP Pty Ltd v Smalley* (1983) 8 ACLR 260, 262 (Master Cohen); *Fat-sel Pty Ltd v Brambles Holdings Ltd* (1985) ATPR ¶40-544, 46,428 (Beaumont J); *Equity Access Ltd v Westpac Banking Corp* (1989) ATPR ¶40-972, 50,637 (Hill J); *Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248, 254 (Hill J); *Pasdale Pty Ltd v Concrete Constructions* (1995) 131 ALR 268, 273 (Finn J); *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857, 862 (Anderson J); *Melunu Pty Ltd v Claron Constructions Pty* Ltd [2004] NSWSC 1064, [31], [32] (Brownie AJ).
55. *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194, 198 (Master Cohen QC).
56. *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643, [39] (Spender J).
57. See para 1.55–1.60.

will probably be stultified if any substantial order for security to costs is made is…an extremely important factor against making an order for security for costs".[58]

The bona fides of the claim

2.62 Whether the claim is bona fide or a sham is a relevant consideration, and the court will take into account the motivation of a plaintiff in bringing the proceedings.[59] Examples include an unsatisfactory pleading, or a vexatious claim,[60] particularly where the plaintiff is self-represented with "abundant time" to pursue incessant and numerous applications.[61]

The strength of the plaintiff's case

2.63 If it can be demonstrated that the plaintiff is likely to succeed, then that is a matter that can properly be weighed in the balance.[62] On the other hand, the lack of apparent merit in a party's case might be a reason for ordering it to provide security for costs. Courts have said that a consideration of the strength or weakness of the plaintiff's case must be exercised with caution, given that the real merits of a case may not emerge until the final hearing.[63] As a general rule, where a claim is regular on its face and discloses a cause of action, then in the absence of evidence to the contrary, the court will proceed on the basis that the claim is bona fide and has reasonable prospects of success.[64]

Timing of the application for security

2.64 The timing of the security for costs application is a relevant consideration because if the application is going to delay the plaintiff's claim while it is finding the security, or put an end to the action, it is desirable that it does so before the plaintiff has incurred significant costs in preparing for the proceeding.[65] This principle is reinforced by the objectives of the *Civil Procedure Act 2005* (NSW), which are to facilitate a just, quick and cheap resolution of proceedings[66] in order to ensure efficient management of cases by the courts.[67]

Nominal or representative plaintiffs

2.65 As a general principle, where the real plaintiff does not appear on the record, the proper course is to move, while the cause is pending, that proceedings be stayed

58. *Morris v Hanley* [2000] NSWSC 957, [29].
59. *Bhagat v Murphy* [2000] NSWSC 892, [20]–[21] (Young J).
60. *Bhagat v Murphy* [2000] NSWSC 892, [26] (Young J).
61. *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310, 313–314.
62. *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074.
63. *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502, 514 (Kirby J).
64. *Staff Development & Training Centre v Commonwealth of Australia* [2005] FCA 1643, [12]–[13] (Spender J).
65. *Smail v Burton* [1975] VR 776, 777 (Gillard J); *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301, 309 (Moffit P); *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd* [2005] NSWSC 1169, [6] (Einstein J).
66. *Civil Procedure Act 2005* (NSW) s 56(1).
67. *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd* [2005] NSWSC 1169, [7] (Einstein J).

until security for costs is given.[68] The rationale for this principle is to prevent the plaintiff from escaping liability for costs by setting up a "dummy" to fight on his or her behalf.[69] Pursuant to UCPR r 42.21(1)(e), the fact that the plaintiff is suing not for his or her own benefit but for the benefit of someone else is also a distinct ground for ordering security, not just a relevant discretionary factor that the court may consider.

Proportionality

2.66 The court may take into account the proportion of the costs to the issues at stake. For example, in *Maritime Services Board v Citizens Airport Environment Association*, the court, in granting the application for security, took into account the fact that the estimated cost of $11,000 for an additional day of litigation was "extremely small" compared to the cost of the subject matter of litigation, which was the construction of a third runway for Sydney Airport.[70]

The public interest

2.67 The court may take the public interest into account in deciding whether to order security for costs. The public interest may operate against an order for security in cases involving curial determinations on areas of law that require interpretation or clarification,[71] or where the claim is brought by the plaintiff to pursue some interest that is common to other members of the community.[72] The public interest by itself is not a sufficient reason for denying security, but is a factor which, together with other factors, may influence a court's willingness or otherwise to make a security for costs order. Chapter 4 examines in greater detail the public interest principle as it relates to security for costs.

Incorporating a list of discretionary factors in the UCPR

2.68 A question of reform for consideration is whether some or all of these factors should be incorporated in the UCPR. An argument in favour of such reform, which has received support from the NSW Bar Association,[73] is that it may make it easier for courts, litigants and their legal representatives to identify some of the key factors that are relevant in security for costs applications. On the other hand, it may be argued that the case law has sufficiently identified those factors and a legislative list is therefore unnecessary.

2.69 There is precedent for including a list of discretionary factors in the rules of court. In Queensland, r 672 of the *Uniform Civil Procedure Rules 1999* (Qld) provides:

68. *Evans v Rees* (1842) 2 QB 334.
69. *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 505 (French J).
70. *Maritime Services Board v Citizens Airport Environment Association* (1992) 83 LGERA 107.
71. *Smail v Burton* [1975] VR 776.
72. *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.
73. NSW Bar Association, *Preliminary Submission PSC10*, [19]–[21].

672 Discretionary factors for security for costs

In deciding whether to make an order, the court may have regard to any of the following matters--

(a) the means of those standing behind the proceeding;

(b) the prospects of success or merits of the proceeding;

(c) the genuineness of the proceeding;

(d) for rule 671(a)--the impecuniosity of a corporation;

(e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;

(f) whether the plaintiff is effectively in the position of a defendant;

(g) whether an order for security for costs would be oppressive;

(h) whether an order for security for costs would stifle the proceeding;

(i) whether the proceeding involves a matter of public importance;

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding.

2.70 This rule is to be read in conjunction with r 671 (the equivalent of UCPR r 42.21), which contains the "jurisdictional provisions" or grounds on which courts may order security. Rule 671 provides:

671 Prerequisite for security for costs

The court may order a plaintiff to give security for costs only if the court is satisfied—

(a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or

(b) the plaintiff is suing for the benefit of another person, rather than for the plaintiff's own benefit, and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them; or

(c) the address of the plaintiff is not stated or is misstated in the originating process, unless there is reason to believe this was done without intention to deceive; or

(d) the plaintiff has changed address since the start of the proceeding and there is reason to believe this was done to avoid the consequences of the proceeding; or

(e) the plaintiff is ordinarily resident outside Australia; or

(f) the plaintiff is, or is about to depart Australia to become, ordinarily resident outside Australia and there is reason to believe the plaintiff has insufficient property of a fixed and permanent nature available for enforcement to pay the defendant's costs if ordered to pay them; or

(g) an Act authorises the making of the order; or

(h) the justice of the case requires the making of the order.

2.71 The Australian Capital Territory has a rule of court that is identical to r 672 of the *Uniform Civil Procedure Rules 1999* (Qld).[74]

2.72 If the UCPR were to be amended to include a list of discretionary factors, r 672 of the *Uniform Civil Procedure Rules 1999* (Qld) could be used as a model. The questions that arise are whether there any provisions in r 672 that should be excluded or modified, and whether there are factors that should be added, for the purposes of amending UCPR r 42.21. There are some factors recognised by case law that are not listed in, or are worded differently to, r 672. We list them in the following section for the purpose of getting submissions on whether they should be included in the list of discretionary factors proposed to be included in UCPR r 42.21.

Proportionality

2.73 The principle of proportionality is one of the discretionary factors recognised by the case law that is not reflected in r 672 of the *Uniform Civil Procedure Rules 1999* (Qld). This principle states that when assessing security for costs applications, courts may take into account the proportionality of the security being sought with the subject matter of the litigation.[75] It should be noted that with respect to costs, s 60 of the *Civil Procedure Act 2005* (NSW) provides that "in any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute". The question that arises is whether it is desirable to reiterate in legislation, by an amendment to UCPR r 42.21, that the proportionality principle applies to security for costs applications.

The public interest

2.74 It may be desirable to include the public interest in a list of discretionary factors that the court may take into account when ordering security pursuant to the UCPR. Queensland rule 672(i) permits the court to consider "whether the proceeding involves a matter of public importance".[76] If New South Wales were to include a similar provision, one question to ask is whether the term "public importance" is equivalent to the term "public interest" found in case law, and, if not, which term the provision should include.

74. *Court Procedure Rules 2006* (ACT) r 1902(h).
75. See para 2.66.
76. *Uniform Civil Procedure Rules 1999* (Qld) r 672(i).

2.75 There are numerous considerations that courts have considered relevant to determining whether litigation is in the "public interest".[77] Some of these considerations are: whether the litigation raises significant issues about the interpretation and future administration of statutory provisions; and whether the issues in dispute concern a significant number of members of the public.[78]

2.76 On the other hand, there is little guidance on how to construe "public importance" for the purposes of Queensland r 672(i).[79] As a result, it may be preferable to use the term "public interest" in any amendments to the UCPR. This would ensure that the court rules are consistent with case law, and would also allow courts to refer to the case law on public interest if necessary. It should be noted, however, that in Chapter 4 we discuss the issue of whether "public interest" should be defined in the legislation in order to codify the case law principles.

2.77 Further, in Chapter 4, one of the questions we ask is whether courts should be able to make public interest costs orders, which are orders relating to costs and security for costs in proceedings involving public interest matters. If separate rules and procedures were adopted for public interest proceedings, the question that would need to be resolved is whether "public interest" or an equivalent term should still be included in the list of discretionary factors that are proposed to be included in UCPR r 42.21.

Impecuniosity of the plaintiff

2.78 Rule 672(d) of the *Uniform Civil Procedure Rules 1999* (Qld) refers to the impecuniosity of a corporation as a relevant factor in an application for security for costs against a corporate plaintiff. The question that arises is whether the impecuniosity of the plaintiff who is a natural person should included in the list of discretionary factors proposed to be included in UCPR r 42.21.

2.79 It is arguably important to insert such a provision given the emphasis that courts place on the case law rule that "poverty is no bar to a litigant".[80] One court has stated this general rule in the following way:

> … the door of the court should not be barred to a prospective plaintiff, resident within the realm, because he is impecunious. Thus as between residents within the jurisdiction, prosecuting what could properly be described as their own suits, the law required the defendant to accept the risk that the plaintiff might not be able to satisfy the order as to costs.[81]

77. These considerations are discussed in more detail in Chapter 4, see para 4.7–4.9.

78. See *Oshlack v Richmond River Council* 1998) 193 CLR 72, 80 [20]; *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* [2004] NSWLEC 434, [15]; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [202].

79. For example, the Supreme Court of Queensland has accepted that litigation that raises the issue of the "use and abuse" of Part 5.3A of the *Corporations Act 2001* (Cth) is a matter of "public importance", but no general principles for determining what is of "public importance" are provided: see *Mt Nathan Landowners Pty Ltd (In Liq) v Morris* [2006] QSC 225, [51]–[53].

80. *Cowell v Taylor* (1885) 31 Ch D 34, 38.

81. *Harpur v Ariadne Australia Ltd* [1984] 2 Qd R 523, 530 (Connolly J).

2.80 The rule applies only to plaintiffs who are natural persons, and not to corporate plaintiffs. The High Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* has stated:

> In general, the bare fact of impecuniosity is not of itself reason to order a plaintiff who is a natural person to provide security for costs. But a corporate plaintiff may be ordered to provide security where it is shown that it will not be able to meet the defendant's costs.[82]

2.81 Slater & Gordon in their preliminary submission have commented on the "paramount importance" of the general principle that poverty is no bar to litigation, suggesting that the "overarching imperative" of security for costs legislation should be to "ensure that plaintiffs are not prevented from pursing legitimate causes of action merely because of their relative financial weakness".[83] The Commission has received other preliminary submissions confirming the centrality of this general rule and emphasising its importance in providing access to justice.[84] The importance of the general rule that poverty is no bar to litigation suggests that it would be beneficial for the UCPR to state expressly that courts may consider the issue of the plaintiff's impecuniosity when ordering security for costs. Including such a provision would ensure that the UCPR more accurately embodies the principle that courts routinely follow when making security orders.

2.82 Another reason to include the plaintiff's impecuniosity as a relevant discretionary factor in the UCPR relates to the substantial number of self-represented litigants appearing before courts.[85] As the courts have recognised, the principle that mere poverty is no bar to litigation can assume special relevance in cases where the plaintiff is self-represented. The Queensland Supreme Court in *Mbuzi v Hall*, in considering whether to order security for costs against a self-represented plaintiff, quoted the following with approval in the course of its reasons:[86]

> [T]here should not be undue inhibitions on less wealthy persons from seeking vindication of their rights against more wealthy persons, and… there could be such inhibitions if it was in every case open to defendants to apply for security for costs on the basis of some evidence…suggesting inability to pay costs.[87]

2.83 Amending the UCPR to state that courts may consider the plaintiff's financial situation when exercising its discretion to order security, therefore, is one way to ensure that self-represented litigants have access to justice and can litigate to defend their legitimate claims.

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82. *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, [38] (footnotes omitted).
83. Slater & Gordon, *Preliminary Submission PSC8*, 2.
84. Maurice Blackburn Pty Ltd, *Preliminary Submission PSC5*, [2.6] ("As a general rule the poverty of a litigant is not a sufficient ground for the granting of security for costs and neither should it be"); Public Interest Advocacy Centre, *Preliminary Submission PSC12*, 9 ("If security for costs were available in matters based solely or even substantially on the impecuniosity of individual plaintiffs, a substantial portion of the community would be unable to litigate to enforce their rights, and access to justice in Australia would be significantly limited").
85. See Chapter 1 at para 1.55–1.60 for a discussion of the substantial numbers of self-represented litigants in courts.
86. *Mbuzi v Hall* [2010] QSC 359, [70].
87. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [46].

2.84 Aside from the two reasons already canvassed, another reason for amending the UCPR to include impecuniosity as a relevant factor is that it would clarify the status of the general rule that poverty is no bar to litigation. The rule currently operates as a principle underpinning the court's discretion to order security for costs, but it is not absolute.[88] The grounds specified in r 42.21(1) represent instances when courts may divert from the general rule.[89] In *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*, Justice Heydon recognised this and identified other situations where mere impecuniosity would not prevent courts from ordering security:

> Mere impecuniosity is not an absolute barrier to ordering security for costs against a natural person, although it is a factor against doing so. In particular, there are instances additional to those listed in r 42.21(1)(a)–(c) and (e) where it can be done. They include the vexatious conduct of litigation by a plaintiff who had failed to set aside an earlier judgment, instances where the plaintiff has dissipated assets and/or not paid previous costs orders (particularly costs orders in favour of the defendant), instances where the plaintiff brings a weak case to harass the defendant and instances where the plaintiff brings a case for the benefit of others, but not solely for that benefit. Hence the supposed "general principle … that poverty is no bar to a litigant" is a severely qualified one. So is the "overriding principle of open access to justice" (or, more realistically, at least access to the courts).[90]

2.85 In the light of the qualified nature of the general rule, it might be best to allow the court to consider the impecuniosity of the plaintiff as one relevant consideration among others when exercising the discretion to order security for costs.

2.86 An alternative to inserting a provision stating that the impecuniosity of the plaintiff is a relevant discretionary factor would simply be to state the rule that poverty is not a bar to litigation in the UCPR. The Supreme Court of Western Australia rules contain the following provision:

> **Security generally**
> The Court may order security for costs to be given by a plaintiff, but no order shall be made merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs which may be awarded against him.[91]

2.87 On the one hand, it may be argued that the inclusion of a statement similar to the Western Australian provision would be useful in reminding the courts and lawyers about the general rule, and in informing those who might not be aware of the rule, such as litigants who do not have lawyers. It might also be said that this would better preserve the rule's status as an overarching principle.

2.88 On the other hand, it could be argued that the provision in the UCPR is not necessary because the general rule found in case law is very well-known to judges and lawyers. Slater & Gordon have suggested that the rule is sufficiently recognised by courts that litigants, including self-represented ones, are adequately protected.[92] Furthermore, it might be argued that simply stating the general rule that poverty is

88. National Pro Bono Resource Centre, *Preliminary Submission PSC9*, 13.
89. See *Green (As Liquidator of Arimco Mining Pty Ltd)* v *CGU Insurance Ltd* [2008] NSWCA 148, [32].
90. *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 96–97 [38].
91. *Rules of the Supreme Court 1971* (WA) O 25 r 1.
92. Slater & Gordon, *Preliminary Submission PSC8*, 3.

not a bar to litigation in the UCPR does little to inform courts and litigants how this principle applies in practice.

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,

(a) 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?

(b) 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?

(c) Should the list include public interest? If so, should the provision refer to "public interest" or "public importance"?

(d) 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?

Relationship between the jurisdictional grounds and discretionary factors

2.89 If UCPR r 42.21 were amended to include a list of discretionary factors, the question that arises is what the relationship of those factors to the jurisdictional grounds should be.

2.90 The case law has indicated that in relation to s 1335 of the Corporations Act and r 42.21(1)(d) of the UCPR — which provide courts jurisdiction to order security against a corporate plaintiff if there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence — the court must first consider the "jurisdictional question" of whether the evidence indicates that there is reason to believe that the company will not be able to pay the defendant's costs, and only then can the court move on to examine the discretionary factors.[93]

2.91 However, in *Robson v Robson*,[94] the Queensland Court of Appeal (by a majority) appears to have taken a different approach. The issue the court considered was how the list of discretionary factors in r 672 relate to r 671, which specifies the

93. See *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* [2000] WASCA 69, [20]–[21].

94. *Robson v Robson* [2008] QCA 36.

grounds on which the court may order security for costs in a similar manner to UCPR r 42.21(1). The majority held that the court was permitted to consider the factors in r 672 in order to determine whether a ground for ordering security in r 671 was made out.[95]

2.92 Justice Keane, by contrast, dissented. He adopted the view that an order for security for costs under the Queensland rules was a "two-stage process":[96]

> It seems to me that the text and structure of r 671 and r 672 require the court to treat the preconditions of making an order for security, which are stated in r 671, separately from the discretionary factors, which are stated in r 672. The latter fall for consideration only when the court is satisfied that the discretion to make an order has been enlivened under r 671…r 671 seems to me to have been deliberately intended to limit the occasions when application for security for costs should be entertained by the court.[97]

2.93 Justice Keane's view, therefore, was that the court could not take into account the discretionary factors listed in r 672 in determining whether a ground for ordering security for costs in s 671 was satisfied.

2.94 It should be emphasised that the court in *Robson v Robson* was considering a broad ground that allows courts in Queensland to order security for costs if "the justice of the case requires the making of the order".[98] It is apparent that the court's view concerning the way in which the grounds for ordering security relate to the discretionary factors was influenced by the broad nature of this provision. Both majority judges based their view on the observation that this provision "is extremely broad" and that to "exclude from this process [the consideration of the discretionary factors listed in r 672]…would impose an unintended limitation on the broad scope" of the provision and "promote an unduly artificial approach to the determination of security for costs applications".[99]

2.95 The decision of the majority in *Robson v Robson* may therefore be construed narrowly to mean that where the broad ground (regarding the justice of the case) is used as basis for a security application, courts may take into account the discretionary factors, in view of the broad nature of this ground. However, where a more specific ground is relied on — for example the plaintiff is ordinarily not a resident of Australia, or the address of the plaintiff is not stated or is misstated in the originating process — it is open for courts to follow the approach taken with respect to s 1335 of the Corporations Act and UCPR r 42.21(d): namely, that the court must first consider whether there is evidence to support the jurisdictional ground before examining whether the court is to exercise its discretion taking into account the discretionary factors.

95. *Robson v Robson* [2008] QCA 36, [31]–[33] (Muir JA), [61] (McMeekin J).
96. See *Robson v Robson* [2008] QCA 36, [31] (Muir JA).
97. *Robson v Robson* [2008] QCA 36, [19] (Keane JA).
98. *Uniform Civil Procedure Rules 1999* (Qld) r 671(h).
99. *Robson v Robson* [2008] QCA 36, [34], [37] (Muir JA), [61] (Keane JA).

Question 2.7

(1) 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)?

(2) Should such a relationship be stated in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 or should it be left for courts to develop?

Security for costs orders against corporate plaintiffs

2.96 Section 1335(1) of the Corporations Act provides another source of power for courts to order security for costs.[100] The section, which applies where the plaintiff is a corporation, states:

> Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

2.97 The UCPR also has a provision giving courts power to order security for costs against corporate plaintiffs. UCPR r 42.21(1)(d) provides that a court may order the plaintiff to give security where it appears "that there is reason to believe that a plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so".

2.98 It has been held that the general discretion conferred by s 1335(1) of the Corporations Act is not constrained by UCPR r 42.21(1)(d).[101] In practice, it is common for an applicant to seek security for costs under both provisions.[102]

Consistency between the wording of UCPR r 42.21(1)(d) and s 1335(1) of the Corporations Act

2.99 UCPR r 42.21(1)(d) does not contain the words "by credible testimony" as the Corporations Act provision does. One question for consideration is whether UCPR r 42.21(1)(d) should be amended to reflect the terms of s 1331(1) of the Corporations Act.

2.100 On the one hand, it could be argued that this is unnecessary because courts have held that the same principles govern both s 1335(1) of the Corporations Act and UCPR r 42.21(1)(d). In *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT)*

100. For a recent survey of the principles and practice relating to s 1335(1) of the *Corporations Act 2001* (Cth), see Hugh Stowe, "Security for costs against impecunious plaintiffs" (Summer 2010–2011) *Bar News* 86.

101. *Pioneer Park Pty Ltd (in liq) v Australia And New Zealand Banking Group Limited* [2007] NSWCA 344; *Prynew Pty Limited v Nemeth* [2010] NSWCA 94.

102. *Baycorp Capital Ltd v Dex Consulting Pty Ltd* [2010] NSWSC 156, [12] (Davies J).

Pty Ltd,[103] Justice Refshauge considered an application made under both s 1335(1) of the Corporations Act and the ACT equivalent of UCPR r 42.21(d). He commented that:

> It does not seem to me to matter under which provision the application is made; I am of the clear view that the principles which a court would apply to both provisions are the same.[104]

2.101 On the other hand, it could be argued that it is desirable to make the amendment to clarify that, notwithstanding the differences in the wording between the two provisions, there is no inconsistency between them and that the same principles apply to both provisions.

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)?

Different treatment of corporate plaintiffs

2.102 The rationale for s 1335(1) of the Corporations Act was articulated by Chief Justice Street in *Buckley v Bennell Design and Constructions Pty Ltd*:

> It reflects the concern of the legislature that, in permitting the incorporation of a limited liability entity, it was necessary to ensure that persons who might have dealings…with such an entity should have a measure of protection against the consequences of limited liability…[If] a company commences litigation against another party, that other party could find himself involuntarily prejudiced by the limited liability character of the plaintiff who had commenced proceedings against him.[105]

2.103 Justice Moffitt made a similar statement in *Pacific Acceptance Corporation Ltd v Forsyth (No 2)*:

> [I]f a company wins it will get the benefit of its verdict and an order for costs against the defendant to the advantage of those who have an interest in the assets of the company, but…the defendant sued will, if successful, be at a disadvantage in being unable to recover his costs if the company is financially insecure.[106]

2.104 In sum, in exchange for the privilege of limited liability, a corporate plaintiff is given a statutory obligation to give security for the defendant's costs if there is credible evidence that it will be unable to pay an adverse costs order.

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103. [2010] ACTSC 20.

104. *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* [2010] ACTSC 20, [197].

105. *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301, 303–304; *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* [2000] WASCA 69, [20]; G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 950.

106. *Pacific Acceptance Corporation Ltd v Forsyth (No 2)* [1967] 2 NSWR 402, 407; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 512; *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd* [2000] NSWSC 826, [84].

2.105 Courts have said that s 1335(1) (or its equivalent) makes the case of a corporate plaintiff an exception to the general rule that mere poverty is not a reason for ordering security for costs.[107] In *Pearson v Naydler*, Vice-Chancellor Megarry stated that "[f]or a natural person, the basic rule is that he will not be ordered to give security for costs, however poor he is",[108] unless an exception recognised by law applies.[109] Vice-Chancellor Megarry proceeded to state that this rule does not apply to corporate plaintiffs:

> In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite.[110]

2.106 The separate legal personality of companies and their limited liability is the reason for treating corporate plaintiffs differently from plaintiffs who are natural persons. In contrast to an impecunious natural person who commences legal proceedings against another party, the members and creditors of an insolvent company can potentially hide behind the separate legal personality and limited liability of the company and litigate without putting their own personal assets at risk.[111] The persons standing behind an insolvent company could therefore "expose the defendant to the risk of irrecoverable costs while themselves shielded, by reason of the interposition of the impecunious plaintiff, from the burden of an adverse order for costs".[112]

2.107 Although the particular treatment of corporate plaintiffs in relation to security for costs is well-established, it could be argued that that it tips the balance too far in favour of defendants. In a preliminary submission, Maurice Blackburn Lawyers said that "it is altogether too easy for a defendant to get a security for costs order against a corporate plaintiff as the courts give insufficient attention to the merits of a claim when such an application in made".[113]

Question 2.9

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

Proving the impecuniosity of corporate plaintiffs

2.108 The onus is initially on the defendant who makes the application under s 1335(1) of the Corporations Act to establish by "credible testimony that there is reason to believe" that the corporate plaintiff will be unable to pay the defendants' costs.[114]

107. *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 505.
108. *Pearson v Naydler* [1977] 3 All ER 531, 535.
109. See *Jeffery & Katauskas Pty Ltd v SST Consulting Pty* Ltd (2009) 239 CLR 75, 96–97 [38] (Heydon J), quoted in para 2.84.
110. *Pearson v Naydler* [1977] 3 All ER 531, 535.
111. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 950.
112. *Cowell v Taylor* (1885) 31 Ch D 34, 11; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, [54]. See also *Harpur v Ariadne* [1984] 2 Qd R 523, 532; *Health Information Pharmacy Franchising Pty Ltd v Khoo* [2010] FCA 438, [73].
113. Maurice Blackburn Pty Ltd, *Preliminary Submission PSC5*, [3.4].
114. *Momentum Mortgages Ltd & Equity Trustees v Elmowy & Meehan* [2010] NSWSC 950, [6]; *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* [2000] WASCA 69, [47].

If the defendant satisfies this threshold requirement, the evidentiary onus will then shift to the corporate plaintiff to satisfy the court that, "taking into account all relevant factors, the Court should exercise its discretion by refusing to order security".[115]

2.109 In a preliminary submission, Mr Stephen Epstein SC has informed the Commission that an applicant for a security for costs order against a corporate plaintiff may face difficulties in providing the court with "credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant" as s 1335(1) of the Corporations Act requires. This is due to the difficulty of finding satisfactory information about the corporate plaintiff's financial position.[116]

2.110 One problem relates to the fact that the financial records of some companies are not publicly available. While all companies must keep written financial records of their transactions and financial position, small proprietary companies are not required to have these financial statements lodged with the Australian Securities and Investments Commission ("ASIC").[117] Consequently, in cases where the corporate plaintiff is a small proprietary company,[118] the defendant would be unable to examine public records of the company's financial position.

2.111 However, apart from financial records and statements lodged with ASIC, there are other forms of evidence that could be used to show that a corporate plaintiff will be unable to pay an adverse costs order. These include:[119]

- balance sheets;
- trading statements;
- books of account;
- correspondence showing the absence of trading or assets;
- actual and draft annual returns;
- tax returns;
- debentures and charges;
- notice of appointment of a liquidator;
- evidence about the period in which the company has ceased trading;
- evidence about inability to pay legal advisers; and
- evidence about inability to pay debts as they fall due.

115. *Strategic Financial and Project Services Pty Ltd v Bank of China Limited* [2009] FCA 603, [31].
116. S Epstein SC, *Preliminary Submission PSC3,* [12]–[14].
117. P Redmond, *Companies and Securities Law: Commentary and Materials* (Thomson Reuters, 5th ed, 2009) 116.
118. "Small proprietary company" is defined in *Corporations Act 2001* (Cth) s 45A(2).
119. S Colbran, "Application for Security for Costs" (1993) 10 *Australian Bar Review* 11, 18; S Colbran, "Security for Costs Against Corporations — Section 1335 of the Corporations Law" (1993) *Company and Securities Law Journal* 273, 276–277.

2.112 The Supreme Court in *Juelle Pty Ltd v Buildev Properties Pty Ltd*[120] considered the issue of whether the Court could consider un-audited financial statements in deciding to grant an order for security for costs. In considering a financial report prepared by the plaintiff's accountant that had not been audited or verified, Justice Gzell said:

> In my view, the lack of verification, validation, audit and review by [the accountant] does not render the financial report inadmissible. They are the statements by the directors of the financial position of [the plaintiff]. The lack of verification, validation, audit and review may bear upon the weight to be given to the evidence but it does not, in my view, exclude the evidence.[121]

2.113 The fact that an applicant under s 1335(1) of the Corporations Act can rely on financial statements even when they are not audited enlarges the class of evidence available to prove the corporate plaintiff's impecuniosity.

2.114 The various forms of evidence relating to the corporate plaintiff's financial position canvassed in the preceding paragraphs may be obtained by the defendant through three procedures under the UCPR:

- by discovery;
- pursuant to a notice to produce; or
- by subpoena.[122]

2.115 Under UCPR r 21.2 the court can order a party to give discovery of a class of documents to another party, provided the documents are relevant to a fact in issue.[123] Presumably, the corporate plaintiff's ability or inability to pay the defendant's costs will be a fact in issue. So it is possible that some forms of evidence about the corporation's financial position will be provided to the applicant during discovery.

2.116 The second way an applicant can obtain evidence about a corporate plaintiff is by serving the party with a notice to produce under UCPR r 21.10. This rule provides that:

> (1) Party A may, by notice served on party B, require party B to produce for inspection by party A:
>
> (a) any document or thing that is referred to in any originating process, pleading, affidavit or witness statement filed or served by party B, and
>
> (b) any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue.

120. *Juelle Pty Ltd v Buildev Properties Pty Ltd* [2006] NSWSC 302, [18].
121. *Juelle Pty Ltd v Buildev Properties Pty Ltd* [2006] NSWSC 302, [18]. See also *Strategic Financial and Project Services Pty Ltd v Bank of China Limited* [2009] FCA 603, [35].
122. LexisNexis *Ritchie's Uniform Civil Procedure NSW* (at 15 April 2011) [33.2.20]; S Epstein SC, *Preliminary Submission PSC3,* [14].
123. *Uniform Civil Procedure Rules 2005* (NSW) r 21.2(4).

2.117 It is possible that notices to produce will only enable defendants to obtain a limited amount of evidence about a company's financial position. This is due to the inherent limitations outlined in UCPR r 21.10 itself.

2.118 Under UCPR r 21.10(1)(a), an applicant will only be able to obtain documentary evidence that is "referred to" in a document filed by the corporate plaintiff. Although a document is sufficiently "referred to" if it is described or referred to in a general manner or as part of an identified class of documents,[124] the reference must involve a direct allusion to the document itself, as distinct from its effect or the information it contains.[125]

2.119 Similarly under UCPR r 21.10(1)(b), the applicant must be able to identify the documents with reasonable precision.[126] As the Supreme Court has said, "references to documents require strict specificity in order to identify the individual document sought".[127] Thus a notice to produce generally will not "clearly identify" documents if the subject matter is only stated broadly.[128]

2.120 These limitations in r 21.10 potentially make it difficult for an applicant under s 1335(1) to obtain adequate evidence for a security order. The applicant will only be able to obtain evidence that the corporate plaintiff has already referred to in court documents, or that the applicant can clearly identify.

2.121 A third way an applicant for a s 1335(1) order may obtain evidence about the corporate plaintiff's financial position is pursuant to a subpoena. UCPR r 33.2 gives the court power to order a party to produce any document or thing as directed by a subpoena.[129]

2.122 However, subpoenas potentially face the same limitations as notices to produce. UCPR r 33.3(4) stipulates that a subpoena must identify the document or thing to be produced. The courts have held that subpoenas are not a substitute for the discovery process and that they must identify the documents to be produced with reasonable particularity.[130] It could be difficult for an applicant to specify documents with the necessary precision when "faced with a corporate plaintiff, about which he or she has no knowledge".[131]

2.123 These considerations support Mr Epstein's preliminary submission that the current procedures for obtaining evidence about corporate plaintiffs do not sufficiently allow defendants to obtain evidence regarding the corporate plaintiff's financial position.[132] In addition to the limitations already mentioned, there may a general problem of

124. *Smith v Harris* (1883) 48 LT 869; *Dubai Bank Ltd v Galadari (No 2)* [1990] 2 All ER 738.
125. *New Cap Reinsurance Corporation Ltd (in liq) v Daya* [2008] NSWSC 763, [36]; LexisNexis *Ritchie's Uniform Civil Procedure NSW,* [21.10.10].
126. *Penrith Rugby League Club Ltd v Brown* [2004] NSWSC 1182, [8]; LexisNexis *Ritchie's Uniform Civil Procedure NSW,* [21.10.15].
127. *Douglas Corporation Pty Ltd v Currico Nominees Pty Ltd* [2007] NSWSC 113, [29].
128. *Norris v Kandiah* [2007] NSWSC 1296; LexisNexis *Ritchie's Uniform Civil Procedure NSW* (at 15 April 2011) [21.10.15].
129. *Uniform Civil Procedure Rules 2005* (NSW) r 33.2(1)(b).
130. *Lane v Registrar, Supreme Court of New South Wales* (1981) 148 CLR 245, 257.
131. S Epstein SC, *Preliminary Submission PSC3,* [14].
132. S Epstein SC, *Preliminary Submission PSC3,* [15].

corporate plaintiffs responding to subpoenas or notices to produce with incomplete or unsatisfactory information.[133]

2.124 The recent case of *Health Information Pharmacy Franchising Pty Ltd v Khoo*[134] in the Federal Court of Australia illustrates the practical difficulties that can beset defendants when they seek an order for security. In that case, the plaintiff was a wholly owned subsidiary proprietary company with a paid up capital of $1.00. The court summarised the evidence available for the application for security as follows:

> The evidence of the financial position of the applicant is scant. Shortly after this proceeding was commenced, the then solicitors for the respondents wrote to the applicant's then solicitors on 14 December 2009 seeking documents in relation to the applicant's assets and liabilities to satisfy the respondents that the applicant could pay any costs awarded in the respondents' favour. In response, by letter dated 15 December 2009, the applicant's then solicitors queried the basis on which the respondents claimed to be entitled to security for costs and said that the applicant "did not acknowledge" any liability to give security. This prompted a further letter, dated 16 December 2009, from the respondents' then solicitors. The letter set out the basis for the respondents' claimed entitlement, namely that the applicant had a paid up capital of only $1.00 and that the respondents believed that it had unpaid creditors who were owed more than $100,000. The letter repeated the request for information about the applicant's financial position. The request was not answered.[135]

2.125 Ultimately the only evidence before the court about the plaintiff's financial position was a "bank statement and a transaction list printed from an internet banking site". As the court said, "[t]here is no evidence of the applicant's assets beyond these matters. There is no evidence of its liabilities".[136]

2.126 Hence, it appears that defendants can be unduly disadvantaged by the difficulties they may encounter when it comes to obtaining evidence about a corporate plaintiff's impecuniosity.

2.127 To overcome this problem, Mr Epstein suggested that there be a procedure that applies specifically to applications for security for costs that would allow defendants to request a corporate plaintiff to produce a specified form of current and verified disclosure of its overall financial status. The proposed procedure would not make it obligatory for the corporate plaintiff to comply with the request. However, failure to comply would give rise to a rebuttable presumption that the plaintiff is "unable to pay the costs" for the purposes of s 1335(1) of the Corporations Act and UCPR r 42.21(d).[137]

2.128 The advantage of such a procedure is that it would give defendants an express right to request the necessary financial information in all cases. On the other hand, it may be argued that the current procedures are sufficient.

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133. S Epstein SC, *Preliminary Submission PSC3,* [15].
134. [2010] FCA 438.
135. *Health Information Pharmacy Franchising Pty Ltd v Khoo* [2010] FCA 438, [26].
136. *Health Information Pharmacy Franchising Pty Ltd v Khoo* [2010] FCA 438, [27].
137. S Epstein SC, *Preliminary Submission PSC3,* [16].

Question 2.10

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to include:

(a) a procedure allowing defendants to request a corporate plaintiff to disclose its overall financial status; and

(b) a presumption that the corporate plaintiff is impecunious, if the plaintiff refuses the request for disclosure?

Where an insolvent corporate plaintiff sues its former directors, officers and shareholders

2.129 In his preliminary submission, Mr Epstein proposed that s 1335(1) of the Corporations Act should not apply in cases where an insolvent corporation commences legal proceedings against the company's former directors, officers and controlling shareholders. The proposal is based on the argument that former company directors, officers and shareholders "who are sued by the insolvent companies over whose affairs they have presided, should not have the benefit of what used to be called the 'predisposition' to order security for costs" that arises under s 1335(1).[138]

2.130 The argument is that the ease with which courts grant applications for security against corporate plaintiffs should not be extended to its former directors, officers and controlling shareholders who have caused or contributed to its insolvency or other financial predicament because they could use this process to thwart legitimate claims against them. The proposal would still allow such former directors, officers and shareholders to apply for security for costs under the inherent jurisdiction of the court, but not under s 1335(1) of the Corporations Act.

2.131 However, it could be argued that the current state of the law may be adequate to deal with the situation under discussion.

2.132 First, the proposal is based on a premise that it is uniformly easier to obtain security for costs when the plaintiff is a corporation. Judicial opinion initially varied about whether the discretion to order security for costs against insolvent corporations gave rise to a 'predisposition' in favour of making the order.[139] Courts oscillated between the view expressed in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* that the court should exercise the discretion "considering all the circumstances of the particular case" without being "hampered by any special rules or regulations",[140] and the view in *Buckley v Bennell Design & Construction Pty Ltd* that the court should exercise the discretion with a predisposition in favour of granting the order for security.[141]

138. S Epstein SC, *Preliminary Submission PSC3,* [17]–[19].

139. *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 506.

140. *Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609, 626 (Lord Denning MR), 629 (Lawton LJ); *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 506.

141. *Buckley v Bennell Design & Construction Pty Ltd* (1974) 1 ACLR 301, 305 (Street CJ); *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 507.

2.133 However, the law is now settled that the discretion under s 1335(1) of the Corporations Act, as well as UCPR 42.21(d), is unfettered. It should be exercised "having regard to all the circumstances of the case without any predisposition in favour of the award of security".[142] The fact that courts now exercise their discretion in this manner suggests that some of the problems discussed above can perhaps be overcome. It is not the case that the court will be predisposed to grant a former officer's application for security against their former corporation. Rather, the court will consider each application on its merits, having regard to the whole range of factors relevant to the exercise of the discretion.

2.134 The second reason the suggested reform may be unnecessary is that courts already recognise that former officers should not be able to avail themselves of a security order against their former company in a specified class of case: namely, where the corporate plaintiff can prove that the former officers caused the corporation's impecuniosity.[143] Courts have long accepted that, if the defendant caused the plaintiff's impecuniosity, this can be taken into account when exercising the discretion under s 1335(1) of the Corporations Act.[144]

2.135 However, this method of resisting a security for costs order has limitations.[145] In practice it is often difficult for the corporate plaintiff to satisfy the court that its impecuniosity was caused by the defendant.[146] The court must be satisfied on reasonable grounds that the plaintiff's assertion is correct.[147] Further, there is Supreme Court authority that the plaintiff must also establish that the defendant has been "guilty of some form of misconduct or unacceptable business dealings".[148] In any case, the difficulty of satisfying the plaintiff's evidentiary onus in many situations means that former directors and officers could possibly still rely on s 1335(1) of the Corporations Act and UCPR r 42.21(1)(d) to obtain an order for security against their former company.

Question 2.11

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(d) be amended to make it inapplicable in cases where a corporation is suing former directors, controlling shareholders or officers of the corporation where the corporation is under administration or liquidation?

142. *Karl Suleman Enterprises Pty Ltd (in liq) v Pham* [2010] NSWSC 886, [29]; *Jazabas Pty Ltd v Haddad* [2007] NSWCA 291; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 511; G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd Ed, 2009) 984.
143. *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857, 862.
144. *Michael Bickley Pty Ltd v Westinghouse Electric Australia Ltd* (1983) 1 ACLC 967, 970 ; *KP Cable Investments Pty Ltd v Metaglow Pty Ltd* (1995) 56 FCR 189, 197; G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd Ed, 2009) 1036.
145. S Epstein SC, *Preliminary Submission PSC3,* [18].
146. *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857, 862 (Supreme Court of Western Australia); *Pasdale Pty Ltd v Concrete Constructions* (1995) 131 ALR 268, 273; G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd Ed, 2009) 1036; LexisNexis *Ritchie's Uniform Civil Procedure NSW* (at 15 April 2011) [42.21.40].
147. *Fakes v Taylor Woodrow Constructions Ltd* [1973] 1 QB 436, 442 (Lord Denning MR); G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd Ed 2009) 1036.
148. *Melunu Pty Ltd v Claron Constructions Pty Ltd* [2004] NSWSC 1064 [31]; *Dalma Formwork Pty Ltd v Concrete Constructions Group Ltd* [1998] NSWSC 472 (Rolfe J).

Potential restrictions on New South Wales law reform

Overcoming constitutional problems

2.136 The presence of a Commonwealth law relating to security for costs in cases involving corporate plaintiffs has constitutional implications for any reform of New South Wales law on the matter.

2.137 Section 109 of the Constitution provides that when a State provision is inconsistent with a Commonwealth provision, the Commonwealth provision prevails and the State provision is invalid to the extent of the inconsistency. For the purposes of s 109 of the Constitution, a state provision will be inconsistent with a Commonwealth provision if the state law:

- alters, impairs or detracts from the operation of the Commonwealth law ("direct inconsistency");[149] or
- "if it appears from the terms, nature or subject matter of the Commonwealth law that it was intended to operate as a complete statement of the law governing a particular matter or set of rights and duties" [150] ("indirect inconsistency").

2.138 Section 79 of the *Judiciary Act 1903* (Cth) ("Judiciary Act") also makes it clear that State laws only apply to the extent that they are valid and operate pursuant to the Constitution or a Commonwealth law.[151]

2.139 Since s 1335(1) of the Corporations Act is a Commonwealth provision, it is possible that amendments to New South Wales law that are inconsistent with s 1335(1) of the Corporations Act could be declared invalid as a result of s 109 of the Constitution and s 79 of the Judiciary Act.

2.140 There are nevertheless several avenues that potentially allow New South Wales to amend State legislation relating to corporate plaintiffs despite the existence of s 1335(1) of the Corporations Act.

2.141 The first consideration is UCPR r 42.21(4), which provides that r 42.21 does not "affect the provisions of any Act under which the court may require security for costs to be given". This suggests that an amendment to the security for costs provisions in the UCPR will not be regarded as inconsistent with other legislation on this matter. However, the reference in UCPR r 42.21(4) to another "Act" is arguably a reference to New South Wales legislation and not to Commonwealth legislation such as the Corporations Act. It is therefore unclear whether New South Wales could rely solely on UCPR r 42.21(4) to ensure that amendments to State law on security for costs provisions are effective.

2.142 In any case, s 5D-5G of the Corporations Act explicitly govern the interaction between State laws and Corporations legislation. These sections effectively "cut

149. See, for example, *Dickson v The Queen* [2010] HCA 30 (22 September 2010).

150. *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083, [77]. See also *Telstra Corporation Limited v Worthing* (1999) 197 CLR 61.

151. *Pioneer Park Pty Ltd (in liq) v Australia and New Zealand Banking Group Limited* [2007] NSWCA 344, [17] (Basten JA).

down the operation of s 109" of the Constitution.[152] The result is that New South Wales has a broad scope to amend State provisions relating to corporate plaintiffs despite the provisions of s 1335(1) of the Corporations Act.

2.143 Section 5E of the Corporations Act provides that unless there is a "direct inconsistency" between the Commonwealth and State laws, the State law can operate concurrently with a provision of the Corporations Act.[153] In *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation*, the Supreme Court held that the phrase "direct inconsistency" in s 5E has the same meaning as under s 109 Constitution: direct inconsistency occurs when Commonwealth and State laws "make contradictory provision upon the same topic, making it impossible for both laws to be obeyed".[154]

2.144 **Declaration as an excluded matter.** If New South Wales does enact a provision that is directly inconsistent with the Corporations Act, there are two options. First, the State provision could be effective due to the operation of s 5F. Section 5F(1)(b) permits a state law to declare a matter to be an excluded matter for the purposes of that section in relation to a specified provision of the Corporations Act. When such a declaration is made, by force of the section, the specified provision of the Corporations Act will not apply in the state in relation to the matter.[155]

2.145 Recent New South Wales legislation has relied on s 5F to provide that the Corporations Act does not apply to certain matters: the Central Coast Water Corporation is an "excluded matter" for the purposes of s 5F,[156] as is a statutory state owned corporation.[157]

2.146 Section 5F of the Corporations Act may overcome any constitutional inconsistency that might otherwise arise between any amended UCPR r 42.21(1)(d) and s 1335(1) of the Corporations Act. Any amended rule should be accompanied by a declaration that the matter of orders by New South Wales courts for security for costs against corporate plaintiffs is an excluded matter for the purposes of s 5F in relation to s 1335(1) of the Corporations Act. Section 5F(2)(b) would then have the effect of making s 1335(1) inapplicable in New South Wales in relation to the security for costs matters against corporate plaintiffs. As a consequence, an amended UCPR r 42.21(1)(d) would operate free of any constitutional infirmities.

2.147 **Declaration as a Corporations legislation displacement provision.** Section 5G of the Corporations Act provides another option for avoiding constitutional problems if UCPR r 42.21(1)(d) were amended. This section provides that if the State provision complies with certain conditions specified in s 5G(3), the Corporations legislation will not operate in the State to the extent necessary to ensure that no

152. *Loo v DPP* [2005] VSCA 161, [6]; *Bow Ye Investments Pty Ltd (in liq) v DPP* [2009] VSCA 149, [49].
153. *Corporations Act 2001* (Cth) s 5E(4).
154. *HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation* [2003] NSWSC 1083, [78].
155. *Corporations Act 2001* (Cth) s 5F(2)(b).
156. *Central Coast Water Corporation Act 2006* (NSW) s 11.
157. *State Owned Corporations Act 1989* (NSW) s 20G.

inconsistency arises between the Corporations Act and the State provision.[158] The conditions set out in s 5G(3) of the Corporations Act vary according to the kind of the state provision that is directly inconsistent with the Corporations Act.[159]

2.148 For the purposes of s 5G(3) of the Corporations Act, an amendment of UCPR r 42.21 would be either:

- "a post-commencement provision" since it would be enacted and come into force after the commencement of the Corporations Act and is not a provision that has been materially amended after commencement; or
- "a provision that is materially amended on or after [the Corporations Act] commenced.[160]

In either case, the crucial condition under s 5G(3) is for the amendment to be declared "a Corporations legislation displacement provision".[161] If such declaration were made, s 5G(11) would have the effect of making s 1335(1) of the Corporations Act inoperative in New South Wales to the extent necessary to ensure that no inconsistency arises between that section and the amended UCPR r 42.21.[162]

2.149 The NSW Office of the Parliamentary Counsel has informed the Commission that, as a matter of policy, they prefer to use the provisions of s 5G over the provisions of s 5F.[163] The main reason for this is that while a declaration under s 5F results in the specified provision of the Corporations Act becoming inapplicable "wholesale" in the State in relation to the subject matter of declaration,[164] a declaration under s 5G would result in the relevant provision of the Corporations Act becoming inoperative in the State "to the extent necessary to ensure that no inconsistency arises" between "the provision of the Corporations [Act]" and the provision of the law of the State that is the subject of the declaration.[165] The effect of a declaration under s 5G on the operation of the Corporations Act in this State is therefore narrower than a declaration under s 5F.

158. *Corporations Act 2001* (Cth) s 5G(11).

159. See *Pioneer Park Pty Ltd (in liq) v Australia and New Zealand Banking Group Limited* [2007] NSWCA 344, [21] for an illustration of the conditions in s 5G for "a pre-commencement (commenced)" state provision. The issue in that case was whether pt 51, r 16 of *the Supreme Court Rules 1970* (NSW), which provided that the court could only order security for costs in relation to an appeal in "special circumstances", was inconsistent with the discretion in s 1335(1) of the *Corporations Act 2001* (Cth). The Court of Appeal held that s 1335(1) prevailed over pt 51, r 16 because the latter did not operate "despite the" corporations law of the state, which was a condition in s 5G of the *Corporations Act 2001* (Cth).

160. See *Corporations Act 2001* (Cth) s 5(14)–(17).

161. *Corporations Act 2001* (Cth) s 5G(3) Table Items 3 & 5.

162. For examples of NSW statutory provisions that have been declared Corporations displacement provisions for the purposes of s 5G, see *Housing Act 2001* (NSW) s 67S; *Pacific Power (Dissolution) Act 2003* (NSW) s 16; *Australian Jockey And Sydney Turf Clubs Merger Act 2010* (NSW) s 44.

163. Information supplied by Mr John Ledda, Assistant Parliamentary Counsel, NSW Parliamentary Counsel's Office.

164. *Corporations Act 2001* (Cth) s 5F.

165. *Corporations Act 2001* (Cth) s 5G(11); *Loo v DPP* [2005] VSCA 161 [33]; *Bow Ye Investments Pty Ltd (in liq) v DPP* [2009] VSCA 149, [49] (If the State provision complies with conditions set out in s 5G, the Commonwealth legislation is "rolled back" to allow the state provision to have its full effect).

2.150 **Amendment by Parliament.** A declaration under s 5F or s 5G of the Corporations Act to amend New South Wales law on security for costs as it relates to corporations would have to be done by, or under the authority of, Parliament. The NSW Uniform Rules Committee, which has power to amend the UCPR,[166] does not currently have power to make declarations under s 5F or 5G of the Corporations Act.

Ensuring uniformity

2.151 If New South Wales were to amend the law on security for costs in a way that departs from the provisions of s 1335(1) of the Corporations Act, the resulting lack of uniformity with other Australian jurisdictions could create problems. A departure from uniformity may encourage corporate plaintiffs to 'forum-shop' — that is, institute litigation in the jurisdiction that has the most favourable security for costs rules.[167]

2.152 To prevent this, any proposed amendment to legislation on security for costs as it applies to corporations should go through the Ministerial Council for Corporations, which considers proposals for amendment of the Corporations Act and related legislation.

Ordering security for costs against defendants

2.153 The general rule is that security will not ordinarily be ordered against parties who are defending themselves and thus forced to litigate.[168]

2.154 However, consistent with the law's general approach of favouring substance over form, the court will not allow the mere identification of a person on the record as plaintiff or defendant to fetter its jurisdiction to order security. Lord Justice Vaughan Williams articulated the relevant principle as follows:

> One must look at each case to see whether in substance the claim set up by a defendant is set up by him by way of defence to the claim against him… I do not think that there is any hard and fast rule on the subject. We have to consider whether, in substance, upon the facts of the particular case, the defendants in the original action are to such an extent plaintiffs in the cross-action, that they ought according to the general practice in the matter to be ordered to give security for costs, because they have taken up the position of plaintiffs, irrespective of defence to the original action.[169]

2.155 Where the defendant is in fact pursuing a claim as, in substance, the claiming party, the court may order security for costs against the defendant.[170] Hence, for example, a cross-claim in which fresh substantive causes of action are raised, brought not

166. *Civil Procedure Act 2005* (NSW) s 9.

167. S Epstein SC, *Preliminary Submission PSC3*, [4].

168. *Stanley-Hill v Kool* [1982] 1 NSWLR 460, 464 (Reynolds JA); *Amalgamated Mining Services Pty Ltd v Warman Int'l Ltd* (1988) 19 FCR 324, 328 (Wilcox J).

169. *New Fenix Compagnie Anonyme d'Assurances de Madrid v General Accident Fire & Life Assurance Corporation Ltd* [1911] 2 KB 619.

170. *Classic Ceramic Importers Pty Lid v Ceramica Antiga SA* (1994) 12 ACLC 334.

merely by way of defence, will be susceptible to an order for security based on the usual principles.[171]

2.156 In some jurisdictions, the rules of court on security for costs contain a provision that reflects the principle developed at case law, though the formulation varies. For example, in South Australia, the court rule on security for costs provides that "[i]f the defendant makes a counterclaim, the defendant is the plaintiff in the cross action".[172] In Queensland, the rules of court provide that the chapter on security for costs applies "for a counterclaim and a third party proceeding".[173] In Western Australia, the court rules provide that "the term plaintiff shall include a defendant counterclaiming in respect of a claim not arising out of the claim made against him".[174] In Victoria, the court rules provide that for purposes of the order relating to security for costs, plaintiff is defined to mean as "any person who makes a claim in a proceeding".[175]

2.157 In New South Wales, UCPR 42.21 provides that "the court may order the plaintiff to give such security as it thinks fit". It does not have a provision similar to those in other jurisdictions quoted in the preceding paragraph. However, s 3 of the *Civil Procedure Act 2005* (NSW) provides that:

> plaintiff means a person by whom proceedings are commenced, or on whose behalf proceedings are commenced by a tutor, and includes a person by whom a cross-claim is made or on whose behalf a cross-claim is made by a tutor.

2.158 The question that arises is whether UCPR 42.21 should have a provision confirming that security for costs may be ordered against a person who is making a cross or counter-claim even though that person is not designated as the plaintiff. Arguably, UCPR 42.21 referring only to a "plaintiff" gives the impression that courts cannot order security against defendants in any circumstances. A provision in UCPR 42.21 similar to those in other jurisdictions would make it readily apparent that defendants may be ordered to provide security for costs under certain circumstances. On the other hand, it could be argued that such a provision would be redundant in view of s 3 of the *Civil Procedure Act 2005* (NSW).

2.159 If such a provision were considered desirable, the next question is how to formulate such a provision. The options include: (a) using the terms of the definition of plaintiff in s 3 of the *Civil Procedure Act 2005* (NSW); or (b) using any of the provisions in other jurisdictions as canvassed above.

Question 2.12

Should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to provide that courts have the power to order security for costs against a person who, although not designated as plaintiff, is making a claim? If so, how should such a provision be formulated?

171. *Motakov Ltd v Commercial Hardware Suppliers Pty Ltd* (1952) 70 WN (NSW) 64.
172. *Supreme Court Civil Rules 2006* (SA) r 194.
173. *Uniform Civil Procedure Rules 1999* (Qld) r 677.
174. *Rules of the Supreme Court* (WA) O 25 r 4.
175. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.01.

3. Plaintiffs assisted by particular forms of costs agreements

Introduction

3.1 The number of plaintiffs funded by third parties is growing, partly as a result of the rising costs of litigation.[1] Third party funded litigation can provide a mechanism for increasing access to justice, though in the case of commercial litigation funders there is also a clear profit motive. Third parties that fund plaintiffs include:[2]

- commercial litigation funders (that is, those who provide litigation funding for profit);
- lawyers acting on a conditional costs basis;

1. See John Walker, "Litigation Funding for Consumers of Civil Justice System Services" (1 November 2006) <http://www.imf.com.au/pdf/LitigationFundingForConsumers.pdf>; Michael Legg et al, "Litigation Funding in Australia" [2010] *University of New South Wales Legal Research Series* 12.
2. We have provided some background to these sources of third party funding in Chapter 1 at para 1.37–1.54.

- lawyers acting pro bono; and
- legal aid.

3.2 While this consultation paper does not consider the merits of litigation funded by third parties, it does consider the responsibility of third party funders in relation to both costs and security for costs.

3.3 This chapter refers to litigation funding as a contractual arrangement whereby a third party to the proceedings pays the cost of litigation and in return receives a percentage of the proceeds if the case succeeds.[3] One issue for consideration is whether the existence of litigation funding is a relevant consideration in applications for security for costs.

3.4 A related question is whether legislation should be adopted to provide that 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. Disclosure would enable the court and the defendant to assess whether the litigation funding agreement has provision for indemnity for adverse costs orders, and if not, the defendant would then have an opportunity to apply for security for costs.

3.5 A further issue in relation to litigation funders is whether courts should have power to make costs orders against them under certain circumstances. The main argument for giving courts the power to order costs against litigation funders is that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails. The main argument against such power is that it may discourage litigation funding. Funders may not want to take the risk of having to pay significant costs orders even where they have not agreed to do so; they may therefore simply avoid funding litigation.

3.6 A related question is whether courts should have the power to order security for costs against litigation funders. The arguments for and against such a power are similar to those on the question of whether courts should have power to order costs against litigation funders.

3.7 In New South Wales, a lawyer may enter into an agreement as to costs under which payment of costs is contingent on the successful outcome of the case. In *Del Bosco v Outtrim*,[4] ("*Del Bosco*") the Supreme Court, in ordering security for costs against the plaintiff, took into account of the fact that the plaintiff's lawyer was acting on a contingency fee basis. Some preliminary submissions have criticised this case. The argument is that conditional fee arrangements are aimed at plaintiffs who are otherwise unable to pay their own legal costs up-front. It is therefore inappropriate

3. See *In the matter of ACN 076 673 875 Ltd* [2002] NSWSC 578, [9], *QPSX Ltd v Ericsson Australia Pty Ltd* (No. 3) [2005] FCA 933; (2005) 219 ALR 1, [39]- [48], *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 11, [31]-[33].
4. *Del Bosco v Outtrim* [2008] NSWSC 105.

for the court to regard this as a factor that would make it more likely for the plaintiff to be ordered to secure the defendant's costs up-front.[5]

3.8 This chapter examines representative proceedings, which are cases where one or more plaintiffs institute court proceedings on behalf of a group of people. There are new statutory provisions regulating representative proceedings brought before the Supreme Court. There is uncertainty under the new provisions whether courts may order security for costs against representative plaintiffs. We ask whether courts should have power to order security for costs against representative plaintiffs and, if so, whether such power should be expressed in legislation or left for the case law to develop.

3.9 Plaintiffs assisted by funding from Legal Aid NSW may be ordered to give security for costs. The Commission seeks submissions on whether there are problems relating to the rules and principles on security for costs as they apply to cases where the plaintiff is supported by legal aid.

3.10 Finally, this chapter examines cases where a party is assisted by a lawyer acting pro bono, and goes on to win the case. The question is whether courts should be able to order costs against the losing party. At the moment, litigants with lawyers acting pro bono are not entitled to a costs order in their favour. This is because of the indemnity principle on costs; the purpose of a costs order is to indemnify, at least in part, the costs incurred by party for his or her lawyer. However, some preliminary submissions have suggested that courts should have power to make "pro bono costs orders".

3.11 In the United Kingdom, courts may make "pro bono costs orders" requiring the opposing party to make a payment to a charity, which distributes funds to national pro bono organisations. The fund helps others who need pro bono legal assistance to gain access to justice in other cases. We ask whether a similar system should be adopted in New South Wales.

Litigation funding for profit

What are litigation funders?

3.12 Litigation funding is usually provided by organisations that do so with a view to obtaining profit. Litigation funders are entities that contract with potential or actual litigants.[6] The contractual arrangements usually involve an agreement by the litigation funder to pay the plaintiff's costs, including lawyer's fees, disbursements, project management fees and claim investigation costs. In return for the funding, the

5 Slater & Gordon, *Preliminary Submission PSC8*, 5; Maurice Blackburn Pty Ltd, *Preliminary Submission PSC5*, 6.

6. See Chapter 1 at para 1.50–1.51 for an introduction to litigation funders. Another introduction can be found in Michael Legg, "Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions — The Need for a Legislative Common Fund Approach" (2011) 30 *Civil Justice Quarterly* 52, 56.

funder takes a percentage of the proceeds of the litigation, which ranges from 15% to 75%.[7]

3.13 In some cases, litigation funders will agree to fund up to 100% of the plaintiff's costs. Litigation funders usually also accept the risk of paying the other party's costs in the event that the claim fails by providing the plaintiff with an indemnity.[8] There are, however, cases where the funding agreement excludes indemnity for adverse costs orders.[9]

3.14 To ensure the success of the litigation, the funder takes control of major decision-making. This may include retaining and giving instructions to the solicitor who acts for the plaintiff, prohibiting that solicitor from directly liaising with the plaintiff, and reserving the right to settle the claim.

3.15 The leading case of *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*[10] ("*Fostif*") provides an illustration of the terms of a funding agreement. The funder in that case:

- retained the solicitor to act for the claimants and forbade the solicitor from directly liaising with the claimants;
- gave all instructions to the solicitor in relation to the conduct of the proceedings;
- had the power to settle the claims with the defendants (provided the amount of the settlement was not less than 75% of the amount claimed);
- undertook the administrative task of identifying and organising the claimants;
- agreed to meet all the legal costs and disbursements of the proceedings, which were ultimately lost in the High Court;
- indemnified the claimants against all adverse costs orders; and
- provided security for the defendants' costs in the sum of $1 million.

3.16 In return, the funder would:

- receive 33.3% of any amounts recovered by or on behalf of the plaintiff from the defendant by way of judgment or settlement of the proceedings; and
- retain any amounts awarded to the claimants for costs.[11]

3.17 Examples of other litigation funding agreements can be found on the websites of various litigation funders.[12]

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7. Michael Legg et al, "Litigation Funding in Australia" [2010] *University of New South Wales Legal Research Series 12*; Renée Leon, "Litigation Funding: A Need for Regulation" (Paper presented at the Conference of Australian and New Zealand Insurance Law Associations, Christchurch, New Zealand, 21 September 2007).
8. See *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148.
9. See, for example, *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75.
10. *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386.
11. See *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, [239].

3.18 Although litigation funding is commonly provided by organisations whose main business is to provide litigation funding, it may also be provided on a one-off basis; that is, where the litigation funder is not in the business of providing litigation funding. *Jeffery v Katauskas v SST Consulting*,[13] which is discussed below,[14] provides an example. In that case, the plaintiff obtained funding from a creditor.

The development of the litigation funding industry

3.19 Before 1995, litigation funding in Australia was prohibited under the common law torts and crimes of "maintenance" (improperly encouraging litigation) and "champerty" (funding another person's litigation for profit).[15] The common law prohibition of litigation funding was aimed at preventing abuses of court process including: vexatious or oppressive litigation; suppressed evidence; and misuse of witnesses — for personal gain. It was also based on a policy that the judicial system should not be the site of speculative business ventures.[16]

3.20 In 1995, a statutory exception to the prohibition was adopted. Insolvency practitioners were authorised to contract for the funding of lawsuits pursuant to their statutory powers of sale.[17] The validity of litigation funding in insolvency proceedings has been confirmed in a number of cases.[18] Litigation funding companies were established to service this market including, for example, litigation involving voidable transactions and misfeasance by company officers.

3.21 From the 1990's some jurisdictions — New South Wales, South Australia, Victoria and the Australian Capital Territory — passed legislation abolishing the torts and offences of maintenance and champerty.[19] This did not immediately result in the expansion of litigation funding to areas other than insolvency because the relevant legislation provided that the Act "does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act."[20] Hence there was uncertainty about whether litigation funding agreements continued to be against public policy.

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12. See for example the pro forma agreement of Litigation Lending Services: <http://www.litigationlending.com.au/public/download/Funding_Agreement.pdf>
13. (2009) 239 CLR 75.
14. Para 3.48–3.52.
15. NSW Law Reform Commission, *Barratry, Maintenance and Champerty* (Discussion Paper 36, 1994), [2.7]–[2.10].
16. Standing Committee of Attorneys-General, *Litigation Funding in Australia* (Discussion Paper, 2006), [1.2].
17. See, for example, the powers of disposal given to a receiver to dispose of a company's property under the *Corporations Act 2001* (Cth) s 420(2)(b) and (g), and the powers of disposal accorded to a liquidator by the *Corporations Act 2001* (Cth) s 477(2)(c).
18. See, for example, *Re Motivor Pty Ltd* (1996) 14 ACLC 587 (FCA); *Re Tosich Construction Pty Ltd* (1997) 143 ALR 18 (FCA).
19. *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 3 and 4; *Criminal Law Consolidation Act 1935* (SA) sch 11 s 1(3) and 3; *Wrongs Act 1958* (Vic) s 2, *Crimes Act 1958* (Vic) s 322A; *Civil Law (Wrongs) Act 2002* (ACT) s 221.
20. *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 6.

3.22 In 2006, the High Court clarified this issue in *Fostif* by holding that litigation funding is no longer against public policy in New South Wales and other jurisdictions that have abolished maintenance and champerty.[21] The court held that a funder's control of proceedings would not by itself amount to an abuse of process. It confirmed that champerty and maintenance are no longer considered tortious acts.

3.23 Since *Fostif*, litigation funding continues to be provided mainly for insolvency proceedings but has expanded to other types of litigation, predominantly commercial litigation with large claims (typically over $500,000 or, for some funders, over $2 million) and class actions. As a result of these developments, the litigation funding industry has grown considerably. Revenues of litigation funders have grown from nothing to $50 million per year over the last 15 years.

New legal obligations imposed on litigation funders

3.24 In December 2010, Parliament passed the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), which amends the *Civil Procedure Act 2005* (NSW) ("CPA"). The new provisions impose obligations on a person who provides financial assistance to any party to the proceedings, and exercises control over the conduct of the proceedings.

3.25 Under the new law, "any person with a relevant interest in the proceedings commenced by the party to a litigation" will have an obligation not to cause a party to breach its duty to:

- assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court; and
- take reasonable steps to resolve or narrow the issues in dispute.[22]

3.26 Persons who fund litigation are considered covered by the definition of a "person with a relevant interest".[23]

The significance of litigation funding in security for costs applications

Case law recognition of litigation funding as an important factor

3.27 The High Court's ruling in *Fostif* that litigation funding is not against public policy, and the consequent growth of litigation funding, raises the issue of what (if any) impact a funding agreement should have on security for costs applications.

3.28 In *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance,*[24] ("*Green*") the Court of Appeal held that the existence of a litigation funding agreement, under which the funder is obliged to indemnify the liquidator in relation to security for

21. *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386.
22. *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 6 [3]–[6].
23. *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 6 [7].
24. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148.

costs, should make a court more willing to make an order for security for costs against a plaintiff.

3.29 The claimant in *Green*, who was a liquidator, entered into a funding agreement in which the litigation funder was under an obligation to indemnify the claimant in relation to any order for security for costs. On the defendant's application, the primary judge ordered the liquidator to pay $450,000 by way of security for costs. The existence of a litigation funder that stood to gain from the liquidator's success in the proceedings was among the factors the primary judge took into account in making the order:

> Clearly a very important factor to be borne in mind on the present application concerns the circumstance that there is a funder who stands to benefit from the liquidator's success in these proceedings. The relevant discretion requires to take into account the disinclination of the Court 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.[25]

3.30 In the appeal proceedings, counsel for the liquidator submitted that the circumstance that someone other than a plaintiff stands to gain from the success of the proceedings was not an important factor justifying an order for security. The Court of Appeal rejected this submission, with Justice Hodgson stating that a court "should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated", such as a shareholder or creditor of the plaintiff corporation. He reasoned that the primary goal of the court system is to enable rights to be vindicated and not for a commercial entity to obtain profits. In his opinion, "courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails".[26]

3.31 Justice Campbell agreed with Justice Hodgson. He stated that "in the present case, the very fact of private profit from the litigation, and lack of satisfaction that there are available assets from which an unfavourable costs order against the liquidator would be met, are enough to show that some order of security for costs should be made". [27]

Statutory recognition of the relevance of litigation funding

3.32 The question that arises is whether the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") should be amended to expressly include litigation funding as a relevant factor that courts may take into account when ordering security for costs. This factor could appear as part of a list of discretionary factors in the UCPR, as discussed in Chapter 2.

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25. *Martin John Green in his capacity as liquidator of Arimco Mining Pty Limited v CGU Insurance Limited* [2008] NSWSC 449.
26. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [51], [61].
27. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [88].

3.33 As the court in *Green* acknowledged, the relevance of litigation funding to security for costs is grounded in policy considerations. It would be unfair for a funder to have the opportunity to gain financially from the plaintiff's success without also having some obligation to contribute to costs if the plaintiff fails.

3.34 A significant feature of the *Green* decision is that the court decided that litigation funding is relevant to security for costs even where the funder has agreed to indemnify the plaintiff against adverse costs orders. The plaintiff had argued that, in light of such a funding arrangement, security for costs was not appropriate, since the defendant could insist that the funder pay any costs.[28] However, Justice Hodgson did not accept this argument. He said that, in practice, it would be difficult for the defendant to enforce the funder's costs indemnity because the funder is not an insurer who could be sued pursuant to s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).[29] Despite the funder's providing the plaintiff with a costs indemnity, therefore, there would still be a risk of the defendant being left out of pocket unless security for costs were ordered.

3.35 It may be argued that an express provision in the UCPR that litigation funding is a relevant factor in security for costs applications would provide greater clarity and accessibility to the law. A summary statement of that principle in the court rules would arguably make it easier for the court and the parties to inform themselves of the relevant law.

3.36 On the other hand, it could be argued that it is unnecessary to include litigation funding as a factor in the UCPR, since the recognition of this factor in case law is sufficient.

Definition of "litigation funder"

3.37 If such provisions are to be included in the UCPR the questions arises as to how "litigation funder" should be defined.

3.38 The case law has defined litigation funding as a contractual arrangement whereby a third party pays the cost of litigation and in return, if the case succeeds, receives a percentage of the proceeds.[30] In *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd*, Justice Einstein described litigation funding as an arrangement

> where a third party in return for a stake in the outcome of proceedings shoulders the burden of litigation in terms of its management and meeting its costs, including the costs of the parties who are sued.[31]

3.39 NSW Young Lawyers has recommended that the following definition of "litigation funder" be included in the dictionary of the UCPR:

28. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [49].
29. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [52].
30. *In the matter of ACN 076 673 875 Ltd* [2002] NSWSC 578, [9]; *QPSX Ltd v Ericsson Australia Pty Ltd* (No. 3) (2005) 219 ALR 1, [39]- [48]; *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 11, [31]-[33].
31. *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty* Ltd [2003] NSWSC 816, [3].

> litigation funder means a person who has provided financial assistance to a party to proceedings in return for a financial benefit to be calculated by reference to the outcome of the proceedings and/or proceedings, and who does not otherwise have any interest (financial or otherwise) in the proceedings.[32]

Question 3.1

(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?

(2) If so, how should "litigation funder" be defined?

Disclosure of the terms of the litigation funding agreement

3.40 The existence of a litigation funding agreement that supports a party to proceedings gives rise to the question of whether the party should be required to disclose the agreement to the court and the other parties at the initial stage of case management.

3.41 Disclosure would enable the court and the defendant to assess whether the litigation funding agreement has provision for indemnity for adverse costs orders and, if so, whether it is binding and satisfactory. If the funding agreement does not have adequate provision for indemnity for costs, the defendant would then have an opportunity to apply for security for costs.[33]

3.42 Further, if a security for costs order were appropriate in a given case, the terms of the funding agreement may assist the court in assessing the amount of security it should order. The extent of the funder's interest in the outcome of the case is a factor that courts may take into account in determining the appropriate amount of security.[34]

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.[35]

3.44 There is precedent for such a disclosure requirement. The Federal Court has recently issued a practice note that, among other things, requires the disclosure of any litigation funding agreement in representative proceedings commenced under Pt IVA of the *Federal Court of Australia Act 1976* (Cth). The relevant provision of the practice note states:

32. NSW Young Lawyers, Civil Litigation Committee, *Preliminary Submission PSC15,* 12.
33. NSW Young Lawyers, Civil Litigation Committee, *Preliminary Submission PSC15,* 9–10.
34. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [88] (Campbell JA), [53] (Hodgson JA).
35. NSW Young Lawyers, Civil Litigation Committee, *Preliminary Submission PSC15,* 9-10.

> At or prior to the initial case management conference each party will be expected to 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. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.[36]

3.45 A barrier to mandatory disclosure of the terms of the ligation funding agreement is client legal privilege. In *Green*, the court was unable to obtain relevant information in the litigation funding agreement because the plaintiff claimed client legal privilege.[37] The privilege protects confidential communications between a lawyer and client from compulsory production in court proceedings.

3.46 The privilege is based on the policy of promoting trust between the lawyer and client.[38] It encourages the client to fully and frankly disclose the relevant circumstances to their lawyer without fear of being prejudiced by their disclosure. The privilege serves a broader public interest because the freedom to consult a lawyer with the assurance that the communications are safe "will often contribute to the general level of respect for and observance of the law within the community".[39]

3.47 However, in the context of proceedings involving litigation funding agreements, it could be argued that mandatory disclosure of the relevant provisions of a litigation funding agreement is in the public interest. The public interest is in avoiding abuse of the court's processes by preventing the plaintiff from frustrating court orders. Non-disclosure of the agreement may result in depriving the court and the defendant from assessing whether an order for security for costs is appropriate, which in turn may result in a costs order against the plaintiff becoming frustrated.

Question 3.2

(1) 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?

(2) If so, should the client legal privilege be expressly abrogated in relation to the disclosure requirement?

Power to order costs against litigation funders

3.48 The High Court in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd*[40] ("*Jeffery*") held that a defendant could not seek a costs order against a plaintiff's litigation funder because under the UCPR, courts did not have power to order costs against a non-party.

36. Federal Court of Australia, *Practice Note CM 17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 5 July 2010, [3.6].
37. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance* [2008] NSWCA 148, [11].
38. *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 480 (Gibbs CJ).
39. *Baker v Campbell* (1983) 153 CLR 52, 95 (Wilson J).
40. *Jeffery and Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75.

3.49 In that case, Richard Constructions Pty Ltd and SST Consulting Pty Ltd ("SST") entered into a contract to construct a pavement at a container terminal. Jeffery & Katauskas provided geotechnical services. The pavement failed. Richard Constructions Pty Ltd ("the plaintiff) commenced proceedings against Jeffery & Katauskas ("the defendant") in the Supreme Court. The defendant obtained an order for security for costs against the plaintiff in the amount of $187,750. Subsequently, the plaintiff obtained funding from SST, which was its creditor. The funding was evidenced by a deed of charge and a deed of company arrangement. In these documents, the plaintiff acknowledged that it owed SST a debt of $200,000. This amount was used to fund the litigation. There was evidence that the sum advanced by SST was $300,000 rather than $200,000. In any case, the deed of charge executed by the plaintiff in favour of SST secured payment of the sum of $930,000 and interest. In effect, SST would be making a profit of either $730,000 or $630,000 if the plaintiff were successful in its court case.

3.50 However, the plaintiff's claim was dismissed. The court then ordered the plaintiff to pay the defendant's costs, which totalled $653,470. The plaintiff was impecunious. That left the defendant out-of-pocket, once the security had been realised, in an amount of more than $450,000. The defendant sought a costs order against the litigation funder pursuant to rule 42.3(2)(c) (now repealed) of the UCPR which provided:

> **42.3 Powers of the court generally**
>
> (1) Subject to rule 42.27, the Court may not, in the exercise of its powers and discretions under section 98 of the *Civil Procedure Act 2005*, make any order for costs against a person who is not a party.
>
> (2) This rule does not limit the power of the court: …
>
> (c) to make an order for payment, by a person who has committed contempt of court or an abuse of process of the Court, of the whole or any part of the costs of a party to proceedings occasioned by the contempt or abuse of process.

3.51 The Supreme Court dismissed the application for costs against the litigation funder and the appeal to the Court of Appeal was unsuccessful.

3.52 An appeal was made to the High Court raising the issue of whether the Supreme Court had power to order costs against a non-party that, for a contingency fee, has funded an impecunious corporate plaintiff without providing the plaintiff with an indemnity for adverse costs orders. Whether the Court had the power depended on whether the litigation funder had "committed … an abuse of process of the Court", thus attracting UCPR r 42.3(2)(c). The High Court held (by a vote of 4 to 1) that there was no abuse of process and dismissed the appeal. It held, among other things, that:

- The bare fact that a plaintiff is unable to meet an adverse costs order does not mean that further prosecution of proceedings is an abuse of process.
- There can be no general rule prohibiting the funding of litigation for reward following the decision in *Fostif.*

- The proposition that those who fund another's litigation must put the party funded in a position to meet any adverse cost order is too broad and did not have any "doctrinal root".

3.53 The decision in *Jeffery* meant that, if a defendant obtained a costs order against a funded plaintiff, but the amount of the order was greater than the plaintiff could pay, it would be very difficult for the defendant to recover the balance from the litigation funder since the courts did not have power to order costs against a non-party unless there was abuse of process.

3.54 In response, the NSW Uniform Rules Committee repealed UCPR r 42.3 from July 2010. As a result, it would appear that the courts covered by the UCPR now have power to order costs against a person who is not a party to the proceedings. However, since no case has yet stated whether courts may exercise this power in relation to litigation funders, it could be argued that it would be desirable to settle the law on the issue by adopting legislation expressly giving courts power to make costs orders against litigation funders. This would help to overcome situations where the defendant, as in *Jeffery*, is left out of pocket as a result of the funded plaintiff's failure to pay an adverse costs order.

3.55 If such power were given to courts, an issue for consideration would be under what circumstances it should be exercised. Should the legislation establishing this power provide that it can only be exercised where the defendant has provided evidence that the plaintiff is unlikely to comply with a costs order? Or should the power be expressed broadly and allow the case law to identify the circumstances in which it is appropriate to exercise the power?

3.56 Further, there are arguments against giving courts power to order costs against litigation funders. First, consider that in *Jeffery*, the litigation funding agreement in question did not include an indemnity against adverse costs orders: the funder did not agree to pay costs for which the plaintiff might be liable if the litigation was unsuccessful. It could be argued that, if courts could order a funder to pay costs, regardless of the terms of the funding agreement, this would discourage litigation funding. Funders would not want to take the risk of having to pay significant costs orders even where they have not agreed to do so, and may therefore simply avoid funding litigation. This could mean that some plaintiffs without financial resources could not gather enough funds to pursue their legitimate claims.

3.57 Another possibility is that, if the court had an express power to order costs against third party litigation funders, even where the contractual agreement between the plaintiff and the funder excluded liability for costs, funders would build in the risk of having to pay an adverse costs order into their pricing.[41] Litigation funding would become more expensive and less accessible. Further, an express power of this nature would limit the extent to which both funders and consumers could decide the terms of their own litigation funding arrangements.

3.58 A preliminary submission has argued that any express power to order costs against litigation funders would be an unjustifiable singling out of litigation funding.[42]

41. *Confidential Preliminary Submission CPSC2*, 9.
42. *Confidential Preliminary Submission CPSC2*, 9.

Litigation funders are not the only stakeholders who expect to make a profit from providing their services: solicitors, barristers, forensic accountants, engineers and medical experts, for example, all charge fees for their services in court proceedings. It could therefore be said that providing an express power to order costs against litigation funders, but not other various stakeholders, would be an inconsistent position to adopt.

3.59 However, one response to that argument is that lawyers and expert witnesses are providing a fee for a professional service that is one part of the scope of their practice. They are bound by professional rules of ethics which make it clear that their prime duty is to the court. In contrast, litigation funders are set up for the express purpose of conducting and profiting from litigation. Under these circumstances, it may be argued that they ought to accept the risks of their business and that an adverse costs order should be one of those risks.

Question 3.3

(1) Should legislation be adopted to give courts the power to order costs against litigation funders?

(2) If so, should the legislation provide the circumstances under which the power may be exercised, or should the case law be allowed to identify such circumstances?

Power to order security for costs against litigation funders

3.60 If an express power to award costs against a litigation funder is created, the question that arises is whether courts should have an express statutory power to order security for costs against litigation funders.

3.61 There are a number of arguments in favour of such a power. First, a security for costs order against the litigation funder would give the defendant greater certainty at the start of the proceedings that its costs would be paid if it is successful in its defence.

3.62 Secondly, security for costs may also function as a form of consumer protection for the funded plaintiff. The security provides protection because it means funds are available to pay an adverse costs order if the case is unsuccessful so that the plaintiff is not left to deal with the adverse costs order and possibly become bankrupt or be wound up.[43] A security for costs order against the funder would be particularly useful where the funding agreement allows the funder to terminate the agreement at any time. An order for security would prevent a funder terminating a funding agreement "when the going gets tough and leaving a plaintiff exposed".[44]

43. Michael Legg et al, "Litigation Funding in Australia" [2010] *University of New South Wales Faculty of Law Research Series* 12, 23.

44. Michael Legg et al, "Litigation Funding in Australia" [2010] *University of New South Wales Faculty of Law Research Series* 12, 23.

3.63 Finally, a requirement that a funder provide security for costs may arguably improve the development of the litigation funding industry by acting to ensure that only funders of substance can support litigation.[45]

3.64 A counter-argument for a statutory power to order security for costs against litigation funders is that it would discourage litigation funding, particularly where the litigation funding agreements excludes liability for adverse costs and security for costs orders.

3.65 There is precedent for a power for courts to order security for costs against litigation funders. In the United Kingdom, the *Civil Procedure Rules 1998* (UK) r 25.14 provides:

> (1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) one or more of the conditions in paragraph (2) applies.
>
> (2) The conditions are that the person –
>
> (a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or
>
> (b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and
>
> (c) is a person against whom a costs order may be made.

Question 3.4

Should legislation be adopted giving courts the power to make security for costs against litigation funders?

Conditional costs agreements

3.66 In New South Wales, a lawyer may enter into an agreement as to costs under which payment of costs is contingent on the successful outcome of the matter in which he or she provides legal services.[46] A conditional cost agreement may provide for the payment of a premium, generally no greater than 25%, on those costs otherwise payable under the agreement only on the successful outcome of the matter.[47]

45. Michael Legg et al, "Litigation Funding in Australia" [2010] *University of New South Wales Faculty of Law Research Series* 12, 23.
46. See Chapter 1 at para 1.38–1.42 for an introduction to the types of cost agreements available in NSW.
47. *Legal Profession Act 1987* (NSW) s 186.

3.67 Where a party is represented on a conditional basis, as distinct from litigation funding, there is usually no indemnity provided for an adverse costs or security for costs order.[48]

Relevance of conditional costs agreements to security for costs applications

3.68 An issue that arises where the plaintiff's lawyer is acting on a contingency basis is whether the existence of a conditional cost agreement is relevant to an application for security for costs.

3.69 In *Del Bosco*,[49] an Associate Judge of Supreme Court ordered the plaintiff to provide security for costs on the basis that she lived outside Australia and the defendant stood in a position of vulnerability when it came the enforcing any costs order. The judge took into account the plaintiff's financial capacity and her refusal to disclose the identity of her employer.

3.70 The plaintiff appealed the order for security on the basis, among other things, that because of her lack of lack of funds, the order had the effect of stultifying her ability to pursue the proceedings. Justice Barrett rejected this argument because there was evidence that the plaintiff had a salary of about $144,000 to $184,000. The security for costs ordered at that stage was $25,000. Further Justice Barrett stated that:

> proof of lack of funds is not of itself proof that an order for security will stultify the proceedings. Stultification must be proved in its own right. In many cases, an immediate plaintiff's impecuniosity will be seen to be offset by the fact that persons of financial substance stand behind him or her, so that funds are available from the real plaintiffs.[50]

3.71 He then proceeded to discuss the plaintiff's evidence that her legal representatives had agreed to act on a contingency basis. Based on the plaintiff's income and the contingency fee arrangement with her lawyers, Justice Barrett concluded that the order for security would not stultify the proceedings.[51]

3.72 In their preliminary submissions, Maurice Blackburn and Slater & Gordon took exception to the decision in *Del Bosco.* They submitted that conditional fee arrangements improve access to justice by making the payment of legal costs conditional upon a successful outcome for plaintiffs otherwise unable to meet their own legal costs upfront but for whom legal aid is not available. Slater and Gordon asserted that: "to the extent that conditional fee arrangements are aimed at plaintiffs who are otherwise unable to meet their own legal costs up-front, it is perverse for

48 Slater & Gordon *Preliminary Submission PSC8*, 4; Maurice Blackburn Pty Ltd, *Preliminary Submission PSC5*, 7.

49 *Del Bosco v Outtrim* [2008] NSWSC 105.

50 *Del Bosco v Outtrim* [2008] NSWSC 105, [22].

51 *Del Bosco v Outtrim* [2008] NSWSC 105, [24].

the court to regard this as a factor that speaks in favour of plaintiff paying for the defendant's legal costs up-front".[52]

Question 3.5

Should the court, in determining applications for security for costs, be able to take into account the fact that the plaintiff's lawyer is acting pursuant to a conditional costs agreement?

Representative proceedings

3.73 A representative proceeding is one where one or more claimants bring a court proceeding on behalf of a group of people. Plaintiffs in representative proceedings are often assisted by litigation funding or represented by lawyers acting on a conditional or speculative fee agreement. The issues relating to these two forms of costs arrangements as discussed above are thus relevant to this section. However, there are also costs and security for costs issues that arise specifically in the context of representative proceedings. These are examined in the following paragraphs.

3.74 The UCPR had some provisions on representative proceedings.[53] These provisions have recently been superseded. The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) inserted a new Part 10 to the CPA, which contains provisions on representative proceedings in the Supreme Court. The new provisions on representative proceedings are modelled on the provisions of Part IVA of the *Federal Court of Australia Act 1976 (Cth)* ("Federal Court Act") and the rules promulgated under it.

Liability of representative plaintiffs for costs

3.75 In a representative proceeding, a "representative plaintiff" (a party or numerous parties) brings proceedings on behalf of others, the "represented claimants". The case law is clear that it is the representative plaintiff, not the group of represented claimants, who is liable for any adverse costs orders or (potentially) security for costs orders.[54]

3.76 The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) added s 181 to the CPA which provides:

> Despite section 98 [which gives the court a general discretion to order costs], in any representative proceedings, the Court may not award costs against a person on whose behalf the proceedings have been commenced (other than a representative party) except as authorised by sections 168 and 169 [which

52 Slater & Gordon, *Preliminary Submission PSC8*, 5; Maurice Blackburn Pty Ltd, *Preliminary Submission PSC5*, 6.

53. *Uniform Civil Procedure Rules 2005* (NSW) r 7.4.

54. *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021; *Price v Rhondda Urban District Council* (1923) All ER 679; *Moon v Atherton* (1972) 3 WLR 57 at 61; *Carnie v Esanda Finance Corp* (1995) 127 ALR 76, 90, 92.

> authorise the award of costs against an individual group member with respect to a claim that relates only to that member].[55]

This provision is consistent with the case law principle that it is the representative plaintiff who is liable for costs.

3.77 Section 181 of the CPA was patterned after s 43(1A) of the Federal Court Act, which is similarly worded. The rationale for s 181 of the CPA is likely to be similar to s 43(1A) of the Federal Court Act, given the similarity in their terms. In *Woodhouse v McPhee* ("*Woodhouse*"), Justice Merkel said that the purpose of the immunity from adverse costs orders conferred by s 43 on represented claimants is linked to the aims of the rules on representative proceedings under Part IVA of the Federal Court Act. One of those aims is to give access to the courts to those in the community who have been effectively denied justice because of the high cost of litigation. The rules provide "a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions".[56] The rational for s 181 of the CPA is therefore to facilitate access to justice by encouraging the represented plaintiffs to receive the benefit of any legal remedies that result from the case.

Liability of representative plaintiffs for security for costs

3.78 The new (as well as the old) provisions on representative proceedings before the Supreme Court do not contain provisions on whether the court may order security for costs against representative plaintiffs. The question that arises is whether courts have power to order security for costs against representative plaintiffs.

3.79 In relation to representative proceedings before the Federal Court, there was debate on whether courts may order security for costs against the representative plaintiff. In *Woodhouse*[57] Justice Merkel commented that it could be argued that it is incongruous to confer an immunity for costs against represented claimants:

> It would be incongruous and anomalous for Parliament specially to confer a direct costs immunity under s 43(1A), *inter alia* to afford represented persons greater access to justice, and then for the courts indirectly to remove the effect of that immunity by making orders for security for costs on the basis that the applicant is bringing the proceedings for the benefit of others who ought to bear their share of the potential costs liability to other parties.[58]

3.80 Nevertheless, Justice Merkel held that the represented claimants' costs immunity did not preclude the court from taking into account the plaintiff's representative status as a factor relevant to ordering security. In *Bray v F Hoffmann-La Roche Ltd* ("*Bray*") the full Federal Court held that ordering security against representative plaintiffs was inconsistent with the immunity conferred on represented claimants by s 43(1A).[59]

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55. *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), schedule 6.1, s 181.
56. See the discussion in *Woodhouse v McPhee* (1997) 80 FCR 529, 532.
57. *Woodhouse v McPhee* (1997) FCR 529, 532.
58. *Woodhouse v McPhee* (1997) FCR 529, 532.
59 *Bray v F Hoffmann-La Roche Ltd* (2003) 130 FCR 317.

3.81 Considering that s 181 of the CPA was patterned after s 43(1A) of the *Federal Court Act 197*6 (Cth), the same question could arise in New South Wales on whether the Supreme Court may order security for costs against representative plaintiffs. The question that arises is whether it is better to clarify this in legislation or whether case law should be allowed to develop a principle on this topic.

Arguments for a power to order security

3.82 The main argument for allowing courts to order security for costs against representative plaintiffs focuses on the first consideration: that it is necessary to protect defendants in representative proceedings. In many cases, a defendant will apply for a security order against the representative plaintiff on the grounds that the plaintiff will be unable to pay the defendant's costs if successful.[60] Permitting courts to order security in these situations prevents what has been referred to as the "palpably unfair" situation of a successful defendant having its "entitlement to recover costs thwarted by the fact that the representative party in class proceedings is impecunious".[61]

3.83 Another related reason why courts should be allowed to order security against representative plaintiffs is to protect the defendant in situations where a "person of straw" has been selected as the representative plaintiff so that the represented claimants are immunised from financial burdens.[62] It would be unfair for represented claimants who have substantial financial resources to hide behind their immunity against costs orders, and hence deprive the defendant of an award of costs, while using an impecunious representative to litigate their claims.

Argument against a power to order security

3.84 Despite the above reasons in favour of providing courts with power to order security against representative plaintiffs, there is an important argument suggesting that courts should not have such a power. The argument is that an order for security for costs against the representative plaintiff is incongruous with the immunity from costs conferred on represented claimants by s 181 of the CPA.

3.85 The incongruity is said to arise because there is a risk that a security order against the representative plaintiff, especially where that plaintiff has limited financial resources, will force represented claimants to share the financial burdens imposed by such an order.[63] Where security is ordered against an impecunious representative plaintiff, the represented claimants may need to contribute their own funds to satisfy the security if they wish the proceedings to continue. This arguably circumvents the immunity from costs that represented claimants are supposed to enjoy.

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60. For example, this was the situation in *Ryan v Great Lakes Council* (1998) 154 ALR 584; *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004.
61. D M Ryan, "The Development of Representative Proceedings in the Federal Court" (1993) 9 *Australian Bar Review* 131, 141–142.
62. See *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [68]; *Milfull v Terranora Lakes Country Club Limited* [2004] FCA 1637, [12].
63. V Morabito, "Security for Costs and Class Actions in the Federal Court of Australia" (2001) 20 *CJQ* 225, 247.

Question 3.6

(1) Should courts have power to order security for costs against representative plaintiffs?

(2) If so, should such power be expressed in legislation or should it be left for the case law to develop?

Plaintiffs supported by legal aid

Liability of legally-aided plaintiffs for security for costs

3.86 The *Legal Aid Commission Act 1979* (NSW) ("Legal Aid Commission Act") establishes the Legal Aid Commission of NSW ("Legal Aid NSW"), an independent statutory body that provides legal services to disadvantaged people.[64] A plaintiff can obtain legal aid assistance in a civil law matter if the matter comes within the Legal Aid NSW policies, satisfies the relevant merit and availability of funds tests, and the plaintiff meets the relevant means test.[65] In most civil law matters the legally assisted person is asked to pay an initial contribution towards the cost of legal services. Further, at the end of the matter, Legal Aid NSW must again consider whether the assisted person should pay a contribution.[66]

3.87 Section 42 of the Legal Aid Commission Act states that a "court or tribunal which may order the payment of costs in proceedings before it shall, where a legally assisted person is a party to any such proceedings, make an order as to costs in respect of the legally assisted person as if he or she were not a legally assisted person".[67]

3.88 Section 47(1) provides that where a court or tribunal makes a costs order against a legally assisted person, Legal Aid NSW will pay the whole of those costs and the legally assisted person will not be liable for any amount. This provision is subject to several exceptions:[68]

- Legal Aid NSW will not pay more than $5000 per party, "or such other amount as the Commission may from time to time determine".[69] Currently, Legal Aid NSW policy is to pay a maximum of $15,000.[70]
- Legal Aid NSW is not liable for costs incurred by a person during any period when he or she were not legally assisted.[71]

64. Legal Aid New South Wales, *About Us* <http://www.legalaid.nsw.gov.au>.
65. Legal Aid New South Wales, *Legal Aid NSW Policy*, [6.2].
66. *Legal Aid Commission Act 1979* (NSW) s 46; Legal Aid New South Wales, *Legal Aid NSW Policy*, [6.2.3]–[6.2.4].
67. *Legal Aid Commission Act 1979 (NSW)* s 42.
68. Legal Aid New South Wales, *Annual Report 2008–2009*, 4.
69. *Legal Aid Commission Act 1979 (NSW)* s 47(2).
70. Similarly, in a proceeding in a Federal court or tribunal, Legal Aid NSW policy guidelines dictate they will pay only up to a maximum of $15,000 in any adverse costs order: *Legal Aid Commission NSW Guidelines*, Guideline 10.2.1.
71. *Legal Aid Commission Act 1979 (NSW)* s 47(3).

- Legal Aid NSW can decline to pay all or part of the legally assisted person's costs in certain specified situations.[72]
- Legal Aid NSW may decline to pay costs where an adverse costs order is made on the basis that a legally assisted person did not accept an offer of compromise.[73]

3.89 Assistance from Legal Aid NSW does not prevent the court from making an order for security for costs against a legally assisted person. The courts have held that legal assistance may be a relevant factor in the exercise of the court's inherent and general discretion to make an order for security for costs. In *Rajski v Computer Manufacturer & Design Pty Ltd*, the Court of Appeal held that s 47(1)(b) of the Legal Aid Commission Act "cannot operate to destroy the jurisdiction or power of the Supreme Court to order security for costs."[74]

3.90 The Commission seeks submissions on whether there are problems relating to the rules and principles on security for costs as they apply to cases where the plaintiff is supported by legal aid.

Question 3.7

Does the law and practice on security for costs apply satisfactorily in the case of plaintiffs who are supported by legal aid?

Enabling Legal Aid NSW to enter into conditional and speculative fee arrangements with private lawyers

3.91 The NSW Bar Association suggested that the Commission consider whether it is desirable to amend the Legal Aid Commission Act to enable Legal Aid NSW to enter into costs agreements with private lawyers on terms analogous to a "conditional costs agreement" under s 323 of the *Legal Practitioners Act 1979* (NSW) or "speculative action" fee arrangement such as contemplated by *Clyne v NSW Bar Association*.[75]

3.92 The NSW Bar Association argued that such arrangements would provide a grant of legal aid to private lawyers that would permit them, in the event of a successful outcome, to recover a more commercial rate of remuneration on a party-party assessment.[76]

3.93 The Commission acknowledges the limited legal aid funding available for civil matters. The 2000–2010 *Annual Report* indicates that only 10.59% of Legal Aid NSW budget was spent in civil law,[77] as priority is given to criminal law matters. The NSW Bar Association's suggestion is one way of raising more funds for Legal Aid

72. See *Legal Aid Commission Act 1979 (NSW)* s 47(4).
73. *Legal Aid Commission Act 1979 (NSW)* s 47(4A).
74. *Rajski v Computer Manufacturer & Design Pty Ltd* [1983] 2 NSWLR 122, 127 (Moffitt P).
75. *Clyne v NSW Bar Association* (1960) 104 CLR 186; NSW Bar Association, *Preliminary Submission PSC10*, [22](b).
76. NSW Bar Association, *Preliminary Submission PSC10*, [17].
77. Legal Aid NSW, *Annual Report 2009-2010*, 20.

NSW, which it could then use to fund civil matters. However, the terms of reference for this project do not extend to an examination of the ways of providing more funding for Legal Aid NSW in particular, nor to the issue of funding civil matters where the litigants do not have the resources to fund litigation in general.

Lawyers acting pro bono

Pro bono costs and security for costs orders

3.94 In some situations a plaintiff may be assisted by a lawyer who is acting "pro bono", that is, providing legal assistance either for free or at a substantially reduced fee.[78] Where a plaintiff is receiving assistance under a pro bono scheme, there are potential implications for costs orders.

3.95 According to the general law "indemnity principle", the purpose of an order that one party to litigation pay the legal expenses or "costs" of another party is to provide an indemnity in relation to the whole, or usually part, of the legal obligation incurred by the other party to his or her lawyers.[79] As a result, if a successful party is under no legal obligation to pay lawyers' fees, the indemnity principle states that the successful party cannot recover costs from the opponent.[80] Successful litigants whose lawyers are acting pro bono are therefore not entitled to a costs order in their favour under general law.[81]

3.96 The National Pro Bono Resource Centre ("NPBRC") and the Public Interest Law Clearing House NSW ("PILCH") submitted that costs orders should be available where lawyers for the successful litigants are acting pro bono. They argued that in regular litigation, the potential for an adverse costs order deters unmeritorious or vexatious actions, encourages litigants to conduct their cases expediently, and encourages the litigants to settle out of court. They suggested that these benefits do not exist where lawyers for one party are acting pro bono and the opposing party is aware of such an arrangement.[82] In such situations, the opposing party is aware that they will not be liable for a costs order even if they ultimately do not win the case. The NPBRC suggested that "the pro bono litigant is in the disadvantageous position of having this vulnerability exploited",[83] and expressed concern that the indemnity principle currently operates to create an "uneven playing field":

> Under the current system a litigant who is represented pro bono may not be able to recover his costs even if his claim is successful, whilst still being liable for the other party's costs if his case is unsuccessful. The reverse is that an

78. See Chapter 1 at para 1.47–1.49 for an outline of some of the pro bono schemes currently operating in NSW.
79. *Wentworth v Rogers* [2006] NSWCA 145, [102].
80. *Wentworth v Rogers* [2006] NSWCA 145, [45], [102].
81. See generally *Wentworth v Rogers* [2006] NSWCA 145.
82. National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 8; Public Interest Law Clearing House, *Preliminary Submission PSC14*, [6.1].
83. National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 8.

> opponent of a litigant who is represented pro bono may benefit from not having to pay his opponent's costs, even if he is unsuccessful.[84]

3.97 Some statutory pro bono schemes currently do allow lawyers who are acting pro bono to recover costs from the opposing side, thus overcoming the operation of the general law indemnity principle. At the federal level, practitioners acting pro bono pursuant to both the Federal Court's legal assistance scheme and the Federal Magistrates Court's assistance scheme are entitled to recoup costs awarded from the losing party.[85] Similarly, lawyers acting under the pro bono scheme established by the UCPR Part 7, Division 9 can recover a costs order made in favour of the assisted litigant.[86]

3.98 However, as the NPBRC and PILCH both submitted, there is still inconsistency in the law with respect to costs recovery by pro bono lawyers. This is because lawyers who are acting pro bono through other non-statutory referral schemes, such as the NSW Bar Association Legal Assistance Referral Scheme and the Law Society of NSW Pro Bono Scheme, do not have this same entitlement to recover costs from the opposing side.[87] In these situations, the indemnity principle continues to operate so as to deprive pro bono lawyers of costs orders.

3.99 If the law were amended to provide that costs orders are available in cases where litigants are represented pro bono, two issues arise. First, how should the costs awarded to the pro bono litigant be used? Secondly, should courts be able to order security for costs in favour of a party whose lawyer is acting on a pro bono basis?

3.100 The pro bono costs orders in the United Kingdom may provide an answer to the first issue. Section 194 of the *Legal Services Act 2007* (UK) provides that where a party receiving pro bono representation is successful, the county court, High Court, or Court of Appeal may make "pro bono costs orders" requiring the opposing party to make a payment to a charity prescribed by the Lord Chancellor. The prescribed charity since 2008 has been the Access to Justice Foundation, which distributes funds to national pro bono organisations and strategic projects.[88] The fund helps others who need pro bono legal assistance to gain access to justice in other cases.

3.101 The NPBRC and PILCH both support a fund similar to the one in the United Kingdom.[89] The NPBRC reasoned that allowing costs to be provided to a pro bono litigation fund preserves the function of costs orders to act as a deterrent to frivolous litigation (since an unsuccessful party will still have to pay costs), while also upholding the indemnity principle by preventing a pro bono lawyer from recovering costs from the opposing side.[90]

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84. National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 8.
85. *Federal Court Rules 1979* (Cth), O 80 r 9(3)-(4); *Federal Magistrates Court Rules 2001* (Cth) r 12.07(3).
86. *Uniform Civil Procedure Rules 2005* (NSW) r 7.41(2).
87. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 9; Public Interest Law Clearing House NSW, *Preliminary Submission PSC14*, [6.1].
88. The Access to Justice Foundation <http://www.accesstojusticefoundation.org.uk/>.
89. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 9; Public Interest Law Clearing House, *Preliminary Submission PSC14,* [6.3].
90. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 9.

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?

Exemption from personal costs orders

3.102 Under s 348 of the *Legal Profession Act 2004* (NSW), a legal practitioner may be personally liable for costs if he or she provides legal services to a party "without reasonable prospects of success".[91]

3.103 Under s 99 of the CPA, a legal practitioner may be personally liable for costs if it appears to the court that costs have been incurred:

- "by the serious neglect, serious incompetence or serious misconduct of a legal practitioner", or
- "improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible".[92]

3.104 The NPRCB, PILCH and NSW Bar Association recommended that these statutory provisions allowing costs orders to be made against legal practitioners should be amended to provide an exemption to those who are acting pro bono.[93]

3.105 The main argument for such an amendment is that potential personal costs orders against lawyers who act pro bono may discourage lawyers from taking up pro bono work. The deterrent effect of personal costs orders would likely be more pronounced where lawyers are considering whether or not to undertake test cases pro bono, since often the prospects of success in such cases can be difficult to ascertain.[94] These provisions therefore potentially reduce access to justice "by making pro bono solicitors subject to and fearful of personal liability where they are

91. *Legal Profession Act 2004* (NSW) s 348(1).

92. *Civil Procedure Act 2005* (NSW) s 99(1).

93. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 10; Public Interest Law Clearing House, *Preliminary Submission PSC14,* [6.2]; NSW Bar Association, *Preliminary Submission PSC10*, [22].

93. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 10; Public Interest Law Clearing House, *Preliminary Submission PSC14,* [6.2]; NSW Bar Association, *Preliminary Submission PSC10*, [15](h).

94. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 10; Public Interest Law Clearing House, *Preliminary Submission PSC14,* [6.2]; NSW Bar Association, *Preliminary Submission PSC10,* [15](h).

94. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 10; Public Interest Law Clearing House, *Preliminary Submission PSC14,* [6.2]; NSW Bar Association, *Preliminary Submission PSC 10*, [15](h).

not receiving any financial gain".[95] This may make it more difficult for litigants to obtain legal representation and pursue legitimate claims.

3.106 There are, however, arguments against the recommended exemption. It may encourage pro bono lawyers to conduct frivolous or unnecessary litigation. It would remove a powerful deterrent to pro bono lawyers providing legal services with serious neglect, incompetence or misconduct.

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?

95. Public Interest Law Clearing House, *Preliminary Submission PSC14,* [6.2].

4. Public interest and protective costs orders

Introduction

4.1 This chapter examines costs and security for costs in public interest proceedings, which are proceedings that raise issues affecting a significant sector of the community, or involve questions of law of significant interest to the community that need clarification.

4.2 Costs and security for costs orders are significant issues for the litigants involved in these proceedings. It is common for those who bring or are intending to bring public interest proceedings to be deterred from doing so as they may not have sufficient resources to mount and maintain a court case. If public interest proceedings are commenced, the impecuniosity of plaintiffs may be a concern for defendants who may be left with the costs of defending the court case if the plaintiff is unable to pay an adverse costs order.

4.3 The first part of the chapter examines the definition of public interest proceedings. The second part of the chapter examines the current law on costs and security for costs in public interest proceedings.

4.4 The third part of the chapter considers whether there is a need for a new law giving courts power to make orders protecting public interest litigants from adverse costs in appropriate cases. The Australian Law Reform Commission ("ALRC") has considered this issue previously and recommended the adoption of legislation giving the courts the power to make a variety of public interest costs orders, at any

stage of proceedings.[1] This chapter uses the ALRC recommendations on public interest costs orders as the basis of discussion.

4.5 The fourth part of the chapter examines orders that a court may make under r 42.4(1) of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") which, as mentioned earlier, gives courts power to specify the maximum costs that may be recovered by one party from another, also known as protective costs orders.

4.6 The final part of this chapter raises the concept of a public interest litigation fund as a means of dealing with the impact of adverse costs on public interest litigants, and upon defendants when plaintiffs are unable to pay costs ordered against them.

Public interest proceedings

What are public interest proceedings?

4.7 There is currently no clear legal definition of public interest proceedings, and one of the issues canvassed below is how to define or characterise this concept for the purposes of determining when public interest costs orders are appropriate.[2] However, this term is generally used to refer to a case that:

- raises issues affecting a significant sector of the community,[3] or
- is a "test case" in that it is "a case where the parties seek primarily to settle a point of law, and where the impact of that rule on those parties is of secondary importance to the settlement of the law itself".[4]

Raises issues affecting a significant sector of the community

4.8 In the case of *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd Limited*[5] a group of residents challenged the validity of a development consent, pursuant to the *Environmental Planning and Assessment Act* (NSW). The challenge was dismissed, but the association submitted that no costs order be made against it. In making his decision, Justice Stein noted that:

> The broad public interest in the proposal is demonstrated by the number of submissions received by the Council…Not only were the objectors numerous but they also included a number of institutions…A number of Council and public meetings were held in the lead up to the Council's decision.[6]

His Honour concluded that the challenge by the Association was:

1. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) ch 13.
2. See paras 4.41–4.52.
3. *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214.
4. *Vriend v Alberta* (1996) 141 DLR (4th) 44, 53 (Hunt JA).
5. (1992) 75 LGRA 214.
6. *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214, 216.

> representing and expressing far wider objections than the narrow private amenity of residents living in close proximity to the proposal. A wider public purpose was served by the litigation than solely that of some of the members of the applicant.[7]

Test case

4.9 One example of a case that provided legal clarification is *Sharples v Minister for Local Government*.[8] At first instance in the Land and Environment Court, the plaintiff argued unsuccessfully that his local council had misleadingly understated the effect of a proposed rate increase to his community.[9] However, the court held that, in relation to the first limb of the plaintiff's argument, "the raising of novel legal issues of general importance could be a sufficient reason for not ordering costs against an unsuccessful applicant under the general law, even apart from r 4.2(1)."[10] Those novel legal issues involved interpretation of s 508A of the *Local Government Act 1993,* to clarify the effect of a local government misleading ratepayers.[11]

The current law

Legislation on costs and security for costs

4.10 Public interest proceedings are subject to the same rules on costs and security for costs that apply to other civil proceedings. Section 98 of the *Civil Procedure Act 2005* (NSW) provides that "[s]ubject to the rules of court", "costs are in the discretion of the court" and "the court has full power to determine by whom, to whom and to what extent costs are to be paid."[12] Rule 42.1 of the UCPR states the general rule as to costs,[13] and the rules on security for costs are located in UCPR r 42.21.[14]

4.11 There are two rules of court that allow some courts to depart from the general rule that costs follow the event. However, they have some limitations.

Land and Environment Court Rules 2007 (NSW) r 4.2

4.12 Rule 4.2 of the *Land and Environment Court Rules 2007* (NSW)[15] provides that:

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7. *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214, 216.
8. *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62. This decision was later upheld in *Sharples v Minister for Local Government* [2010] NSWCA 36.
9. *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62, [8].
10. *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62, [23].
11. *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62, [21].
12. *Civil Procedure Act 2005* (NSW) s 98(1)(a)–(b).
13. *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.
14. *Uniform Civil Procedure Rules 2005* (NSW) r 42.21. See para 2.3.
15. This rule prevails over the UCPR to the extent of any inconsistency between them: *Civil Procedure Act 2005* (NSW) s 11; *Uniform Civil Procedure Rules 2005* (NSW) r 1.7, sch 2: see

4.2 Proceedings brought in the public interest

(1) The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest.

(2) The Court may decide not to make an order requiring an applicant in any proceedings to give security for the respondent's costs if it is satisfied that the proceedings have been brought in the public interest.

(3) In any proceedings on an application for an interlocutory injunction or interlocutory order, the Court may decide not to require the applicant to give any undertaking as to damages in relation to:

(a) the injunction or order sought by the applicant, or

(b) an undertaking offered by the respondent in response to the application,

if it is satisfied that the proceedings have been brought in the public interest.

4.13 The Land and Environment Court has developed a three-step process to be used in deciding whether to make no order for costs against an unsuccessful litigant.[16] That process involves asking:

(i) First, can the litigation be characterised as having been brought in the public interest?

(ii) Secondly, if so, is there something more than the mere characterisation of the litigation as having been brought in the public interest?

(iii) Thirdly, are there any countervailing circumstances that speak against departure from the usual costs rule? [17]

4.14 One case that applied this three-step process, *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd,*[18] involved a group challenging the validity of a mining authority issued by the Minister for Mineral Resources to a mining company. This case comprehensively considered each of these three steps. Chief Justice Preston decided that the proceedings could be characterised as being brought in the public interest because, as required under the first step, the applicants sought to uphold public law obligations.[19] However, there were no additional factors of the type referred to in the second step: the litigation did not raise any novel issues of general importance, and it did not directly concern the environment or affect the general community.[20]

Hastings Point Progress Association Inc v Tweed Shire Council [2010] NSWCA 39, [11], [5] (Basten JA); *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164, [4] (Biscoe J).

16. See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, [13]; *Gray v Macquarie Generation (No 2)* [2010] NSWLEC 82, [12] (Pain J); *Hill Top Residents Action Group Inc v Minister for Planning (No 3)* [2010] NSWLEC 155, [39]; *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164, [5]; *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231, [171].
17. *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231, [173].
18. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59.
19. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, [81].
20. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, [84]–[88].

4.15 Finally, the third step demonstrated that there were countervailing factors in that the landowners behind the action group had significant financial interests in the litigation, and the issues raised were quite narrow.[21] Thus, the applicant was ordered to pay the costs of the respondents.

4.16 Rule 4.2 is limited in a number of ways. First, this rule only applies to matters heard in the Land and Environment Court whereas public interest proceedings may arise in a wide range of legal areas. Secondly, the *Land and Environment Court Rules* do not define public interest litigation. Thirdly, the range of orders that can be made under this rule is limited, as the court "may decide not to make an order" as to costs or security for costs, instead of being able to negotiate a fair payment based upon the individual circumstances of the parties.[22]

UCPR r 42.4(1)

4.17 UCPR r 42.4(1) provides that "the court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another".[23]

4.18 This rule was applied for the first time in the recent case of *Blue Mountains Conservation Society v Delta Electricity*, where the Land and Environment Court ordered that the maximum costs that could be recovered by one party from another party would be limited to $20,000, despite the fact that the defendant's actual costs were already $97,000 at that stage of the proceedings.[24] The plaintiff in that case, the Blue Mountains Conservation Society ("BMCS"), was the peak environmental group in the Blue Mountains region, aimed at promoting ecological sustainability.[25] The BMCS had sought orders that the defendant, as a power station operator, stop polluting the Cox's River and mitigate the harm caused to that river.[26]

4.19 In this case, Justice Pain emphasised that "the power in r 42.4 is directed to the need to ensure that costs are proportionate to the issues…It is not a tool in the armoury of well intentioned public litigants."[27] Her Honour did, however, consider the public interest to be one of a number of relevant considerations. She concluded that the objects of the BMCS, the broad standing provisions relevant to the case and the lack of action by government authorities to resolve the matter contributed to a finding that this case was in the public interest.[28]

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21. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59 [82]–[92].
22. In practice, this rule has been applied by the courts with some flexibility, with costs sometimes ordered in accordance with the proportion of the proceedings that could be characterised as public interest. See, eg, *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164; *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62.
23. Order 62A r 1 of the *Federal Court Rules* effectively mirrors the UCPR. It states: "The Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on party and party basis." The case of *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 applied this rule.
24. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150.
25. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [7].
26. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [1]–[2].
27. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [32].
28. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [59]–[62].

4.20 The other factors considered by the court in consideration of costs included the overall requirement of justice contained within the *Civil Procedure Act 2005* (NSW) ("CPA"),[29] the timing of the application; whether the claim appeared arguable; any private interest of the plaintiff; the impact of not awarding a protective costs order upon proceedings; whether counsel was acting pro bono; the parties' financial means; and whether a protective costs order would reward inefficient litigation.[30] Justice Pain's decision was confirmed by a majority of two to one by the Court of Appeal.[31]

4.21 Rule 42.4(1) is limited in a number of ways. The protection provided by this rule is limited to capping the costs each party may recover from the other. It does not provide for other costs orders, including that the plaintiff will not be liable for the other party's costs.

4.22 Furthermore, this rule only refers to costs, and not to security for costs. Neither does it specifically refer to public interest litigation. It is a broad discretionary power, the purpose of which has been described as the curbing of disproportionate expenditure by parties.[32] The structure and context of the UCPR "provide no assistance in considering the functions and scope of this provision."[33] As such, public interest considerations will only ever be one of multiple factors to be considered by the court.

Case law principles

Costs

4.23 Courts have repeatedly rejected the notion that public interest litigants are subject to costs regimes any different to other litigants.[34] Courts have emphasised that public interest litigants are not granted a "free kick" in relation to costs.[35] The general rule on costs, that costs follow the event, applies to public interest proceedings. In the recent case of *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd*,[36] the Land and Environment Court held that "the mere characterisation of the litigation as

29. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [55].
30. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [56]–[68].
31. Justice Beazley, in dissent, did not disagree with the finding of public interest. Rather, she would have upheld the appeal by Delta Electricity on the grounds that Justice Pain had not adequately considered the question of proportionality between the costs orders and the costs of the other party: *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [163]–[166].
32. *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [134], [138] (Basten JA).
33. *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [181] (Beazley JA, in dissent).
34. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 263, [9.2].
35. *Oshlack v Richmond River Council* (1998) 193 CLR 72, [123]. See also *Re Southbourne Sheet Metal Co Ltd* [1993] 1 WLR 244, 254 (Beldam J); *South Melbourne City Council v Hallam [No 2]* (1994) 83 LGERA 307, 308–311 (Tadgell J); *Hudson v Entsch* [2005] FCA 557, [6].
36. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59.

having been bought in the public interest"[37] did not suffice to displace the usual order as to costs.

4.24 There are cases where courts depart from the general rule on costs in public interest proceedings. These cases occur infrequently. Further, courts emphasise that the public interest nature of issues subject of the proceedings is only one factor that courts consider in their decision on whether or not to depart from the general rule. Courts consider other factors such as the strength of the plaintiff's case.

4.25 The case of *Oshlack v Richmond River Council*[38] illustrates one example of the court departing from the general rule on costs. The plaintiff in that case brought proceedings before the Land and Environment Court against the local council and a land developer with the object of disputing the consent granted by the council to a proposed development. The plaintiff brought the proceedings to preserve the habitat of endangered fauna on and around the proposed development site. The Land and Environment Court dismissed the action. Justice Stein made no order as to the costs of the proceedings on the basis that special circumstances justified a departure from the usual order as to costs. On appeal, the Court of Appeal ordered the plaintiff to pay the local council's costs at first instance and on appeal. However, the High Court (by a 3:2 majority) subsequently upheld the Land and Environment Court's original decision as to costs.

4.26 Justices Gaudron and Gummow, who were in the majority, noted with approval the following factors which Justice Stein took into account to justify not making a costs order against the plaintiff:

- The plaintiff's pursuit of the litigation was motivated by his desire to ensure obedience to environmental law and to preserve the habitat of endangered animals in and around the site, and he had nothing to gain from the litigation except the fulfilment of that motive.
- Many members of the public shared the position of the plaintiff as to the preservation of the natural features, including the flora and fauna, in the development site; in that sense there was a public interest in the outcome of the litigation.
- The basis of the challenge had raised "significant issues" regarding the interpretation and future administration of statutory provisions relating to the protection of endangered fauna, and the ambit and future administration of the subject development consent. These issues had implications for the council, the developer and the public.[39]

Security for costs

4.27 As with orders as to costs, the courts have been reluctant to deny applications for security for costs based upon public interest considerations. This is illustrated by the case of *Sales-Cini v Wyong City Council.*[40]

37. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (*No 3)* [2010] NSWLEC 59, [85].
38. (1998) 193 CLR 72.
39. (1998) 193 CLR 72, 80 [20].
40. [2009] NSWLEC 201.

4.28 In that case, the defendants applied for security for costs from Mr Sales-Cini, who was requesting judicial review of a development consent. Justice Pepper accepted that the "plaintiff is raising matters that involve the public interest", as the case was brought to protect Aboriginal property and heritage.[41] However, her Honour said that "of itself, this is not enough" and that she did not accept that the litigation could properly be characterised as public interest sufficient to displace a security for costs order.[42] This was because the case had neither raised important questions of statutory construction, nor had it broken new ground on a matter of legal principle.[43]

4.29 There are some cases (discussed below) where courts have decided not to make a security for costs order after taking into account the public interest nature of the issues subject of the proceedings and other factors. Courts have emphasised that the public interest nature of the issues subject of the proceedings does not by itself justify a decision not to order security. Courts consider other factors such as the strength of the plaintiff's case,[44] the timing of the application for security for costs,[45] whether the security sought is proportional to the issues at stake,[46] and whether an order for security would force the plaintiff to abandon the proceedings.[47]

4.30 *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc*[48] provides an example of a case where the court decided not to order security after taking into account the public interest nature of the proceedings and other factors. In that case, the Citizens Airport Environment Association ("Association") brought proceedings challenging the dredging activities being undertaken by the Maritime Services Board of New South Wales ("Board") in Botany Bay as part of construction works at Sydney Airport. President Kirby held that the Board's security for costs application should be refused on the basis that no special circumstances had been shown and even if such special circumstances were shown, the motion should be refused in the exercise of the Court's discretion.

4.31 In reaching his decision, President Kirby took into account the public interest nature of the proceeding. He said that the case at first instance came before the Land and Environment Court pursuant to widened standing rights[49] that were intended to complement the objectives of the *Environmental Planning and Assessment Act 1979* (NSW), which underscore the high social importance of protecting the environment by the processes of law. He also emphasised the number of people present at public meetings on this issue.

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41. *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [47], [60].
42. *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [60].
43. *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [61].
44. *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 155 ALR 1, 10–11.
45. *Smail v Burton* [1975] VR 776, 778 (Gillard J).
46. *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc* [1992] NSWCA (23 December 1992) 9 (Kirby P).
47. The principle of access to justice trumps mere poverty: see *Sharples v Minister for Local Government* [2008] NSWLEC 67, [8].
48. *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc* [1992] NSWCA (23 December 1992) 9 (Kirby P).
49. *Environmental Planning and Assessment Act 1979* (NSW) s 123.

4.32 President Kirby considered the following other factors in denying the security for costs application:

- While the Association had little funds, its impecuniosity did not necessarily establish special circumstances for purposes of the relevant court rule.
- The proportion of the costs (estimated at $11,000) was "miniscule" compared to the issues at stake (the total costs of the construction of the runway for the Sydney Airport).
- The fact that there is a right of appeal to the Court of Appeal indicated the "high importance, which Parliament attached to the availability of a second consideration of this kind".
- While the case by the Association had weaknesses, it was not hopeless.

4.33 Another illustrative case is *Smail v Burton*,[50] where the liquidator of a company took out summons pursuant to s 367B of the *Companies Act 1961* (Vic) with the purpose of getting an order against Mr Burton, a former company director, to repay specified company moneys allegedly misapplied by Mr Burton, and ordering him to pay damages in respect of his alleged misfeasance.

4.34 The Court refused the application for security after taking into account that the case raised "important matters of public interest for discussion," particularly in relation to provisions regarding the liability of a director to replace lost moneys.[51] The Court also took account of the inordinate delay in the application for security, saying that it would be unjust to permit a respondent who stood by and allowed the work relating to the appeal to be done to come to court and ask for security after such expenses had been incurred.[52]

Public interest costs orders

4.35 Some of the preliminary submissions to this inquiry have supported the adoption of new legislation giving courts power to make public interest costs orders.[53] It could be argued that a new law is needed to standardise the practice of courts in relation to costs and security for costs in public interest proceedings. It is also arguable that there is already an existing, albeit limited, practice of courts making "public interest costs orders".

4.36 The case law allows courts to decline to order costs against the unsuccessful plaintiff of public interest proceedings, provided other factors are present. The Land and Environment Court has a rule of court that allows it to decide not to make an order for the payment of costs against an unsuccessful applicant (or not to order

50. *Smail v Burton* [1975] VR 776, 778 (Gillard J).
51. *Smail v Burton* [1975] VR 776, 778–779 (Gillard J), 780 (Norris J).
52. *Smail v Burton* [1975] VR 777, 779 (Gillard J).
53. Public Interest Advocacy Centre, *Preliminary Submission PSC12,* 4–7; Environmental Defender's Office NSW, *Preliminary Submission PSC9,* 7-11; NSW Land and Environment Court, *Preliminary Submission PSC16*, 1; Public Interest Law Clearing House, *Preliminary Submission PSC14*, 8 [5.4]–[5.6]; National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 12 [6.3].

security for costs) in any proceedings if it is satisfied that the proceedings have been brought in the public interest. The question that arises is whether this power should be extended to other courts such as the Supreme Court, District Court and the Local Court.

4.37 A further question is whether there is a need to change the procedure by allowing the determination of liability for costs orders at the early stages of proceedings. Under the current procedure, orders for liability for costs are made at the end of the proceedings. This means there is uncertainty for both plaintiffs and defendants in relation to the award of costs since they will not know whether or not the court would follow the general rule on costs until the proceedings are finalised.

4.38 The law could be amended to allow such orders to be made at any time during proceedings. An order made at the early stages of the proceedings would give certainty to the parties about their liabilities for adverse costs and security for costs orders. The main argument against such amendment is that the current law is adequate. The case law allows courts to depart from the general rule on costs in cases involving public interest issues on a case-by-case basis. Instituting new procedures for public interest costs orders may add another time consuming and expensive interlocutory procedure. It would also be difficult to determine at the early stages of the proceedings whether the issues involved are in the public interest.

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?

4.39 The Australian Law Reform Commission ("ALRC") considered this issue in its 1995 report titled *Costs Shifting – Who Pays for Litigation* where it recommended the adoption of legislation giving the courts the power to make public interest costs orders. The ALRC recommended that through a public interest costs order, a court may order that the party applying for the public interest costs order shall:[54]

- not be liable for the other party's costs;
- only be liable to pay a specified proportion of the other party's costs; or
- be able to recover all or part of his or her costs from the other party.

The ALRC also recommended that a court may make a public interest costs order at any stage of the proceedings.

4.40 Given the comprehensive way in which the ALRC examined the problem of costs in public interest proceedings, and the endorsement of its recommendations by other law reform bodies,[55] as well as by some preliminary submissions we received,[56] the ALRC recommendations are used below as the basis of discussion.

54. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) ch 13.
55. Rt Hon Lord Gill, *Report of the Scottish Civil Courts Review* (2009), Chapter 12; Senate Legal and Constitutional References Committee, Parliament of Australia, *Access to Justice* (2009).

Definition

4.41 There is currently no clear definition of public interest litigation available. If new legislation were adopted giving the courts the power to make public interest costs orders, one question for consideration is whether the legislation should define public interest proceedings, and if so, what that definition should be.

4.42 Of the preliminary submissions received, Slater & Gordon and the National Pro Bono Resource Centre both broadly supported criteria that assisted courts in determining whether proceedings were in the public interest.[57] The NSW Young Lawyers Environmental Law Committee, The Public Interest Law Clearing House ("PILCH") and the Environmental Defender's Office ("EDO") advocated a definition of the public interest.[58]

4.43 Case law has grouped public interest litigation in two categories: cases that raise issues affecting a significant sector of the community, and test cases that settle important points of law.[59] However, there is no settled definition of public interest litigation at case law. For instance, in *Oshlack v Richmond River Council*[60] the Court said that the term public interest litigation was "nebulous",[61] and "inherently imprecise."[62]

4.44 There is also currently no statutory definition of public interest proceedings. Although there are a number of provisions that do mention the public interest, these are very context specific and do not assist the court in characterising proceedings as public interest. For instance, the *Payment Systems (Regulation) Act 1998* (Cth) requires the Reserve Bank to have regard to the desirability of payment systems being financially safe, efficient and competitive when determining whether particular actions are in the public interest.[63]

4.45 In light of these difficulties in defining public interest litigation, the ALRC has developed a definition, which has the support of the Public Interest Advocacy Centre ("PIAC"):[64]

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56. Public Interest Advocacy Centre, *Preliminary Submission PSC12,* 4–7; Environmental Defenders' Office NSW, *Preliminary Submission PSC9*, 7–11; NSW Land and Environment Court, *Preliminary Submission PSC16*; Public Interest Law Clearing House, *Preliminary Submission PSC14,* 8 [5.4]–[5.6]; National Pro Bono Centre, *Preliminary Submission PSC6,* 12 [6.3].
57. Slater & Gordon, *Preliminary Submission PSC8,* 6; National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 12 [6.3].
58. NSW Young Lawyers, Environmental Law Committee, *Preliminary Submission PSC11*, 5; Public Interest Law Clearing House, *Preliminary Submission PSC14,* 5; Environmental Defender's Office NSW, *Preliminary Submission PSC9,* 9.
59. See para 4.7–4.9.
60. *Oshlack v Richmond River Council* (1998) CLR 72.
61. *Oshlack v Richmond River Council* (1998) CLR 72, [30] (Gaudron and Gummow JJ).
62. *Oshlack v Richmond River Council* (1998) CLR 72, [71] (McHugh J).
63. *Payment Systems (Regulation Act) 1998* (Cth) s 8(a)(i)–(iii). See also the *Corporations Act 2001* (Cth) s 1317DAA in conjunction with *Australian Securities and Investment Commission Act 2001* (Cth) s 50.
64. Public Interest Advocacy Centre, *Preliminary Submission PSC12,* 5.

Recommendation 45 — public interest costs order

A court or tribunal may, upon the application of a party, make a PICO 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 PICO notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter. [65]

4.46 The ALRC's preference that a public interest costs order could be made notwithstanding a personal interest would clarify the current law in this area. At times, it has been held that proceedings could not be characterised as pursued purely in the public interest because of private financial interests.[66] At other times, personal interests have been ruled to be irrelevant so long as there was also a "wider public purpose" being served.[67]

4.47 It may be undesirable for a definition to specify that public interest litigation will "reduce the need for further litigation" as per the ALRC definition, as it may be difficult for courts to determine in advance the impact that any one case will have upon future cases. An alternative might be to require that the proceedings raise novel and important questions of law. [68]

4.48 Legal Aid NSW suggests some guiding principles about the meaning of the public interest.[69] These are that:

- It is something of serious concern common to the public at large or a significant section of the public, such as a disadvantaged or marginalised group.
- It must amount to more than a private right or individual interest, although the two may coincide.
- It must amount to more than something merely "of interest to the public", although again, the two may coincide.
- There may be competing public interests in any one case that have to be weighed against each other.[70]

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65. Australian Law Reform Commission*, Costs Shifting — Who Pays for Litigation*, Report 75 (1995) [13.16].
66. *Qantas Airways Ltd v Cameron (No 3)* (1996) 68 FCR 387 in G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 269 [9.13].
67. *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214.
68. *Ruddock v Vadarlis (No 2)* [2001] FCA 1865, [28].
69. Legal Aid NSW also produces guidelines that specifically assess whether environmental matters and human rights matters are in the public interest. See Legal Aid NSW <http://www.legalaid.nsw.gov.au>.
70. Legal Aid NSW <http://www.legalaid.nsw.gov.au>.

4.49 These guidelines are similar to those of the ALRC in that they require the public interest to concern a significant section of the public or a group of people.[71]

4.50 The Commonwealth Public Interest and Test Case Scheme is run through the Commonwealth Attorney-General's Department. The scheme provides funding assistance in certain cases involving questions that arise under a law of the Commonwealth which, in the opinion of the federal Attorney-General, "are of public importance either because they raise matters in the public interest or the questions are in the nature of a test case".[72]

4.51 The guidelines for the scheme define public interest cases as "those involving questions arising under a law of the Commonwealth the resolution of which by the courts is, in the opinion of the Attorney-General, of public importance". Test cases "are those brought for the purpose of resolving an important question arising under a law of the Commonwealth that, in the opinion of the Attorney-General, affects the rights of a section of the public which is, or a group of persons who are, for the most part, socially or economically disadvantaged."[73]

4.52 The scheme's definition of public interest cases as of "public importance" does not provide much precision. However, the definition of test cases encompasses both areas of law mentioned earlier,[74] including that the issues involved affect a significant section of the community or that a question of law is clarified.

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?

Timing of public interest costs orders

4.53 The prompt resolution of costs orders in public interest proceedings would have the benefit of allowing litigants to decide early whether or not to pursue a case, bringing weaker cases to an early conclusion and resulting in reduced costs overall for both parties.

4.54 PILCH and PIAC both supported the early resolution of costs orders. PIAC also supported later applications for public interest costs orders on the basis that the public interest in a matter might become apparent some way into proceedings.[75]

71. While there is no specific reference to test cases in this definition, this may be because Legal Aid uses the definition of test cases used by the Commonwealth Public Interest and Test Cases Scheme: Legal Aid NSW <http://www.legalaid.nsw.gov.au>.
72. Commonwealth Attorney-General's Department, *Guidelines for the Provision of Assistance by the Commonwealth for Legal and Related Expenses under the Commonwealth Public Interest Test Cases Scheme* (1996) [4.2].
73. Commonwealth Attorney-General's Department, *Guidelines for the Provision of Assistance by the Commonwealth for Legal and Related Expenses under the Commonwealth Public Interest Test Cases Scheme* (1996) [4.3].
74. See para 4.7–4.9.
75. Public Interest Law Clearing House, *Preliminary Submission PSC14*, 6 [4.6]; Public Interest Advocacy Centre, *Preliminary Submission PSC12*, 7.

4.55 There may be difficulties for a court in making a public interest costs orders too early in proceedings as usually, costs orders are made at the end of proceedings once the court has all the information before it. The ALRC recognised that early resolution of public interest costs orders might actually lead to substantial disputes between parties.[76]

4.56 ALRC Recommendation 49, which is quoted below, is a compromise between these two views as it provides for flexibility and gives the court the power to make orders at any time. It may also be beneficial for the court to have their power to vary this order clearly enunciated. Such a provision might be useful if new facts came to light or if the behaviour of the parties changed, as per the current r 42.4(4) in the UCPR.

Recommendation 49 — timing of a public interest costs orders

The court or tribunal may make a PICO at any stage of the proceedings including at the start of the proceedings.

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?

Discretionary factors

4.57 There are a number of factors that a court could take into account in exercising its discretion to make a public interest costs order. ALRC Recommendation 47, (paragraph 1) contains one possible list of factors. PILCH and PIAC supported this recommendation.[77]

Recommendation 47 — terms of a public interest costs order

If the court or tribunal is satisfied that there are grounds for it to make a PICO, it may make such orders as to costs as it considers appropriate having regard to

- the resources of the parties
- the likely cost of the proceedings to each party
- the ability of each party to present his or her case properly or to negotiate a fair settlement
- the extent of any private or commercial interest each party may have in the litigation.

4.58 The ALRC placed particular emphasis upon the resources of the parties, stating that:

76. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) [13.27].
77. Public Interest Law Clearing House, *Preliminary Submission PSC14,* 6 [4.5]; Public Interest Advocacy Centre, *Preliminary Submission PSC12*, 6.

> public interest cost orders should reflect, as far as possible, the extent to which a party could satisfy an adverse costs order without such an order affecting the party's ability to pursue the litigation. The extent to which a party can pay an adverse costs order is affected by such mechanisms as legal aid, insurance and tax deductibility. Without this information a court would find it difficult to determine an appropriate cap or other order.[78]

4.59 This emphasis was reflected in ALRC Recommendation 48:

> **Recommendation 48 — determining the resources of the parties**
>
> When considering the resources of the parties the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.[79]

4.60 There are, however, other factors that may be relevant in the consideration of public interest costs orders. These include:

- Legislative intent, including objects clauses and broad standing entitlements.[80]
- The proportion of costs compared to the issues at stake.[81]
- The strength of the case.[82]
- Whether the party requesting security for costs delayed in lodging their application, allowing the other party to expend both time and money in the meantime.[83]
- Any effect upon marginalised or vulnerable people.
- Whether national security is at issue.[84]
- The ability of proceedings to continue if public interest costs order is not made.[85]
- Whether legal representation is pro bono.[86]

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78. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) [13.24].
79. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) Recommendation 45. See also *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [69]–[71]; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 [61].
80. For example, s 52 of the *Trade Practices Act 1974* (Cth) is evidence of a policy that, in prohibiting misleading and deceptive conduct, is in the public interest. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [29.114].
81. *Maritime Services Board of NSW v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107; *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, 67.
82. *Maritime Services Board of NSW v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.
83. *Smail v Burton* [1975] VR 776, 779 (Gillard J).
84. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) [13.2].
85. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [64].
86. The NPBRC argue that currently, costs exposure is a deterrent to *pro bono* participation. See National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 7 [5.2].

Question 4.4

(1) Should the legislation giving courts power to make public interest costs orders contain a list of discretionary factors that courts may take into account when determining whether to make a public interest costs orders?

(2) If so, what should these factors be?

Types of orders

4.61 A variety of orders as to costs are currently made by the courts in public interest proceedings. For instance, there have been public interest cases in which each party has paid their own costs,[87] or been liable to pay a specific proportion of costs.[88] The option of the losing party being able to recover their costs from the opposing party if they were litigating in the public interest is currently available in California.[89] The reasoning behind the rule in that jurisdiction is that:

> if the public interest litigant wins, they should not be personally out of pocket for acting in the public interest; if they lose, they should not be penalised for either clarifying the law or testing an issue of public interest and importance.[90]

4.62 The ALRC's Recommendation 47 (paragraph 2) regarding the terms of public interest costs orders is set out below. This recommendation aligns with existing case law in that it allows the court to consider all the circumstances of the proceeding. It then expands upon current case law by providing for a number of different orders as to costs.

> **Recommendation 47 — terms of a public interest costs order**
>
> The orders the court or tribunal may make include an order that:
>
> - costs follow the event
> - each party bear his or her own costs
> - the party applying for the PICO, regardless of the outcome of the proceedings, shall
>   - not be liable for the other party's costs
>   - only be liable to pay a specified proportion of the other party's costs
>   - be able to recover all or part of his or her costs from the other party
> - another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

87. *Hill Top Residents Action Group Inc v Minister for Planning (No 3)* [2010] NSWLEC 155.
88. *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164, [13].
89. Cal Civil Code §1021.5 (West 2010).
90. Queensland Public Interest Law Clearing House, *Costs in public interest proceedings in Queensland* (2005) 16 [2.3.1].

> An order under this provision will be subject to the power of the court or tribunal to make disciplinary and case management costs orders.[91]

4.63 Both PIAC and the EDO explicitly supported the range of orders provided in Recommendation 47, stating that they would give public interest litigants access to a "variety of costs orders that could be tailored appropriately to each case."[92] Slater & Gordon were also supportive of legislation that clarified the range of costs orders available to the courts, as they felt that this would lead to greater certainty and predictability.[93]

4.64 One type of order proposed under the ALRC Recommendation 47 is that the party applying for the public interest costs order shall only be liable to pay a specified proportion of the other party's costs, regardless of the outcome of the proceedings. This order in effect specifies a maximum amount that the party applying for a public interest costs order is liable to pay. In that sense, it is similar to an order under UCPR r 42.4 which provides that the court may, by order, specify the maximum costs that may be recovered by one party from another. However, there are two differences between these two types of orders.

4.65 First, the order under ALRC Recommendation 47 is an order in favour of only the party who makes the application for a public interest costs order. The other party would not have the benefit of having the amount of costs it could be liable to pay capped by the court. In contrast, the order under UCPR r 42.4 on the maximum recoverable costs applies to both plaintiff and defendant. Second, ALRC Recommendation 47 refers to liability to pay "a specified proportion of the other party's costs", which could be interpreted to mean a percentage of the other party's costs, rather than a specified amount. It could be argued that an order to pay a certain percentage of the other party's costs would not give certainty because the amount of costs that the other party will ultimately incur is uncertain and may be quite substantial. In contrast, UCPR r 42.4 does not refer to a proportion of the costs but instead allows a court to specify the "maximum costs". The Commission seeks submissions on whether the provision in ALRC Recommendation 47 or UCPR r 42.4 is the most appropriate provision for the purposes of capping the recoverable costs in public interest proceedings.

4.66 Another type of order proposed under ALRC Recommendation 47 is an order 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". This provision is relevant at the Commonwealth level where there are there are funding schemes that fund public interest proceedings, which are discussed below. Given that there are no funding schemes in New South Wales that provide financial assistance to persons who bring public interest proceedings, the question that arises is whether the proposed order under discussion would have any application in New South Wales.

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91. Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995).
92. Environmental Defender's Office NSW, *Preliminary Submission PSC9,* 10.
93. Slater & Gordon, *Preliminary Submission PSC8*, 6.

Question 4.5

If a 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?

Location of the provisions on public interest costs orders

4.67 Currently, the rule on security for costs is provided for within the UCPR, at r 42.21, and the power to order maximum costs is located at r 42.4. Locating provisions on public interest costs orders within the UCPR would ensure consistency. On the other hand, locating these provisions within the *Civil Procedure Act 2005* (NSW) ("CPA") would make them harder to amend than the other options, and would show a symbolic commitment to public interest proceedings.

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)?

Protective Costs Orders

UCPR r 42.4

4.68 Rule 42.4 of the UCPR provides:

> (1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.
>
> (2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party:
>
> (a) has failed to comply with an order or with any of these rules, or
>
> (b) has sought leave to amend its pleadings or particulars, or
>
> (c) has sought an extension of time for complying with an order or with any of these rules, or
>
> (d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:
>
> (i) progress of the proceedings to trial or hearing, or
>
> (ii) trial or hearing of the proceedings.
>
> (3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:
>
> (a) progress of the proceedings to trial or hearing, or
>
> (b) trial or hearing of the proceedings.

> (4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).

4.69 The order that a court may make under this rule is known as a protective costs order[94] because it provides parties protection from paying the costs of the other party beyond the amount specified by the court. It provides each party certainty in regards to the costs that they may be liable to pay the other party.

4.70 UCPR r 42.4 has, so far, only been applied in one case, *Blue Mountains Conservation Society Inc v Delta Electricity*, where the Land and Environment Court ordered that the maximum costs that could be recovered by one party from another party would be limited to $20,000.[95] The public interest nature of the proceedings — the case was brought to stop the defendant from polluting the Cox's River near Lithgow — was among the factors the court took into account in making the order.

4.71 UCPR r 42.4 is not, by its terms, confined to public interest proceedings. The question that arises is whether it has application in proceedings other than those brought in the public interest. Some judicial statements have indicated that protective costs orders apply to a broader range of cases.

4.72 Justice Beazley in *Delta Electricity v Blue Mountains Conservation Society Inc* underscored the purpose of UCPR r 42.4 in the following statement:

> The courts have thus far identified the central purpose of r 42.4 as providing a means to curb the tendency of parties to engage in disproportionate expenditure, especially in cases where the quantum involved is relatively low or the proceedings are not complex…However, the general terms of the discretion are such that it is not confined by or to that purpose. 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.[96]

4.73 Further, Justice Beazley referred to UCPR r 42.4 as a "broad discretionary power…to be exercised in the context of the overriding statutory purpose of the CPA and the UCPR in facilitating the just, quick and cheap resolution of the real issues in the proceedings."[97]

4.74 The Federal Court has a similar power to cap the costs that each party may recover from the other party.[98] When protective costs orders were first introduced to the Federal Court in 1992, Chief Justice Black stated that:

> It is anticipated that such a rule, if introduced, would be applied principally to commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute, although it could be applied to other cases as appropriate.[99]

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94. *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 150, [5] (Pain J).
95. *Blue Mountains Conservation Society v Delta Electricity (No 2)* [2009] NSWLEC 150; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263.
96. *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [138] (Beazley JA, in dissent).
97. *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [134] (Beazley JA, in dissent).
98. Order 62A r 1 of the *Federal Court Rules* (Cth) provides that the Court may by order made at a directions hearing, specify the maximum costs that can be recovered on a party-and-party basis.

4.75 These judicial statements indicate that the discretion to make protective costs orders is broad and may be applied in cases regardless of whether any public interest issues are raised. They emphasise that the purpose of protective costs orders is to ensure that the costs are proportional to the issues at stake, especially in cases which are not complex or the amount subject of the litigation is relatively low.

4.76 There is, therefore, potential for a more widespread use of protective costs orders. The provisions of UCPR r 42.4 were first introduced in 2000 in the rules of court of the Supreme Court.[100] Yet, as mentioned above, a protective costs order has been made in only one case.[101] If the purpose of this rule is to ensure proportionality, the question arises as to why it has not been used more frequently in public interest litigation, in which plaintiffs may tend to have less financial resources and an interest in keeping costs proportionate to the issues subject of the proceedings.

4.77 The Commission seeks submissions on the relevance of this rule to public interest litigation, and whether it should be used more regularly in such cases.

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?

4.78 A further question in relation to UCPR r 42.4 is whether its provisions should be relocated to within s 98 of the CPA. Section 98 provides that "[s]ubject to the rules of court", "costs are in the discretion of the court" and "the court has full power to determine by whom, to whom and to what extent costs are to be paid".[102] It could be argued that incorporating the provisions of UCPR r 42.2 in s 98 would make it readily apparent, without the need for searching the rules of court, that courts' broad discretion in relation to costs include the power to cap the costs that one party may recover from the other. Further, a statutory power to make protective costs orders has arguably greater force than if such power were based on a rule of court. On the other hand, it could be argued that the provisions of UCPR r 42.4 are details of courts' power in relation to costs that are best located in the court rules.

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 42.4, be relocated into s 98 of the *Civil Procedure Act 2005* (NSW)?

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99. *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509 cited in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [64] (Beazley JA, in dissent).
100. *Supreme Court Rules 1970* (NSW) r 35A.
101. There is one reported case, *Sherborne Estate (No 2): Vanvalen v Neaves* [2005] NSWSC 1003, where a protective costs order was sought but was denied.
102. *Civil Procedure Act 2005* (NSW) s 98(1)(a)–(b).

Public interest litigation fund

4.79 Some preliminary submissions have suggested that one possible method of addressing the impact of adverse costs on public interest proceedings could be to establish a public interest litigation fund.[103] Under this suggestion, the fund would, in appropriate cases, provide funds to persons and organisations that bring public interest proceedings. The fund would cover adverse costs and security for costs orders.

4.80 There are some Commonwealth funding schemes dedicated to providing funds for public interest proceedings. The Australian Taxation Office ("ATO") has a test case litigation program, under which the ATO provides financial assistance to taxpayers whose litigation is likely to be important to the administration of Australia's revenue and superannuation systems. The aim of the program is to obtain court decisions that provide guiding principles on how specific provisions of the laws the ATO administers should be applied. Funding may cover adverse costs orders.[104]

4.81 As discussed above, there is another funding program called the Commonwealth Public Interest and Test Case Scheme.[105] Under this scheme funding may be given, subject to certain eligibility criteria, in cases involving questions that arise under a law of the Commonwealth which, in the opinion of the federal Attorney General, are in the public interest or are in the nature of a test case. However, any funding given under this scheme will not cover indemnity for adverse costs orders.[106]

4.82 The question that arises is whether it is desirable to establish a funding scheme in New South Wales that would provide funds for public interest proceedings, including funding for adverse costs orders. The main arguments for such a fund are first, it would allow people who would otherwise not be prepared to risk an adverse costs order to bring a court case. Secondly, it would allow a party to recover at least part of his or her costs if successful against a party who has been given an indemnity. However, the creation and maintenance of such a fund would involve resource implications.

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?

103. Public Interest Law Clearing House, *Preliminary Submission PSC14,* 10 [6.3]*,* Public Interest Advocacy Centre, *Preliminary Submission PSC12,* 7–8.

104. Australian Taxation Office, *Test case litigation program* <http://www.ato.gov.au>.

105. See paras 4.50–4.51.

106. Commonwealth Attorney-General's Department, *Guidelines for the Provision of Assistance by the Commonwealth for Legal and Related Expenses under the Commonwealth Public Interest Test Cases Scheme* (1996) [6.19]. The ALRC has recommended that this fund be extended to indemnify litigants for adverse costs orders: Australian Law Reform Commission, *Costs Shifting — Who Pays for Litigation*, Report 75 (1995) Recommendation 60. This recommendation has not been implemented.

5. Procedures and appeals

Introduction

5.1 The chapter considers issues relating to procedures and appeals. The first part of the chapter canvasses:

- how courts determine the amount of security;
- the various forms of security that may be ordered;
- the procedures available to stay or dismiss proceedings when a security order is not complied with;
- appeals against security orders;
- the procedures available for varying or setting aside security orders; and
- how security is finalised, that is, what happens to the security when the main proceeding is finalised.

5.2 The second part of the chapter examines security for costs in the context of appeal and leave to appeal proceedings.

Determining the amount of security

5.3 The amount or quantum of security that a plaintiff will be ordered to provide is a matter for the court's discretion. There are two basic principles relevant to the exercise of this discretion:[1]

- the court should order "such sum as the court thinks just, having regard to all the circumstances of the case";[2] and
- the court should fix an amount it considers will be adequate for the services to be rendered.[3]

5.4 Applying these principles involves considering the nature of the case and determining the "probable costs which the defendants may be put to so far as it can be ascertained".[4] In addition to the defendant's likely costs, other factors that are relevant to assessing the quantum of security include:[5]

- the possibility that the case will settle or collapse before trial;
- matters that the plaintiff advances to oppose the security application, including the relative strength of the parties' cases, and delay by the defendant in making the application; and
- whether or not the relief sought is monetary in nature (for example, if the case involves a public interest litigant).

5.5 Where there are multiple plaintiffs, some solvent and some not, this will also weigh heavily against a security for costs order against an impecunious plaintiff, especially where there is a corporation whose co-plaintiffs are natural persons.[6]

5.6 The applicant for security bears the onus of adducing evidence that enables the court to estimate the costs of litigation.[7] However, the court is not bound to accept the applicant's estimate of the costs likely to be incurred.[8] In practice, the plaintiff may adduce material to aid the court in determining the quantum of the security. Most hearings for security for costs applications, therefore, involve competing estimates of likely litigation costs that the court must consider on a case-by-case basis. The Supreme Court has summarised the general approach to determining the appropriate amount of security as follows:

> The court in exercising its discretion to order security for costs will always stand back from the precise amounts claimed and from the precise assessments of

1. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.32]–[28.33].
2. *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (No 19) (1995) 134 ALR 187, 197.
3. *Sunday Times Newspaper Company Ltd v McIntosh* (1933) 33 SR (NSW) 371, 373.
4. *Mokau Timber Co v B*erry (1908) 11 GLR 212; *Concorde Enterprises Ltd v Anthony Motor*s *(Hutt) Ltd* (No 2) [1977] 1 NZLR 516, 521.
5. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.34]–[28.44]; LexisNexis, *Halsbury's Laws of Australia*, [325-9715].
6. *Whyked Pty Ltd v Yahoo Australia and New Zealand Pty Ltd* [2006] NSWSC 1236, [25]
7. *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002] FCA 821, [31]–[34]
8. *MA Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97; *Plaza Print Pty Ltd v South British Insurance Co Ltd* (1984) 68 FLR 340, 344.

> costs to consider every case on its own particular facts and if an order is to be made at all, make such order as is just and reasonable in the circumstances.[9]

5.7 Courts prefer that applicants adduce a "skeleton bill of costs" rather than providing a merely "broad-brush estimation" of the likely costs of litigation.[10] Where there are real difficulties in forming a reliable assessment of the likely costs, the court may fix the amount of security on the basis of a general estimate.[11] Furthermore, if the parties cannot agree on the amount of the security, the court can make an order for reference to a referee.[12]

Evidence relevant to assessing quantum: case examples

5.8 Two cases involving security for costs applications in the Supreme Court provide useful illustrations of the quantum assessment procedure and the kinds of evidence that parties routinely adduce in these hearings.

5.9 In the first case, a defendant company sought an order that the plaintiff company provide at least $700,000 in security for costs.[13] The plaintiff's claim had not yet been finalised at the time of the security application, but it was estimated that its claim against the defendant would amount to more than $30 million.

5.10 The defendant relied on the affidavits of three solicitors to support its security application.[14] One solicitor prepared a table setting out total expected costs based on an estimate of the length and nature of the trial. He estimated that the defendant would incur $1.71 million in defending the proceedings and that this would be reduced to two thirds ($1.1 million) in the costs assessment process. Another solicitor, who was a legal costing specialist, estimated that the final amount would likely be around $790,000.

5.11 By contrast, the plaintiff adduced affidavit evidence from other solicitors who estimated that the defendant would only incur around $416,000 and that this figure would be reduced by a third on costs assessment (to $270,000).[15] The plaintiff also provided evidence of its financial position as compared with the defendant's.

5.12 The court ultimately preferred the estimates provided by the defendant's solicitors and agreed that it was likely that the costs would be reduced by a third upon assessment. The court estimated that the defendant's total recoverable costs would be in the vicinity of $700,000 and accordingly ordered that the plaintiff provide security for this amount in two instalments.

5.13 In the second case, the defendant's solicitor, guided by an expert costs assessor, estimated that the defendant would incur over $6 million to defend the

9. *Wollongong City Council v FPM Constructions Pty Ltd* [2004] NSWSC 523, [50].
10. *Lisa Joy Pty Ltd v Brothers Neilsen International Pty Ltd* [2003] FCA 986, [8].
11. *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 134 ALR 187.
12. *Sharjade v Darwinia Estate Pty Ltd* [2006] NSWSC 708; LexisNexis, *Ritchie's Uniform Civil Procedure NSW*, [42.21.15].
13. *Western Export Services Inc v Jireh International Pty Ltd* [2008] NSWSC 601.
14. *Western Export Services Inc v Jireh International Pty Ltd* [2008] NSWSC 601, [38].
15. *Western Export Services Inc v Jireh International Pty Ltd* [2008] NSWSC 601, [46].

proceedings.[16] However, the plaintiff contended that this was a grossly inflated figure and that it should only have to pay around $800,000 in security.

5.14 The court considered that there were three main issues affecting the appropriate quantum of security to be ordered:[17]

- the correct estimate for the length of the final hearing;
- whether the costs of the discovery process should be included and whether they were excessive; and
- whether the hourly rates and time estimates in the defendant's assessment were too high.

5.15 After examining these issues, the court formed the view that the defendant would likely incur around $2 million in defending the case. The court ultimately considered that it was appropriate to fix the quantum of security at roughly half this amount, and accordingly ordered the plaintiff to provide $924,536 in security.

5.16 It should be noted that, in some cases, courts may order security at certain stages of the proceedings. In *Del Bosco v Outtrim*[18] for example, the court ordered the plaintiff to pay $25,000 within 28 days from the order, and a further $50,000 one month before the scheduled hearing date.

Difficulties relating to assessing the amount of security

5.17 Some courts have acknowledged the difficulty of determining how much security should be ordered. Determining an appropriate amount often involves considering many "imponderable" factors[19] and relying on the "feel" of the case.[20] The Supreme Court of Western Australia, for example, has observed that "it is often very difficult to reach any confident conclusion as to the ambit of the matters which will be in issue at trial and therefore the nature and scope of the evidence that the parties will seek to adduce".[21]

5.18 A crucial element in assessing the security is the rate the lawyers charge the defendant. The NSW Bar Association has suggested in its preliminary submission that New South Wales courts should publish fee scales similar to the "National Guide to Counsel Fees" published annually by the Federal Court of Australia to assist in the assessment of the quantum of security.[22] As the preliminary submission puts it, since the abolition of fee scales in New South Wales:

> courts and the legal profession have lacked the benefit of an objective standard against which, inter alia, to measure applications for security for costs, and

16. *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664.
17. *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664, [110].
18. [2008] NSWSC 105.
19. *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 19)* (1995) 134 ALR 187, 197.
20. *Pearson v Naydler* [1977] 3 All ER 531, 537.
21. *Nelson Capital Pty Ltd v Short* [2003] WASC 152, [31].
22. New South Wales Bar Association, *Preliminary Submission PSC10*, 10 [22].

> parties are accordingly required in each case to adduce evidence about rates of fees being charged, and fees reasonably chargeable, in a relatively unrestrained "market".[23]

5.19 Allowing courts to refer to fee scales or guidelines when assessing security for costs applications might reduce the problems associated with determining the appropriate quantum. It could also have other benefits such as speeding up applications hearings.

5.20 However, there are arguments against a fee scales system:

5.21 First, the uncertainty that is inherent in the security for costs process may be seen as less problematic when the rationale for security for costs orders is considered. Courts have stated that the quantum of security is not intended to be a precise approximation of the costs of the issues at stake.[24] Similarly, an order for security for costs is not supposed to give a "complete and certain indemnity" to the defendant.[25] So while it is true that New South Wales courts lack objective standards against which to measure security applications, it could be argued that security for costs orders successfully serve their purpose without such standards. On the other hand, it could be argued that courts still need some form of standard to assist when assessing the quantum of security.

5.22 Second, New South Wales abolished the fee scales system a decade ago in favour of a costs assessment regime.[26] In addition, the introduction of fee scales that the court must follow when determining the quantum of security would arguably be inconsistent with the court's unfettered discretion.[27] For example, English courts in the past adopted the "conventional approach" of fixing the amount of security at two-thirds of the estimated costs,[28] but Australian courts regard such a set rule as an impermissible fetter on the court's discretion to consider each case individually.[29]

5.23 Third, there are existing ways that courts can partially overcome difficulties in assessing the quantum of security. These mechanisms minimise the negative consequences that can result from the fact that the costs assessment process is inherently uncertain. For example, courts can partially overcome the difficulty of assessing the quantum of security by ordering security in respect of costs that the applicant has already incurred.[30] However, courts are reluctant to make such an order because the defendant has usually chosen to incur those costs without seeking the protection of a security order.[31]

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23. New South Wales Bar Association, *Preliminary Submission PSC10*, 6 [15].
24. *Interwest Ltd v Tricontinental Corporation Ltd* (1991) 5 ACSR 621, 628; G E Dal Pont, *Law of Costs* (Lexis Nexis Butterworths, 2nd ed, 2009) [28.34].
25. *Brundza v Robbie & Co [No 2]* (1952) 88 CLR 171, 175; *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497.
26. See Bob Debus, "Directions in Legal Fees and Costs" (2004) 27 *UNSW Law Journal* 200.
27. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.35].
28. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.36] n 162.
29. *Lisa Joy Pty Ltd v Brothers Neilsen International Pty Ltd* [2003] FCA 986, [8]; G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.36].
30. *Paris King Investments Pty Ltd v Rayhill* [2006] NSWSC 578, [31].
31. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009), [28.37]; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 5)* [2006] FCA 1762, [48]–[49].

5.24 In any case, courts can also overcome the difficulty of determining an appropriate quantum by estimating the costs up to a certain stage in the proceedings and making a security order based upon that estimate. The court can then permit the defendant to reapply for further security at a later stage in the proceedings.[32] This partly mitigates the problems of predicting the length and nature of proceedings, and allows the court to respond to unforeseen circumstances so as to ensure that the defendant obtains adequate security.

5.25 One way of overcoming these difficulties would be to permit a costs assessor to sit alongside a judge when assessing the amount of security that should be ordered. The expertise of the costs assessor would assist the judge in determining an appropriate quantum of security for costs, could provide a more adaptable system of quantifying costs at an early stage. However, objections may be raised to permitting a costs assessor to adopt such a role in what is a fundamentally judicial determination.

Question 5.1

(1) What problems arise in the assessment of the appropriate amount of security? Do courts have difficulties in determining the amount, particularly in complex cases? Do legal representatives know what arguments or evidence they are allowed to provide to the court?

(2) Should guidance be provided in statute or regulations, or is the matter one most appropriately left to judicial discretion?

(3) Should there be non-binding lawyers' fee scales that may be used in determining the amount of security for costs?

(4) Should costs assessors be permitted to sit alongside a judge in hearings on the amount of security?

Form of security

5.26 UCPR r 42.21(2) provides that "[s]ecurity for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct". This provision gives New South Wales courts a wide discretion when it comes to deciding what form of security the plaintiff should be ordered to give.[33] In deciding what form the security should take, the court is guided by the principle that as long as the defendant is adequately protected, "the security should be given in a way which is the least disadvantageous" to the plaintiff.[34]

32. See, eg, *Check-Out Pty Ltd v Eagle Eye Inspections Pty Ltd* [2001] FCA 1475, [32]; *Transocean Capital Pty Ltd v AFSIG Pty Ltd* [2006] NSWSC 806, [42]; G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.40]; LexisNexis, *Ritchie's Uniform Civil Procedure NSW*, [42.21.15].

33. See LexisNexis, *Ritchie's Uniform Civil Procedure NSW*, [42.21.60].

34. *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198, 200.

List of possible forms of security

5.27 The main form of security is money in the form of a cheque. However, courts have allowed other forms of security such as:

- bank guarantee;[35]
- bond;[36]
- an enforceable undertaking (for example, a binding promise by the plaintiff that it will assume liability for the costs of the defendants for which the plaintiff is liable in the proceedings);[37]
- charge over personal property (for example, a charge over rugs and antiques);[38] and
- lodgement of title to real or intangible property with solicitors.[39]

5.28 Where an application for security for costs is made against a corporate plaintiff, the court can order that the plaintiff provide security in the form of a deed of guarantee executed by the company's directors.[40]

5.29 The form of security can impact upon whether the defendant's application is oppressive to the plaintiff. Consequently, a court may give the defendant a choice between various forms of security.[41] The court will usually simply make an order allowing security to be provided in cash usually in the form of cheque or some other form that is acceptable to the court's registrar.[42]

5.30 The court will usually invest the amount with the NSW Public Trustee at their rates of interest. The interest goes to the party who provided the security if he or she wins the case. If the party loses the case, the court will usually make orders as to how security, including the interest, will be applied to cover the costs.

Formal requirements as to the provision of security

5.31 Unlike New South Wales, the court rules in Tasmania include provisions that specify forms of security that may be given and outline their requirements. Rule 829 provides:[43]

> (2) Subject to any direction given as to the manner and form in which the security is to be given, it is to be given by an instrument that –

35. *Aoun v Bahri* [2002] EWHC 29.
36. *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189.
37. *Billiva Pty Ltd v Eastbrook Estate Pty Ltd* [2009] NSWSC 209; *A Ltd v B Ltd* [1996] 1 WLR 665.
38. *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 204.
39. *Green v Australian Industrial Investment Ltd* (1989) 25 FCR 532, 545 (French J).
40. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.49].
41. *Right Home Improvements International Pty Ltd v Imperial Alarm Screens (Aust) Pty Ltd* (1986) ATPR 40-641, 47,201.
42. *Masri Apartments Pty Ltd (in liq) v Perpetual Nominees Ltd* [2004] NSWCA 255.
43. *Supreme Court Rules 2000* (Tas) r 829.

(a) is signed by the person to be bound, whether as principal or surety; and

(b) sets out that the person submits to the jurisdiction of the Court; and

(c) contains that person's consent to judgment being signed against that person for the amount for which the security is given on the happening of the event specified in the instrument.

(3) Subject to any direction to the contrary, security is to be given by 2 sureties approved by the Principal Registrar, each of whom is to be bound in the full amount of the security.

5.32 The Tasmanian court rules also specify the procedures that should be followed when security takes the form of a bond[44] and payment into court:[45]

830. Bond as security
Unless otherwise ordered, a bond given as security is to be given to the party for whose benefit it is given.

833. Security by payment into Court
A party directed to give security may give it by –

(a) paying it into Court; and

(b) giving to the party for whose benefit the security is to be given –

(i) notice of the payment; and

(ii) and original receipt for the money paid into Court.

5.33 The Commission seeks submissions on whether adoption of similar provisions in New South Wales would be of any benefit.

Question 5.2

(1) Are there any problems relating to the forms of security for costs that courts may currently order?

(2) Is it desirable to amend the *Uniform Civil Procedure Rules 2005* (NSW) by adding a list of the possible forms of security for costs that courts may order?

(3) Is it desirable to amend the *Uniform Civil Procedure Rules 2005* (NSW) to provide requirements similar to the provisions set out in r 829, 830, and 833 of the *Supreme Court Rules 2000* (Tas)?

Stay of proceedings until security is given

5.34 The *Civil Procedure Act 2005* (NSW) ("CPA") gives the court a general power to stay proceedings subject to court rules.[46] Rule 42.21(1) of the UCPR provides that,

44. *Supreme Court Rules 2000* (Tas) r 830.
45. *Supreme Court Rules 2000* (Tas) r 833.
46. *Civil Procedure Act 2005* (NSW) s 67.

along with an order for security, the court may order "that the proceedings be stayed until the security is given".

5.35 Fairfax Media Publications Pty Limited ("Fairfax Media") has suggested in a preliminary submission that the law in New South Wales is problematic because, although courts have power to order that proceedings be stayed until security is provided, there is no requirement that courts make such an order.[47] In the absence of an order of this kind, the defendant must apply to the court for a stay in proceedings, which potentially increases the length and expense of litigation.

5.36 While the court rules in Victoria,[48] South Australia,[49] and Tasmania[50] mirror New South Wales law in granting courts discretion to stay proceedings, the court rules in Queensland and Australian Capital Territory have provisions to ensure that proceedings are automatically stayed if the plaintiff does not provide security.[51] For example, r 674 of the Queensland *Uniform Civil Procedure Rules 1999* (Qld) ("Qld UCPR") provides that "if the court orders the plaintiff to give security for costs" and "security is not given under the order", then "the proceeding is stayed so far as it concerns steps to be taken by the plaintiff".[52]

5.37 The question that needs to be addressed is whether it is desirable to amend the UCPR to provide for an automatic stay of proceedings until security is given, along the lines of the Queensland and Australian Capital Territory rules. Fairfax Media has suggested that such an amendment would provide certainty to litigants, encourage plaintiffs to comply promptly with security orders, and minimise costs by avoiding the need for an additional application for a stay of proceedings.[53]

Question 5.3

Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended so that, if the court orders the plaintiff to give security for costs, there is an automatic stay of proceedings until the plaintiff provides security?

Dismissal of proceedings for non-compliance with order

5.38 Rule 42.21(3) of the UCPR provides that if the plaintiff fails to comply with a security order, "the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed".

47. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, 9 [7.3].
48. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.02(1).
49. *Supreme Court Civil Rules 2006* (SA) r 194(3).
50. *Supreme Court Rules 2000* (Tas) r 828.
51. *Court Procedures Rules 2006* (ACT) r 1904; *Uniform Civil Procedure Rules 1999* (Qld) r 674.
52. *Uniform Civil Procedure Rules 1999* (Qld) r 674(b).
53. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, 9 [7.4].

5.39 Court rules in other jurisdictions similarly empower the court to dismiss proceedings where a plaintiff fails to give security as required under an order.[54]

5.40 The Commission invites submissions on any issues or problems arising in relation to the court's power to dismiss proceedings as specified in UCPR r 42.21(3).

Question 5.4

Are there any problems relating to the power of courts to dismiss proceedings if the plaintiff fails to comply with a security for costs order?

Appeal against order

5.41 New South Wales, like all other Australian jurisdictions, does not have legislative provision regarding appeal from an order for security for costs. However, case law has established the rule that an appeal against an adverse security for costs order, whether the order was made pursuant to the court's inherent jurisdiction or UCPR r 42.21, is an appeal against a discretionary decision on a matter of practice and procedure.[55] In *House v R* the High Court stated the principle that applies to appeals of this nature:

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion…the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[56]

5.42 Courts have reiterated the requirement that "the decision appealed from must work a substantial injustice to one of the parties",[57] saying that courts are "reluctant to grant leave in procedural cases unless manifest injustice will otherwise arise".[58] The Supreme Court has stated that this principle applies with "special stringency" where the appeal concerns an exercise of procedural discretion such as an appeal against a security for costs order.[59]

5.43 The court's reticence to allow appeals against security for costs orders is grounded in policy concerns about ensuring efficient and cost-effective litigation. In considering an application for leave to appeal against a security order, the Queensland Court of Appeal commented:

> As a matter of judicial policy, it is important to ensure that the passage of a proceeding to trial is not burdened by interlocutory skirmishes at an appellate level which consume time, money and other resources, and which will not

54. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.04; *Uniform Civil Procedure Rules 1999* (Qld) r 674(c); *Court Procedures Rules 2006* (ACT) r 1904(3)(b).
55. *Del Bosco v Outtrim* [2008] NSWSC 105, [5]; *Programmed Solutions v Dectar* [2007] QCA 385, [2].
56. *House v R* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).
57. *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177.
58. *Programmed Solutions v Dectar* [2007] QCA 385, [12].
59. *Del Bosco v Outtrim* [2008] NSWSC 105, [28].

> necessarily contribute in a productive way to what really matters to the parties — that is, the determination of their substantive rights.[60]

5.44 While the stringent requirements for appeals against security for costs orders serve to conserve the court's time and resources, the Commission notes that the issue of appeals against security for costs orders also raises access to justice considerations. The Environmental Defender's Office NSW ("EDO") has suggested in a preliminary submission that the availability of appeals against security for costs orders can be particularly relevant where the plaintiff is a public interest litigant. Because public interest litigants often have scant resources and rely on fundraising to finance their proceedings, "[i]n the absence of a right of appeal…[security for costs orders] can and do act as a significant barrier to environmental litigation, and indeed any public interest litigation".[61]

5.45 Furthermore, the EDO has submitted that the availability of appeals against security for costs orders is a particularly important issue given the discretionary nature of the security for costs process, which can result in the court making different orders even in similar cases.[62] The EDO has suggested that "the difficulty of appealing to the NSW Court of Appeal" on discretionary matters such as security for costs orders, where the court will be reluctant to allow an appeal unless the order was clearly unjust, allows defendants to use security for costs applications as "a threatening 'tool'" against plaintiffs.[63]

5.46 The issue that arises is whether it is desirable for the UCPR to set out a principle for appeals against adverse security for costs orders that clarifies when the court will be willing to allow such appeals. However, questions would then arise about how best to balance the competing policy considerations of allowing plaintiffs access to justice and ensuring efficient and cost-effective litigation. The Commission therefore invites further submissions about these, or any other, issues relating to appeals against security for costs orders. In particular, we seek submissions on whether the UCPR should set out a principle for appeals against security for costs orders, and whether the legislation should expressly state that such appeals will only be allowed where the order appealed against has caused substantial injustice.

Question 5.5

(1) 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?

(2) Are there any other issues relating to appeals against security orders that need to be considered?

60. *Programmed Solutions v Dectar* [2007] QCA 385, [12].
61. Environmental Defender's Office NSW, *Preliminary Submission PSC9*, 10.
62. Environmental Defender's Office NSW, *Preliminary Submission PSC9*, 11.
63. Environmental Defender's Office NSW, *Preliminary Submission PSC9*, 11.

Varying or setting aside the order

5.47 The Supreme Court's inherent jurisdiction includes the power to vary or set aside a previous interlocutory order it has made, such as a security for costs order.[64] However, since a variation in the amount of security could lead to injustice and waste time and resources, courts have established a practice that limits parties' ability to re-litigate the quantum of a security order:

> [T]he ordinary practice is that an application to set aside, vary or discharge an order of a substantive nature…must be founded on a *material change of circumstances* since the original application was heard, or the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application.[65]

5.48 The case of *Capital Webworks Pty Ltd v Adultshop.com.Limited* demonstrates that the court, when determining whether there has been a "material change of circumstances", will consider the following issues to be relevant:

- the time expired since the original security order;
- whether the plaintiff is responsible for the delay; and
- whether the delay has increased the applicant's costs.[66]

5.49 In that case, the defendant applied to increase the quantum of a security order that was eight years old. The court allowed the application on the grounds that the plaintiff's delay in pursuing the proceedings had put the defendant to greater costs: the defendant's counsel had since been appointed senior counsel and charged significantly more than eight years ago, and the fees under the relevant scales had increased since the time when the proceedings began.[67]

5.50 Several jurisdictions have court rules expressly providing that the court can vary or set aside a security for costs order.[68] However, the rules in the Australian Capital Territory and Queensland state that the court may only vary or set aside such an order in "special circumstances".[69] The rules do not define "special circumstances", but it is likely that this phrase merely reflects the "material change of circumstances" principle developed by the case law.[70]

5.51 The UCPR does not currently contain a provision explicitly allowing courts to set aside or vary security for costs orders. It may be argued that it is desirable to

64. *National Bank of New Zealand Ltd v Donald Export Trading Ltd* [1980] 1 NZLR 97, 103; *Republic of Kazakhstan v Istil Group Inc* [2006] 1 WLR 596, [32].
65. *Truth About Motorways Pty Ltd v Infrastructure Investment Management Ltd* [2001] FCA 1603, [11] (our emphasis); *Darling Harbourside (Sydney) Pty Ltd v Sanirise Pty Ltd* [1996] FCA 1480; *Lawrance v Commonwealth (No 2)* [2008] FCA 1060, [10].
66. *Capital Webworks Pty Ltd v Adultshop.com.Limited* [2008] FCA 40.
67. *Capital Webworks Pty Ltd v Adultshop.com.Limited* [2008] FCA 40, [23]–[25].
68. *Federal Court Rules* O 28 r 5(2); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.05; *Uniform Civil Procedure Rules 1999* (Qld) r 675, 772(4); *Court Procedures Rules 2006* (ACT) r 1905.
69. *Uniform Civil Procedure Rules 1999* (Qld) r 675; *Court Procedures Rules 2006* (ACT) r 1905.
70. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.63].

include such a provision in order to provide the District Court, Local Court and other statutory courts without inherent jurisdiction the express power to set aside or vary security for costs orders.

5.52 This further raises the possibility, however, that significant court time will be spent hearing appeals on interlocutory orders, which could be a significant drain on court resources. In order to prevent this, a party could be required to obtain leave to seek an order varying or setting aside an order of security for costs. Leave could potentially be made conditional on making out a prima facie "material change of circumstances" or "special circumstances", which would eliminate the need for lengthy full submissions unless warranted by exceptional circumstances.

Question 5.6

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

(2) If so, should the power be in broad terms or should it provide a "standard" for assessing when the court may exercise this power? If there is to be a standard, should it be:

(a) "material change of circumstances" as developed in common law;

(b) "special circumstances" as specified in the Australian Capital Territory and Queensland court rules; or

(c) some other standard?

(3) Should there be a list of list of factors for determining whether the standard has been met?

(4) Should leave be required to seek an order varying or setting aside security for costs?

Finalising the security

Enforcement of the security

5.53 In New South Wales, the procedure for dealing with security at the completion of the main trial is governed by case law. If the court has ordered the plaintiff to provide security for costs and the plaintiff does not succeed in the proceedings, the defendant will be entitled to have recourse to the security in order to satisfy a court order that the plaintiff pay the defendant's costs.[71]

5.54 In contrast to New South Wales, the court rules in some jurisdictions expressly set out the procedure for dealing with security at the end of proceedings.[72] The Australian Capital Territory court rules provide that "[i]f judgment is given requiring the party to pay all or part of the costs of the proceeding or any application in the

71. *Dwight v Federal Commissioner of Taxation* (1992) 107 ALR 407, 416 (FCA).

72. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.65]–[28.66].

proceeding, the security may be applied in satisfaction of the costs".[73] The Queensland rules contain an almost identical provision.[74]

5.55 Similarly, the rules of court in Tasmania state:

> If money is paid into Court as security for costs for a proceeding and the proceeding is finally disposed of –
>
> (a) if the party by whom the payment was made is adjudged to pay any costs to another party, the money is to be applied in payment of those costs, unless the Court or a judge otherwise orders; and
>
> (b) on the application of any party, the Principal Registrar is to pay to the party any amount that the Principal Registrar is satisfied that party is entitled to.[75]

5.56 Western Australia also has a provision framed in similar terms to the Tasmanian rule.[76]

Discharge and payment out of the security

5.57 If the plaintiff who has been ordered to provide security for costs is successful in the action, the rule developed by case law is that the plaintiff is entitled to have that security paid out as soon as judgment is entered – even if the defendant has been granted a stay of execution with a view to an appeal.[77]

5.58 In the Australian Capital Territory, court rules provide that the security provided by the plaintiff must be discharged:

> (a) if a judgment is given and the judgment does not require the party to pay all or part of the costs of the proceeding or any application in the proceeding; or
>
> (b) if the court orders the discharge of the security; or
>
> (c) if the party entitled to the benefit of the security agrees to its discharge; or
>
> (d) in relation to the balance after costs have been satisfied under subrule (2).[78]

5.59 The court rules in Queensland contain a nearly identical provision.[79]

5.60 The question that arises is whether it is desirable to amend the UCPR to include a procedure for finalising security that outlines what happens to the security when the

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73. *Court Procedures Rules 2006* (ACT) r 1906(2).
74. *Uniform Civil Procedure Rules 1999* (Qld) r 676.
75. *Supreme Court Rules 2000* (Tas) r 834.
76. *Rules of the Supreme Court 1971* (WA) O 25 r 7.
77. *The 'Bernisse' and The 'Elve'* [1920] P 1*; Huon Shipping and Logging Co Ltd v South British Insurance Co Ltd* [1923] VLR 216.
78. *Court Procedures Rules 2006* (ACT) r 1906.
79. *Uniform Civil Procedure Rules 1999* (Qld) r 676.

plaintiff succeeds or fails in the action. Such an amendment could use the court rules in other jurisdictions as a guide.

5.61 The benefit of including such a procedure in the UCPR is that it would provide courts and litigants with certainty about court procedures relating to security for costs. This certainty is arguably absent in New South Wales given the current reliance on common law principles in this area.

Question 5.7

(1) Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to incorporate the procedures for dealing with security for costs when the main proceedings are finalised?

(2) If so, how should such provisions be framed?

Security for costs in appeal proceedings

Security in appeals

5.62 Just as a defendant at first instance may seek an order requiring the plaintiff to provide security for costs, a respondent in an appeal proceeding may wish to seek a security order against the appellant. In practice, a respondent will commonly apply for a security order in the context of an application for a stay of the appeal, because such a proceeding allows the court to assess the parties' respective rights and obligations.[80]

5.63 The general rule that mere poverty should not prevent a plaintiff from litigating operates less stringently in appeal proceedings.[81] Whereas courts may be reluctant to order security for costs against a plaintiff at first instance, since to do so might block the plaintiff's access to justice, they will be more willing to order security against an appellant. This is because in the context of an appeal there is an existing decision adverse to the appellant that is presumed correct until displaced.[82] If courts were reluctant to order security in appeal cases, they would effectively be giving a person who "has been on the receiving end…of a determination by the courts a free hit at great cost to the other party in the appeal proceedings".[83]

Special circumstances requirement in New South Wales

5.64 In New South Wales, courts may only order security for the costs of appeals "in special circumstances". In relation to appeals before courts covered by the UCPR (such as the Supreme Court, District Court, Land and Environment Court, Local Court, Dust Diseases Tribunal, and Industrial Court) UCPR r 50.8(1) provides:

80. NSW Bar Association, *Preliminary Submission PSC10*, [10].

81. *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd* [1999] FCA 764, [6]; *Riverside Nursing Care Pty Ltd v Minister of State for Aged Care* [2000] FCA 1054. See generally G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [29.101].

82. *Cowell v Taylor* (1885) 31 Ch D 34, 38 (Bowen LJ); *Tait v Bindal People* [2002] FCA 322, [3]–[4].

83. *Tait v Bindal People* [2002] FCA 322, [4].

> In special circumstances, the court may order that such security as the court thinks fit be given of the costs of an appeal to the court.

5.65 In relation to appeals to the Court of Appeal, UCPR r 51.50(1) contains identical provision to UCPR r 50.8(1), thus:

> In special circumstances, the Court may order that such security as the Court thinks fit be given for costs of an appeal.

5.66 There are two other jurisdictions — South Australia and Victoria — where the rules also make special circumstances a prerequisite for the ordering of security for costs of an appeal.[84]

5.67 In contrast, a number of jurisdictions have rules that provide an unfettered discretion to order security for costs in appeals.[85] In Queensland, r 772(1) of the *Uniform Civil Procedure Rules 1999* provides:

> The Court of Appeal, or the court that made the decision appealed from, may order an appellant to give security, in the form the court considers appropriate, for the prosecution of the appeal without delay and for payment of any costs the Court of Appeal may award to a respondent.

The rules of court of the High Court,[86] Western Australian Court of Appeal,[87] and Family Court are also worded in broad terms.[88]

5.68 The rules in the Federal Court, Northern Territory, Australian Capital Territory and Tasmania provide that no security for costs of an appeal to the court should be required unless the court otherwise directs.[89] So phrased, the rules place an onus to demonstrate that security should be provided. However, since the onus lies on an applicant for security, it is unlikely that this phraseology makes the claim more difficult to establish than in the jurisdictions mentioned in the preceding paragraph.

5.69 One issue that arises is that it is unclear what role the "special circumstances" requirement in the UCPR plays in the context of appeals for security for costs.[90] Courts have stated that the factors relevant to security for costs applications at first instance remain relevant in assessing whether there are "special circumstances" in the context of appeals.[91] Yet the Court of Appeal has been unwilling to define "special circumstances" any more precisely, because to do so could limit its discretion.[92]

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84. *Supreme Court Rules 1987* (SA) r 290(1)(g); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 64.24(2).
85. *Farrell v Royal Kings Park Tennis Club (Incorporated)* [2007] WASCA 173, [32].
86. *High Court Rules 2004* (Cth) r 59.01.
87. *Supreme Court (Court of Appeal) Rules 2005* (WA) r 44(1).
88. *Family Law Act 1975* (Cth) s 117(2).
89. *Federal Court Rules* O 52 r 20; ACT r 5055(1); *Supreme Court Rules* (NT) r 85.13, *Supreme Court Rules 2000* (Tas) r 671.
90. See G E Dal Pont, *Law of Costs* (Lexis Nexis Butterworths, 2nd ed, 2009) [29.101], [29.105].
91. *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247, [18].
92. *Transglobal Capital Pty Ltd v Yolarno Pty Ltd* [2004] NSWCA 136, [33]–[35].

5.70 Furthermore, although courts treat the appellant's impecuniosity as a relevant factor in deciding whether to order security, there is disagreement about whether the appellant's impecuniosity by itself can give rise to a "special circumstance" justifying a security order.[93]

5.71 Courts may be more likely to find that impecuniosity is enough to ground "special circumstances" where the appellant is a corporation that is appealing against an adverse winding up order. As the court in *Tricorp Pty Ltd v DCT (WA)* stated, "the general rule is that a court will regard the existence of the winding up order on the ground that a company is unable to pay its debts as a special circumstance justifying the making of an order for security for costs".[94]

5.72 In practice, courts are generally willing to order security against impecunious appellants provided there are also other factors suggesting that the order should be made. The most common other factor in this context is weakness in the appellant's case.[95] In cases where the appeal lacks merit, there is less reason for the court to be concerned about the potential for an order for security to stifle the appellant's action.[96]

5.73 Courts have similarly held that where an impecunious appellant's action is being funded by a third party, this may amount to "special circumstances" justifying a security order.[97] In such a situation, it may be less likely that a security order will stifle the appellant or prevent him or her from litigating.

5.74 Other factors that courts have regarded as suggesting the presence of "special circumstances" are:[98]

- the appellant's failure to disclose his or her financial position;
- evidence that the appellant divested his or her assets; and
- evidence that the respondent has incurred, or will incur, extensive legal costs in the appeal

5.75 On the other hand, courts may not be satisfied that the "special circumstances" requirement has been made out — even if the appellant is impecunious — where the subject matter of the appeal involves matters of substantial public interest.[99]

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93. Support for the view that the appellant's impecuniosity by itself is enough to ground a security order can be found in: *Scerri v Northam Holdings Pty Ltd* [1967] VR 674; *Ciappina v Ciappina* (1983) 70 FLR 287, 280; *Citicorp Australia Ltd v Cirillo* [2003] SASC 204, [23]. Support for the opposite view can be found in: *Fletcher v Federal Commissioner of Taxation* (1992) 23 ATR 555, 559–560; *Uptown Sydney Development Corporation Pty Ltd v Bank of New Zealand (No 1)* (1993) 11 ACSR 300, 301; *Transglobal Capital Pty Ltd v Yolarno Pty Ltd* [2004] NSWCA 136.
94. *Tricorp Pty Ltd (in liq) v DCT* (WA) (1992) 6 ACSR 706, 707.
95. See *Foxgold Pty Ltd v Paterson* [2005] SASC 376; *J M Properties Pty Ltd v Strata Corporation No 13975 Inc* [2006] SASC 227; *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247.
96. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [29.106].
97. *Winnote Pty Ltd (in liq) v Page* [2005] NSWCA 362; *Piras v Egan* [2007] NSWCA 26.
98. See *Marks-Isaacs v Fowler* [2005] NSWCA 37; *J M Properties Pty Ltd v Strata Corporation No 13975 Inc* [2006] SASC 227.
99. *Loizos v Carlton & United Breweries* (1993) FLR 239.

5.76 The questions that arise are:

(a) whether the "special circumstances" requirement in the UCPR is necessary; and

(b) if it is necessary, whether "special circumstances" should be defined.

5.77 It could be argued that the "special circumstances" requirement in practice has very little effect on the way courts exercise their discretion to order security in appeals. The factors that New South Wales courts have regarded as most relevant to determining whether "special circumstances" exist — the appellant's impecuniosity and the lack of merit in the appeal — are the same factors that courts consider in jurisdictions whose court rules do not contain a "special circumstances" requirement.[100]

5.78 Furthermore, the "special circumstances" requirement in the UCPR is arguably inconsistent with the courts' professed willingness to order security for costs in appeal proceedings.[101] In so far as the requirement adds an additional hurdle to ordering security in appeals, it goes against the principle that the court should not too readily allow an appellant to have a "free hit" against the opposing party.[102]

5.79 It is possible that these considerations partly explain why the Western Australian and Australian Capital Territory superior courts removed the special circumstances requirement in appeals from their court rules in 2005 and 2006 respectively.[103]

Question 5.8

(1) Should the "special circumstances" requirement in appeals be removed?

(2) If not, should "special circumstances" be defined, and how should they be defined?

Placing the power to order security for costs in appeal proceedings in statute

5.80 A further question is whether the power of courts to make security for costs orders should be located in the CPA instead of the UCPR. There is currently no basis in statute for courts to order security for costs on appeal. Section 98 of the CPA gives courts a general power to order costs. However, it does not expressly refer to security for costs. In Chapter 2, we raised the question of whether s 98 should be amended to provide courts with a broad power to order security for costs. This is to clarify in statute that courts have broad discretion in relation to both costs and security for costs. The same approach could be taken in relation to security for costs on appeal.

100. See *Murchie v Big Kart Track Pty Ltd (No 2)* [2002] QCA 339; *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 1334; *Coleman v Greenland* [2004] QCA 93; *Lewis v Strickland* [2004] QCA 134; *Jenkins v Martin* [2004] QSC 417; *Christodoulou v Disney Enterprises Inc* [2006] FCA 38; *Upton v Tasmanian Perpetual Trustees Pty Ltd* [2006] FCA 1336; *Moore v Macks* [2007] FCA 509.

101. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [29.105].

102. See para 5.63.

103. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [29.101] n 421.

Question 5.9

Should the provision relating to the courts' discretion to make security for costs orders in appeals be located in the *Uniform Civil Procedure Rules 2005* (NSW) or in the *Civil Procedure Act 2005* (NSW)?

Security in applications for leave to appeal

5.81 Although the UCPR provides that security can be given for the costs of appeals to the courts in New South Wales "in special circumstances",[104] there is no provision in the UCPR or statute bearing directly on security for costs in the case of leave to appeal proceedings.

5.82 The Court of Appeal in *Fleming v Marshall* held that UCPR r 51.50, which allows security for costs to be given in appeal proceedings, does not apply to an application for leave to appeal.[105] Nevertheless, there are two other sources of power that potentially allow the court to order security for costs in leave to appeal proceedings: UCPR r 42.21, and the inherent jurisdiction of the Supreme Court.[106]

5.83 As *Charara v Integrex Pty Ltd* demonstrates, a defendant applying for security for costs in leave to appeal proceedings under the UCPR will be limited to the grounds outlined in UCPR r 42.21(1). By contrast, the only limitation on the inherent jurisdiction of the Supreme Court to order security is that the court should exercise its discretion by determining how "on the whole, justice will be best served".[107] The inherent jurisdiction of the court therefore allows security for costs in leave to appeal proceedings to be ordered in a broad range of cases.

5.84 One potential issue is that if the applicant is seeking leave to appeal to a court other than the Supreme Court (for example, leave to appeal to the District Court from a Local Court decision), security for costs will be limited to the grounds outlined in UCPR r 42.21(1). This is because statutory courts cannot avail themselves of the Supreme Court's inherent jurisdiction.

5.85 For this reason, it could be beneficial to amend the UCPR or the *Civil Procedure Act 2005* (NSW) to give New South Wales courts power to order security for costs in leave to appeal cases. This would allow the District Court to order security for costs in these situations. Such a provision would only be useful, however, if it was not limited by the grounds enumerated in UCPR r 42.21(1). One option would be to frame the provision in wide terms similar to the Supreme Court's inherent jurisdiction (although limited to leave to appeal cases). Such an amendment would ensure that all New South Wales courts covered by the UCPR have the same wide power to order security in leave to appeal proceedings as the Supreme Court currently enjoys due to its inherent jurisdiction.

104. *Uniform Civil Procedure Rules 2005* (NSW), r 50.8, 51.50.

105. *Fleming v Marshall* [2010] NSWCA 152, [12] (Handley AJA).

106. *Charara v Integrex Pty Ltd* [2010] NSWCA 342, [10].

107. *King v Commercial Bank of Australia Ltd* (1920) 28 CLR 289, 292; *Charara v Integrex Pty Ltd* [2010] NSWCA 342, [17].

Question 5.10

(1) Should legislation provide courts with power to order security for costs for leave to appeal applications?

(2) If so, should the provision be located in the *Uniform Civil Procedure Rules 2005* (NSW) or in the *Civil Procedure Act 2005* (NSW)?

Statutory power to dismiss an appeal for failure to provide security

5.86 In New South Wales there is no provision giving courts power to dismiss an appeal for failure to provide security for costs. Rule 42.21(3) of the UCPR empowers courts to dismiss proceedings where security is not provided, but this provision only applies to security for costs orders made at first instance pursuant to r 42.21.[108] It does not apply to security orders in appeal cases, which are instead governed by UCPR r 50.8 (appeals generally) and r 51.50 (appeals to the Court of Appeal).[109]

5.87 The law in New South Wales is currently analogous to the law in Victoria, where court rules also require "special circumstances" before security can be ordered in appeals and empower the court to dismiss a claim at first instance if security is not provided.[110] The Victorian Court of Appeal has held that, while the Victorian court rules do not provide an express power to dismiss an appeal for failure to provide security, the court does possess this power pursuant to its inherent jurisdiction to regulate its procedures.[111] It is therefore likely that in New South Wales the inherent jurisdiction of the Supreme Court to regulate its procedures and prevent abuses of process would also allow the court to dismiss an appeal for failure to provide security.

5.88 Although the court has power to dismiss an appeal for failure to provide security under its inherent jurisdiction, it could be argued that it is desirable to amend the UCPR to include an express power to do so. This would provide certainty in the law and would also mean that the District Court, Local Court and other statutory courts, which do not have inherent jurisdiction, could avail themselves of this power.

5.89 The Queensland court rules explicitly cover the situation where there is a failure to provide security for an appeal. Rule 774 states:

> If the appellant has been ordered to give security for costs of an appeal and the security has not been given as required by the order—
>
> (a) the appeal is stayed so far as it concerns steps to be taken by the appellant, unless the Court of Appeal otherwise orders; and

108. *Porter v Gordian Runoff Ltd* (No 3) [2005] NSWCA 377, [36] (UCPR r 42.21(3) only "applies to proceedings at first instance").

109. See *US Manufacturing Company v ABB Service* [2007] NSWSC 777, [12] where the court held that UCPR r 50.8 "wholly governs the ordering of security for costs on an appeal".

110. See the discussion of *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 64.24(2), 62.04 in *Farnell v Penhalluriack* [2010] VSCA 305, [17].

111. *Farnell v Penhalluriack* [2010] VSCA 305, [17]–[18].

(b) the Court of Appeal may, on the respondent's application, dismiss the appeal.[112]

5.90 If the law were to be amended in New South Wales, this Queensland rule could be used as a model.

Question 5.11

Should courts have express legislative power to dismiss an appeal for failure to provide security for costs under an order to do so?

112. *Uniform Civil Procedure Rules 1999* (Qld) r 774.

Appendix A: Preliminary Submissions

Confidential Preliminary Submission, 18 February 2010
Confidential Preliminary Submission, 7 July 2010
Environmental Defender's Office NSW, 15 February 2010
Fairfax Media Publications Pty Ltd, 16 March 2010
Insolvency Practitioners Association, 26 February 2010
LawCover Insurance Pty Ltd, 26 February 2010
Law Institute of Victoria, 26 February 2010
Malcolm Arthur, 8 February 2011
Maurice Blackburn Pty Ltd, 26 February 2010
National Pro Bono Resource Centre, 26 February 2010
NSW Bar Association, 8 February 2010
NSW Young Lawyers, Environmental Law Committee, 3 March 2010
NSW Young Lawyers, Civil Litigation Committee, 26 February 2010
NSW Land & Environment Court, 27 February 2010
Public Interest Advocacy Centre, 5 March 2010
Public Interest Law Clearing House, 13 September 2010
Slater & Gordon, 15 February 2010
Stephen Epstein SC, 26 February 2010
Yvonne Elliott, 26 February 2010
Mr Malcolm Arthur, 8 February 2011