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New South Wales
Law Reform Commission

Report
137

Security for costs and associated costs orders

December 2012
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Law Reform Commission
Attorney General & Justice

The Hon G Smith SC MP
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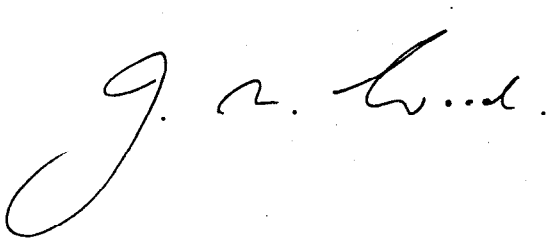
SYDNEY NSW 2000

Dear Attorney

Security for costs and associated orders

I enclose a copy of our report on security for costs and associated orders.



The Hon James Wood AO QC
Chairperson
December 2012

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Terms of reference

The terms of reference 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;

   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.

[*Reference received on 8 December 2009*]

Executive Summary

Chapter 1 Introduction

0.1 This report examines the law on security for costs, as well as related orders including protective costs orders and public interest cost orders. As required by our terms of reference, our recommendations seek a balance between 'protecting a plaintiff's right to pursue legitimate claims regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation'.

0.2 Security for costs is money that a plaintiff is ordered to provide to the court as a condition of continuing with a claim, and which will be applied on any costs order that may made against the plaintiff. It protects the defendant against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff's impecuniosity.

0.3 A number of interests are relevant in relation to security for costs. The first is providing plaintiffs access to the court system, regardless of their financial status. The second is protecting successful defendants from being out-of-pocket for their litigation costs. The third is safeguarding the courts' processes: costs and security for costs may discourage frivolous claims, and encourage the parties to conduct litigation in a manner that is proportional to the matters at issue.

0.4 In undertaking this reference, we consulted widely. We received 19 preliminary submissions. We published Consultation Paper 13 in May 2011 and received 32 submissions in response to it. We conducted 4 consultation meetings and a roundtable forum of stakeholders. A complete list of the recommendations appears immediately following this Executive Summary.

Chapter 2 Jurisdiction to order security for costs

0.5 Rule 42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') is the main legislative provision dealing with security for costs. It contains a list of situations where courts have discretion to order security for costs.

0.6 Applications for security for costs sometimes raise issues outside those listed in UCPR r 42.21. In such cases the Supreme Court and Land and Environment Court may use their inherent jurisdiction. The District Court has power to make security for costs orders in such cases, relying on its implied power to govern it own proceedings. The position of other courts, such as the Local Court, is less clear.

0.7 The *Civil Procedure Act 2005* (NSW) contains a broad power in relation to costs. We consider it desirable for legislation to provide all courts with a similar broad power to make security for costs orders to remove doubts about, and minimise submissions on, jurisdictional issues. We therefore recommend that the *Civil Procedure Act 2005* (NSW) be amended to provide that, subject to the rules of court, the court may order security for costs, where the order is necessary in the

interests of justice, on such terms and in such manner as the court thinks fit (Recommendation 2.1).

0.8 Once a court's jurisdiction to entertain a security for costs application is established, the court has discretion whether or not to order security. The case law has identified factors that courts may consider when exercising their discretion. In the interests of clarity and accessibility, we consider it desirable for the UCPR to be amended to provide a non-exhaustive list of factors that courts may take into account in deciding security for costs applications. Those factors are drawn from the case law, and the rules of court of other Australian jurisdictions. We set those factors in Recommendation 2.5. These factors do not provide a list of additional grounds for application, but are relevant only after the applicant for security has established one of the grounds in UCPR r 42.21.

Chapter 3 Plaintiffs assisted by particular forms of costs agreements

0.9 Some litigants obtain assistance from professional litigation funders, lawyers acting pro bono, lawyers acting on a conditional costs basis, and legal aid. The liability of professional litigation funders for costs and security for costs has raised particular concerns. Such funders contract with litigants to finance litigation in return for taking a percentage of the proceeds of the litigation. The courts have reasoned that a non-party that is funding litigation for commercial profit should not be able to avoid responsibility for the costs if the litigation fails.

0.10 Section 98 of the *Civil Procedure Act 2005* (NSW) has been construed as giving courts power to make costs orders against non-parties. There is, however, some doubt about the power of New South Wales courts to deal with security for costs applications against non-parties including litigation funders.

0.11 Problems are not likely to arise frequently in practice. An order for security for costs will usually be made against the party to the proceedings. Further, we are informed that most litigation funding agreements contain an indemnity for adverse costs orders which, when accompanied by an undertaking by the plaintiff to pursue it if it loses the case, or by the funder to be subject to the court's jurisdiction for costs purposes, may make a security for costs order unnecessary.

0.12 However, there may be cases where problems arise, such as where there is doubt about the nature and terms of the litigation funding agreement or the financial capacity of the funder.

0.13 Recommendation 2.1, which is intended to provide a broad discretion in relation to security for costs will, if implemented, give the courts power to order security for costs against non-parties including litigation funders. Nevertheless, we recommend that the Uniform Rules Committee should give consideration to amending the UCPR to make specific provision that courts have discretion to make security for costs orders against litigation funders. Rule 25.14 of the *Civil Procedure Rules 1998* (UK) provides an appropriate model (Recommendation 3.1). We make this recommendation for clarity, to remove any uncertainty, to prevent litigation on this issue and to clarify the criteria for the exercise of discretion.

0.14 We further recommend that a party to proceedings who is supported by a litigation funder should disclose the existence and the relevant terms of the funding agreement (Recommendation 3.2). Disclosure is desirable in the interests of effective case management because it would assist in identifying whether an application for security is necessary.

0.15 In some cases a plaintiff may be assisted by a lawyer who is acting 'pro bono', a term we use in this report to mean the provision of legal services without any fee. A lawyer acting pro bono cannot generally recover costs because of the indemnity principle. There is, however, an exception for lawyers acting pro bono under the court-appointed scheme specified in the UCPR.

0.16 We see merit in legislative change to provide courts with the discretion to make costs orders in pro bono cases. However, our terms of reference do not cover the issue, and we suggest that further consultation is needed before changes to the law are contemplated.

0.17 The *Civil Procedure Act 2005* (NSW) contains provisions on representative proceedings before the Supreme Court. Section 181 of that Act grants immunity from costs orders to represented group members, although costs orders can be made against the representative plaintiff. However, the cases interpreting the cognate provisions of the *Federal Court of Australia Act 1976 (Cth)*, upon which the New South Wales provisions were modelled, have created some doubt about the proper approach to security for costs in representative proceedings.

0.18 To clarify the law in this regard, we recommend that the *Civil Procedure Act 2005* (NSW) be amended to provide that, in representative proceedings, the court may make an order for security for costs and that, in considering any application for security for costs, the court should take into account the immunity from costs orders provided in s 181 for group members and the function of representative actions in promoting access to justice, among other factors (Recommendation 3.3).

Chapter 4 Public interest proceedings

0.19 Public interest litigation plays an important role in contributing to the development of legal principles that affect a broad section of the community, in making government more accountable, and in providing civil society (including those that advocate for the disadvantaged or marginalised) with an avenue for effecting social change. Costs and security for costs are frequently significant issues for litigants in public interest proceedings. The costs of litigation may be sufficient to bankrupt individuals and community groups, and the potential for such orders may prevent access to justice on important public interest issues.

0.20 However, defendants in such cases may be concerned that impecunious litigants will cause them significant and unrecoverable costs in defending a case.

0.21 Rule 4.2 of the *Land and Environment Court Rules 2007* (NSW) empowers the Land and Environment Court to decide not to make an order requiring a plaintiff to provide security for the defendant's costs, or for the payment of costs against an unsuccessful plaintiff, if it is satisfied that the proceedings have been brought in the public interest.

0.22 Existing laws, including UCPR r 42.1 and r 42.4 (cost capping) and the relevant case law, give other courts discretion to provide some protection to public interest litigants. However, cases where this discretion has been used are scarce.

0.23 We consider it desirable for legislation to provide an affirmative basis for exempting public interest litigants from security for costs and adverse costs orders in appropriate cases. Consequently we recommend that the UCPR be amended to adopt a rule based on r 4.2 of the *Land and Environment Court Rules* (NSW) that will provide courts in New South Wales with the power to make appropriate costs and security for costs orders in public interest proceedings (Recommendation 4.1).

Chapter 5 Procedures and appeals

0.24 Our terms of reference require the Commission to examine whether there are adequate procedures for making and determining applications for security costs and associated orders, and whether any modifications in respect of security for costs in appeals are required.

0.25 Submissions and consultations did not reveal significant problems with the current procedures. We make only two recommendations.

0.26 Rule 50.8(1) of the UCPR provides that a court hearing an appeal may order security for the costs of the appeal in 'special circumstances.' UCPR r 51.50(1) contains an identical provision specific to appeals to the Court of Appeal.

0.27 Relevant case law states that courts should, as a general rule, be more willing to make a security for costs order security in an appeal (provided there are sufficient factors which justify such an order) because there is an existing decision adverse to the appellant that is presumed correct until displaced. The 'special circumstances' requirement in UCPR r 50.8(1) and r 51.50(1) is, therefore, arguably inconsistent with the tenor of the case law. We recommend that UCPR r 50.8(1) and r 51.50(1) of the UCPR be amended by removing the 'special circumstances' requirement (Recommendation 5.1).

0.28 Rule 42.21(3) of the UCPR empowers courts to dismiss proceedings where security is not provided. However, there is no legislative provision that gives courts the power to dismiss an appeal for failure to provide security for costs. In the interests of clarity, we recommend that r 50.8 and r 51.50 of the UCPR be amended to include a power to dismiss an appeal for failure to provide security for costs (Recommendation 5.2).

List of recommendations

	Chapter 2 Jurisdiction to order security for costs	Page
2.1	The *Civil Procedure Act 2005* (NSW) should be amended to provide that, subject to the rules of court, the court may order security for costs where the order is necessary in the interests of justice, on such terms and in such manner as the court thinks fit.	16
2.2	Rule 42.21(1)(a) of the *Uniform Civil Procedure Rules* 2005 (NSW) should be amended to remove the reference to a plaintiff 'ordinarily resident outside New South Wales', and to insert instead 'ordinarily resident outside Australia'.	18
2.3	The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that, if a party changes his or her address during the course of the proceeding, that party should notify the court and the other parties of his or her new address within a reasonable time.	20
2.4	Rule 42.21(1) of the *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that the court may order security where the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings.	22
2.5	The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that if the court has jurisdiction under r 42.21(1) to consider a security for costs application, it may have regard to the following factors, among others: (a) the means of any person standing behind the proceeding; (b) the prospects of success or merits of the proceeding; (c) the genuineness of the proceeding; (d) the impecuniosity of the plaintiff; but if the plaintiff is a natural person, no order shall be made merely on account of his or her impecuniosity; (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 stifle the proceeding; (h) whether the proceeding involves a matter of public importance; (i) whether there has been an admission or payment in court; (j) whether delay by the plaintiff in commencing the proceeding has prejudiced the defendant; (k) the costs of the proceeding; (l) whether the security sought is proportionate to the importance and complexity of the subject matter in dispute; (m) the timing of the application for security for costs; (n) whether an order for costs made against the plaintiff would be enforceable within Australia; and (o) the ease and convenience or otherwise of enforcing a New Wales court judgment or order in the country of a non-resident plaintiff.	33
	Chapter 3 Parties assisted by particular forms of costs agreements	**Page**
3.1	The Uniform Rules Committee should give consideration to amending the *Uniform Civil Procedure Rules 2005* (NSW) to provide courts with the power to make security for costs orders against litigation funders in terms similar to the provisions of r 25.14 of the *Civil Procedure Rules 1998* (UK).	53

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;
>
> 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.

1.2 When this inquiry was announced in Parliament the then Attorney General reported

> 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 In this context the Attorney mentioned some developments of particular significance. First, the spate of litigation in environmental matters had prompted appeals for reform to ensure that defendants are not left out-of-pocket by unsuccessful litigation: on the other hand there were calls for more protection for public interest litigants through greater use of protective costs orders which limit the amount of costs that can be recovered by one party against the other. Second, the growth in litigation funding from professional litigation funders had given rise to concerns about its implications for the law on costs and security for costs. Given the complexity of the issues relating to security for costs and the potential effect on access to justice, the Attorney General referred the law and practice relating to security for costs and associated orders to the Law Reform Commission for review.

1.4 The main focus of our terms of reference is security for costs. However, the issue of costs is also raised. In part this is because the issues relevant to costs and security for costs are necessarily interconnected. However our terms of reference also raise the issue of costs directly, especially in relation to protective costs orders and public interest costs.

Security for costs: meaning and purposes

1.5 In civil proceedings in New South Wales, the court has a broad discretionary power to decide who will pay the parties' litigation costs.[2] The general rule regarding litigation costs in New South Wales, in r 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'), 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'.[3] This means that courts generally order the losing party to pay the winning party's costs. Costs are awarded based on the indemnity principle: costs are compensatory and not punitive in nature and that a party cannot recover against the paying party more than the amount for which he or she is liable to his or her own lawyer.[4] 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.[5]

1.6 Where a defendant, prior to judgment, is concerned that its litigation costs might not be paid if it wins the case (for example, where the plaintiff has limited financial means, or has no assets, in Australia) the defendant may apply to the court for an order for security for costs. If the court decides to grant the defendant's application,

1. New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 December 2009, 20524 (John Hatzistergos, Attorney General).
2. *Civil Procedure Act 2005* (NSW) s 98. See Chapter 2 at [2.4]–[2.6] for a discussion on the relationship between s 98 and security for costs.
3. For a discussion of this rule, see G Dal Pont, *Law of Costs* (2nd ed, LexisNexis Butterworths, 2009) [7.2]–[7.1].
4. *Wentworth v Rogers* [2006] NSWCA 145, 66 NSWLR 274, 499 [102] (Basten JA).
5. *Tsu v Nemeth* [2012] NSWCA 29, [51] (Handley AJA); *Wentworth v Rogers* [2006] NSWCA 145, 66 NSWLR 474, 503 [123]–[126]. See also G Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [7.7].

it will order the plaintiff to provide security for the defendant's costs in the form of a bank cheque,[6] a guarantee or bond,[7] or some other acceptable form.[8] The court will also usually order a stay of proceedings until the security is given,[9] and if the plaintiff does not comply with the order, the court may dismiss the proceedings.[10]

1.7 Hence, security for costs is money that a plaintiff is ordered to give to the court as a condition of continuing with a claim. Its main purposes are

> to protect the efficacy of the exercise of the court's jurisdiction to award costs, and to ensure that a defendant is protected against the risk that a costs order be of no value because the order cannot be met by the applicant/plaintiff. The jurisdiction to award security for costs recognises the principle that injustice would result to a respondent/defendant by the impecuniosity of the applicant/plaintiff, being the moving party in the proceedings.[11]

Balancing of various interests

1.8 In examining the law and practice relating to security for costs and associated orders, the terms of reference direct us to be mindful of a number of underlying interests. The first is access to justice. There is a public interest in endeavouring to give everyone, including those with limited financial resources, access to the court system. This is a fundamental aspect of democracy which is recognised by governments in numerous ways. In the context of security for costs it is recognised by the rule 'that poverty is no bar to a litigant'.[12] If courts were to order security for costs routinely on the ground of the plaintiff's impecuniosity, access to justice would be frustrated because such orders are likely to put an end to the litigation and thus deny persons with limited financial means the opportunity to secure their legal rights.[13]

1.9 There are, however, other interests to consider. Those who are successful in defending a claim may have expended considerable amounts of money to mount their defence. Their interest is in ensuring that there are funds available to cover their costs.

1.10 Important public interests are also at stake. Costs and security for costs play a role in discouraging abuse of the court's processes by 'preventing impecunious persons

6. See for example *Aoun v Bahri* [2002] EWHC 29.
7. See for example *Appleglen Pty Ltd v Mainzeal Corporation Pty Ltd* (1988) 79 ALR 634, 636 (Pincus J) (deed of guarantee executed by the directors of the plaintiff company).
8. See for example *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 204 (charge over personal property). For a more detailed discussion on the various forms of security, see G Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.45]–[28.51].
9. *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1) gives courts discretion to stay the proceedings until the security is given. This provision is examined in detail in Chapter 5 at [5.26]–[5.33].
10. *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(3).
11. *National Mutual Life Assn of Australasia Ltd v Tolfield Pty Ltd (No 4)* [2012] FCA 101, [8] (Collier J).
12. *Cowell v Taylor* (1885) 31 Ch D 34, 38.
13. *McSharry v The Railway Commissioners* (1897) 13 WN (NSW) 161, 162 (Darley CJ); *Fletcher v Commissioner of Taxation* (1992) 23 ATR 555, 558 (Hill J).

from litigating without responsibility',[14] discouraging the filing of unmeritorious and frivolous claims,[15] and encouraging the parties to conduct their litigation in a way that is proportionate to the claim.

1.11 Courts have recognised the need to balance these, and other, interests in the exercise of their discretion to order security. The factors relevant to this balancing exercise are discussed in Chapter 2.

Our process

1.12 After we were given our terms of reference, we received 19 preliminary submissions. These are listed in Appendix A of this report and are available on our website. These preliminary submissions were very useful in identifying some of the problems that arise in relation to security for costs and suggesting options to resolve them.

1.13 We published Consultation Paper 13 in May 2011. It was circulated for comment to more than 150 individuals and organisations, including judges of New South Wales courts, legal professional bodies (such as the NSW Bar Association, the NSW Law Society, and NSW Young Lawyers), barristers, law firms, legal costs specialists, community legal centres and non-profit organisations that engage in public interest litigation and pro bono work, professional litigation funders, academics and relevant government agencies. It was also made available on the Commission's website.

1.14 In response to Consultation Paper 13 we received 32 submissions, which are listed in Appendix A of this report, and are also available on our website.

1.15 We subsequently conducted consultations, primarily to obtain more information about the problems identified in the submissions and to test some options to deal with them. We consulted with judges and judicial officers of the Supreme Court, the Land and Environment Court, District Court and Local Court. We also organised a roundtable meeting of experts and stakeholders. Details of these consultations are listed in Appendix B of this report.

1.16 During preparation of this report we re-contacted some stakeholders to obtain supplementary information to augment material they had provided concerning public interest litigation.

1.17 We sincerely thank all those who made submissions and contributed to our consultations. These contributions were invaluable and played an essential role in informing the conclusions and recommendations contained in this report.

14. *Re Marriage of MA and Brown* (1991) 15 Fam LR 69.
15. *Davey v Herbst (No 2)* [2012] ACTCA 19, [15] (Refshauge J) citing S Colbran, *Security for Costs* (Longman Professional, 1993) 1.

Structure of this report

1.18 Chapter 2 of this report 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 whether it is desirable to make further provision for security for costs in New South Wales law, and whether certain aspects of the relevant case law should be codified. We examine, among other things:

- whether legislation should provide New South Wales courts with a broad ground for ordering security for costs, in addition to the grounds presently listed in UCPR r 42.21; and
- whether the UCPR should be amended to provide a non-exhaustive list of factors that courts may take into account when exercising their discretion on security for costs.

1.19 Chapter 3 deals with security for costs where plaintiffs are funded or assisted by third parties, including:

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

This chapter also examines issues that arise in relation to representative proceedings. These are proceedings where a number of persons have related claims against the same defendant that raise common questions of law or fact. They are usually funded by one or more of the funding arrangements mentioned above.

1.20 Chapter 4 deals with security for costs in public interest proceedings. We consider the nature of public interest proceedings and the issues of security for costs that arise in such cases. In particular we examine whether it is desirable to adopt legislation giving courts power to make public interest costs orders, which may reduce or remove the obligation of the plaintiff to pay costs or to provide security for costs in appropriate cases.

1.21 Chapter 5 deals with security for costs relating to procedures and appeals. It examines whether new measures should be adopted to assist courts in determining the appropriate amount of security, whether there should be an automatic stay of proceedings when a security order is made, and whether the law in relation to varying or setting aside security for costs orders should be reformed. It also considers 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.

2.2 We first outline the main sources of power to order security for costs:

- *The Civil Procedure Act 2005 (NSW)*, particularly s 61 and s 67.
- The *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'), particularly r 42.21.
- Section 1335(1) of the *Corporations Act 2001* (Cth) ('Corporations Act').
- The inherent jurisdiction of the Supreme Court.
- The inherent or implied jurisdiction of the Land and Environment Court.
- The implied power of other courts to control their proceedings.

2.3 We consider whether these powers are sufficient. Next, we examine in detail the grounds for ordering security listed in r 42.21(1) of the UCPR. The third part of the chapter considers whether or not the UCPR should be amended to include factors that courts may take into account when making orders for security for costs. The fourth part of the chapter analyses security for costs orders against corporate plaintiffs. Finally we consider the power of courts to order security for costs against defendants.

Jurisdiction of courts to order security for costs

2.4 As mentioned in Chapter 1, the main purpose of security for costs is to ensure that if the plaintiff is unsuccessful, payment of the defendant's costs is secured. The power of courts in New South Wales to order costs is contained in the *Civil Procedure Act 2005* (NSW). Section 98 of that Act provides that subject 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'. Section 98 further provides that a costs order may be made by the court at any stage of the proceedings, or after the conclusion of the proceedings.

2.5 However, s 98 does not refer to security for costs. An order for security is not regarded as an order for costs to which s 98 applies. It is an order relating to costs, but is essentially a procedural order, an order whereby proceedings may be stayed until security has been provided.[1]

1. For example, in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [20] the Court of Appeal said there is no statutory provision explicitly dealing with security for costs in relation to individual plaintiffs while s 1335 of the Corporations Act 2001 (Cth) is the relevant statutory provision for corporate plaintiffs. This approach to security for costs extends beyond New South Wales. In a different context, Justice Kirby in *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] HCA 41, 193 CLR 502, [20] doubted whether s 26 of the *Judiciary Act 1903* (Cth), which gives the High Court jurisdiction 'to award costs in all matters brought before the Court', could be the source of a power in the High Court to order security for costs in proceedings in the court's original jurisdiction. Justice Kirby nonetheless held that such a power is within the court's inherent jurisdiction.

2.6 Thus s 61 and s 67 of the *Civil Procedure Act 2005* (NSW) have been cited by the courts as relevant in relation to security for costs.[2] These sections provide:

> **61 Directions as to practice and procedure generally**
> (1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.
>
> (2) In particular, the court may, by order, do any one or more of the following:
>
> (a) it may direct any party to proceedings to take specified steps in relation to the proceedings,
>
> (b) it may direct the parties to proceedings as to the time within which specified steps in the proceedings must be completed,
>
> (c) it m*ay* give such other directions with respect to the conduct of proceedings as it considers appropriate.
>
> **67 Stay of proceedings**
> Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day.

The *Uniform Civil Procedure Rules 2005* (NSW)

2.7 The statutes that created the courts in New South Wales give them the power to make rules of court to govern their practices and procedures.[3] Section 8 of the *Civil Procedure Act 2005* (NSW) creates the Uniform Rules Committee, and s 9 provides that the Committee may make rules, consistent with the Act, to give effect to it. Schedule 3 of the Act lists the rule-making powers. These include the power, at clause 26, to make rules concerning the cases in which security may be required, and the form of such security, and the manner in which, and the person to whom, it is to be given.

2.8 The UCPR apply to the:

- Supreme Court;
- District Court;
- Land and Environment Court;
- Local Court;
- Dust Diseases Tribunal;
- Industrial Court; and

2. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [20] (Hodgson JA) (citing s 61); *Duynstee v Dickins* [2011] NSWSC 408, [31] (Price J) (citing s 67).
3. 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.

- Industrial Relations Commission.[4]

2.9 The UCPR do not apply to some courts and tribunals, such as the Administrative Decisions Tribunal; Children's Court; Consumer, Trader, and Tenancy Tribunal; Guardianship Tribunal; and Mental Health Review Tribunal.

2.10 There are a number of rules relating to security for costs in the UCPR,[5] the most significant being rule r 42.21, which provides:

> **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.
>
> (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.

Section 1335(1) of the Corporations Act

2.11 Section 1335(1) of the *Corporations Act* 2001 (Cth) provides another source of power for courts to order security for costs.[6] It gives courts power to order security for costs against corporate plaintiffs. The section states:

4. *Civil Procedure Act 2005* (NSW) sch 1.
5. See 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).

> 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.

The Supreme Court's inherent jurisdiction

2.12 In addition to its power to order security arising from the *Civil Procedure Act 2005* (NSW) and the UCPR, the Supreme Court has inherent power to regulate its procedures and prevent abuse of its processes, and this includes the power to order security for costs.[7] Superior courts have considered the power to order security for costs to be part of their inherent jurisdiction since at least 1786.[8] In *Grassby v Queen*[9] the High Court, referring to the power of the Supreme Court, held that it is undoubtedly 'the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power'.

2.13 The power of the Supreme Court to order security for costs based on its inherent jurisdiction is supported by the following statutory provisions:

- Section 5 of the *Civil Procedure Act 2005* (NSW) states that nothing in the uniform rules limits the jurisdiction of the Supreme Court.
- Section 23 of the *Supreme Court Act 1970* (NSW) 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 is relevant to the inherent power of the Supreme Court to order security for costs.[10]

The Land and Environment Court's inherent or implied jurisdiction

2.14 It was held in *Logwon Pty Ltd v Warringah Council* that the Land and Environment Court is a superior court with inherent jurisdiction.[11] In relation to security for costs

> [t]he court also has an inherent or implied power to make an order for security for costs - which power is unfettered and is not restricted or excluded by rules made on the subject for the purpose of regulating the practice and procedure of the court.[12]

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6. For a survey of the principles and practice relating to s 1335(1) of the Corporations Act, see H Stowe, 'Security for costs against impecunious plaintiffs' (Summer 2010–2011) *Bar News* 86.
7. *Green (in his capacity as liquidator of Arimco Mining Pty Limited) v CGU Insurance Ltd* [2008] NSWSC 449 [12]; *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443, [447]–[448]; *Bhattcharya v Freedman* [2001] NSWSC 498 [27].
8. *Pray v Edie* (1786) 99 ER 1087; K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449, 455.
9. [1989] HCA 45, 168 CLR 1, 16 (Dawson J).
10. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 [20] (Hodgson JA).
11. *Logwon Pty Ltd v Warringah Council* (1993) 33 NSWLR 13. Note on this point the dissent of Kirby P.
12. *Burrell Place Community Action Group Incorporated v Griffith City Council* [2009] NSWLEC 120, [4] (Lloyd J).

The District Court's implied power

2.15 The District Court has power to order security arising from the UCPR, but it does not have inherent jurisdiction to order security for costs.[13] However, it has implied jurisdiction. In *Grassby v Queen* the High Court said that it is undoubtedly 'the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power.'[14] Inferior courts, with limited jurisdiction, cannot draw on these powers. However, 'every court has jurisdiction that arises by implication, on the principle that a grant of power carries with it everything necessary for its exercise.'[15]

2.16 In *Philips Electronics Australia Pty Ltd v Matthews*,[16] the Court of Appeal held that s 156 of the *District Court Act 1973* (NSW), which gives the District Court the power to stay proceedings, 'is wide enough to give the District Court the 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'.[17] Thus the District Court can stay proceedings and make an order for security.

Jurisdiction of other courts

2.17 The Local Court has powers in relation to security arising from the UCPR. While there appear to be no cases directly on point, courts such as the Local Court, appear to have implied power to order security for costs. In *Grassby v Queen* Justice Dawson said of the implied powers of magistrates' courts:

> Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be "derived by implication from statutory provisions conferring particular jurisdiction." There is in my view no reason why, where appropriate, they may not extend to ordering a stay of proceedings.[18]

2.18 The statutes that created the courts in New South Wales give them the power to make rules of court to govern their practices and procedures. The Local Court has power to stay proceedings in s 4 of the *Local Court Act 2007* (NSW). As noted above, *Philips Electronics Australia Pty Ltd v Matthews*, held that the District Court has power to order security derived from the power to stay proceedings.

13. *Philips Electronics Australia Pty Ltd v Matthews* [2002] NSWCA 157, [45].
14. [1989] HCA 45, [21], 168 CLR 1, 16 (Dawson J).
15. [1989] HCA 45, [21], 168 CLR 1, 16 (Dawson J).
16. [2002] NSWCA 157.
17. *Philips Electronics Pty Ltd v Matthews* [2002] NSWCA 157, [47].
18. *Grassby v Queen* [1989] HCA 45, [23], 168 CLR 1, 17 (Dawson J). .

Is a broad legislative ground for ordering security for costs needed?

2.19 Preliminary submissions suggested the amendment of UCPR r 42.21 to provide courts with a broad ground for ordering security for costs.[19] The Bar Association submitted that UCPR r 42.21(1) is inadequate because it does not confer a general discretion to make an order for security particularly against natural persons.[20] Fairfax Media Publications Pty Limited ('Fairfax Media') also suggested the addition of a broad ground to UCPR r 42.21(1) by 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).[21]

2.20 Some jurisdictions have legislation giving courts a broad discretion to order security for cost. In Queensland, the Australian Capital Territory, and South Australia the rules of court give courts discretion to order security for costs in terms of whether the justice of the case requires such an order.[22]

2.21 The Federal Court also has broad discretion in relation to security for costs, which is located in s 56 of the *Federal Court of Australia Act 1976* (Cth).[23] The section provides:

> (1) The Court or a Judge may order an applicant in a proceeding in the Court, or an appellant in an appeal under Division 2 of Part III, to give security for the payment of costs that may be awarded against him or her.
>
> (2) The security shall be of such amount, and given at such time and in such manner and form, as the Court or Judge directs.
>
> (3) The Court or a Judge may reduce or increase the amount of security ordered to be given and may vary the time at which, or manner or form in which, the security is to be given.
>
> (4) If security, or further security, is not given in accordance with an order under this section, the Court or a Judge may order that the proceeding or appeal be dismissed.
>
> (5) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for or in relation to the furnishing of security.

2.22 In Consultation Paper 13, we asked the following questions:

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

19. NSW Bar Association, *Preliminary Submission PSC10*, [20(a)], [20(b)]; Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, [6.1]–[6.3].
20. NSW Bar Association, *Preliminary Submission PSC10*, [20(a)], [20(b)].
21. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13,* [6.1]–[6.3].
22. *Uniform Civil Procedure Rules 1999* (Qld) r 671(h); *Court Procedure Rules 2006* (ACT) r 1901(h); *Supreme Court Rules 2006* (SA) r 194(1)(e).
23. The court's discretion on costs is located in s 43 of the *Federal Court of Australia Act 1976* (Cth).

- If so, should this be achieved by amending the *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)?[24]

Stakeholders' views

2.23 Most of the submissions that addressed this topic supported a broad legislative ground for ordering security for costs,[25] based on these reasons:

- It will clarify and confirm the power of the District and Local Courts to make security for costs orders in cases that are not covered by UCPR r 42.21(1).[26]
- It may simplify the law by removing the need for lawyers and parties to rely on the case law.[27]
- Practitioners and parties are not as familiar with the implied power of the lower courts in relation to security for costs as they might be with the Supreme Court's inherent jurisdiction. A broad power in legislation would remove the need for submissions regarding the court's implied power, which would save costs for the parties and the resources of the courts.[28]

2.24 However there are arguments against legislative change, including the following:

- Justice Brereton of the NSW Supreme Court submitted that it is not needed in light of his observation that the inherent jurisdiction of the Supreme Court to order security for costs is used only rarely.[29]
- A broad legislative ground may convert what is presently an exceptional basis for relief into a standard basis, and may thus encourage more applications for security.[30]
- A broad ground may have an impact on access to justice in that it may 'open the floodgates' to more security applications.[31] Defendants with deep pockets may use the new broad discretion to stultify legitimate claims of plaintiffs with limited resources.[32]

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24. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.1.
25. The NSW Local Court, *Submission SC2*, 1; NSW Bar Association, *Submission SC10*, 2; C Needham SC, *Submission SC9*, 6; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 3; Clayton Utz, *Submission SC 18*, 2; M McHugh SC, *Submission SC6*, 1; CGU Insurance, *Submission SC11*, 1.
26. The NSW Local Court, *Submission SC2,* 1; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 3–4; Clayton Utz, *Submission SC 18*, 2; CGU Insurance, *Submission SC11*, 1.
27. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 3–4; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
28. District Court, *Consultation SC5*, Sydney NSW, 10 October 2012.
29. Justice Paul Brereton AM RFD, *Submission SC 24,* 2–3.
30. Justice Paul Brereton AM RFD, *Submission SC 24,* 2–3.
31. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
32. M McHugh SC, *Submission SC6,* 1; Public Interest Law Clearing House (Victoria), *Submission SC15,* 3.

- It may provoke litigation – for example a broad ground couched in terms of the requirements of justice would create uncertainty about the types of cases where security for costs could be ordered.[33]

2.25 A number of stakeholders submitted that, if a broad ground were recommended, it should be located in UCPR r 42.21.[34] The Bar Association argued that s 98 of the *Civil Procedure Act 2005* (NSW) on the courts' discretion on costs is not an appropriate location for a broad discretion on security for costs because these two powers are distinct, although related, and the distinction should be maintained.[35]

2.26 There were two submissions, both from judges, which suggested that the broad discretion be located in the *Civil Procedure Act 2005* (NSW).[36]

The Commission's conclusion

2.27 In accordance with the weight of submissions, we recommend that legislation should provide courts with a broad discretion relating to security for costs. We are also particularly persuaded by the argument that, while it is clear that the Supreme Court has power to deal with cases outside those listed in UCPR r 42.21 based on its inherent jurisdiction, the power of the other courts is less clear.

2.28 A broad security for costs power in legislation would remove the need for submissions to be made about the implied power of courts to stay proceedings and to make a security for costs order in a case outside UCPR r 42.21. This could save satellite litigation and costs associated with jurisdictional submissions, and give effect to the overriding purposes of the *Civil Procedure Act 2005* (NSW) of facilitating the just, quick and cheap resolution of the real issues in the civil proceedings.[37]

2.29 While there may be speculative applications for security to test the limits of the recommended amendment, we anticipate that such applications would dwindle rapidly following a judicial response making clear the relevance of the existing case law on security for costs. We note also that the Federal Court's experience with such a statutory power does not suggest that the floodgates will be opened.

2.30 On balance we consider the *Civil Procedure Act 2005* (NSW) to be the appropriate location for the relevant provision, since the power of the court to make orders in relation to costs is located in s 98 of that Act. Such a provision should be expressed to be subject to the rules of court, as is the power of the courts relating to costs under s 98 *Civil Procedure Act 2005* (NSW). This formulation will also assist in clarifying that no significant expansion beyond the established law is intended.

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33. Justice Paul Brereton AM RFD, *Submission SC 24,* 2–3, *Submission SC24*, 2–3; Public Interest Law Clearing House (Victoria), *Submission SC15,* 3.
34. NSW Bar Association, *Submission SC10*, 2; CGU Insurance, *Submission SC11,* 1; C Needham SC, *Submission SC9,* 6; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 4; Clayton Utz, *Submission SC 18,* 2; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12,* 5.
35. NSW Bar Association, *Submission SC10*, 2.
36. The NSW Local Court, *Submission SC2*1, 1*;* Justice Paul Brereton AM RFD, *Submission SC24* 3.
37. *Civil Procedure Act 2005* (NSW) s 56(1).

Recommendation 2.1

The *Civil Procedure Act 2005* (NSW) should be amended to provide that, subject to the rules of court, the court may order security for costs where the order is necessary in the interests of justice, on such terms and in such manner as the court thinks fit.

Amendments to rule 42.21 of the UCPR

2.31 This section deals with ways of improving the provisions of UCPR 42.21.

Residence outside New South Wales

2.32 Rule 42.21(1)(a) of the UCPR provides that if 'a plaintiff is ordinarily resident outside New South Wales' the court may order security for costs. The problem this provision addresses is that a non-resident plaintiff, particularly one without assets in this jurisdiction, could circumvent an adverse costs order because it may be difficult to enforce the order in his or her place of residence.[38] A security for costs order ensures that a successful defendant will have a fund available within this jurisdiction to enforce a costs order.[39]

2.33 There has been some judicial debate about whether UCPR r 42.21(1)(a) is consistent with s 117 of the Australian 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.

2.34 In *Australian Building Construction Employees and BLF v Commonwealth Trading Bank*,[40] Justice Helsham held that the then equivalent of UCPR r 42.21(1)(a) was inconsistent with the prohibition in s 117 on discrimination against a resident of another State or Territory. His Honour 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.'[41] Subsequent cases have held that UCPR r 42.21(1)(a) should be 'read down' to mean 'ordinarily resident outside Australia'.[42]

38. See *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463, 469 (Morling J). In cases where the plaintiff is a non-Australian resident, it has been suggested that the current test in Australia for making security for costs orders should revised so as to require the defendant to demonstrate that the plaintiff's foreign residence creates a substantial obstacle to enforcing a cost order over and above what the defendant would encounter if the plaintiff resided within the court's jurisdiction: M Raine, 'In locals we trust. Foreigners pay cash. Rethinking Security for Costs Against Foreign Residents' (2012) 1 *Journal of Civil Litigation and Practice* 210.
39. *Re Energy Drilling Inc v Petroz NL* [1989] FCA 146; *Re Kent Heating Limited v Cook-On Gas Products Pty Limited* [1984] FCA 333.
40. (1976) 2 NSWLR 371.
41. *Australian Building Construction Employees and BLF v Commonwealth Trading Bank* (1976) 2 NSWLR 371, 373.
42. *Porter v Aalders Auctioneers and Valuers Pty Ltd* [2011] NSWDC 96, [8]; *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC 245, [6]; *Morris v Hanley* [2000] NSWSC 957, [9].

2.35 However, in *Rajski v Computer Manufacture & Design Pty Ltd*,[43] Justice Holland reached a different conclusion, finding no discrimination between residents of different States involved in the inherent jurisdiction of the Court to award security for costs. In *Ceil Comfort Insulation Pty Ltd v ARM Equipment Finance Pty Ltd*[44] Justice O'Keefe held that an order for security (under the equivalent of r 42.21(1)(a)) could be made in relation to a corporation but not in relation to natural persons because the protection of s 117 of the Constitution is limited to natural persons, referring, as it does, to subjects of the Queen.

2.36 We also note in this context the provisions of s 105 of the *Service and Execution of Process Act 1992* (Cth), which allows a person in whose favour a judgment is given in a State or Territory Supreme Court to register that judgment in the Supreme Court of the other Australian States and Territories, so that it may be executed anywhere in Australia. Hence, there is a mechanism for enforcing an adverse costs order against a plaintiff who resides in another Australian State or Territory.

2.37 The question for consideration is whether UCPR r 42.21(1)(a) should be amended to refer to 'a plaintiff is ordinarily resident outside Australia'. Other jurisdictions have rules of court to this effect.[45]

Stakeholders' views

2.38 Almost all the submissions that commented on this topic supported such an amendment. The reasons provided were to:

- resolve the constitutional issue;[46]
- align the law of New South Wales with other jurisdictions;[47]
- mirror the current approach of the courts and legal practitioners;[48] and
- reflect broader moves towards greater uniformity in many areas of law.[49]

2.39 However, Justice Rein did not support such an amendment because the 'costs and difficult of enforcement in another state are…likely to exceed the costs of enforcement within New South Wales'.[50]

The Commission's conclusion

2.40 In view of the compelling arguments given by most of the submissions on this issue, we recommend the amendment of UCPR r 42.21(1)(a) so that, instead of referring

43. *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443, 451.
44. [2001] NSWSC 28.
45. *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).
46. Justice Paul Brereton AM RFD, *Submission SC24,* 3; The NSW Local Court, *Submission SC2,* 2; Clayton Utz, *Submission SC 18,* 2.
47. The NSW Local Court, *Submission SC2,* 2.
48. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 6.
49. Legal Aid Commission of New South Wales, *Submission SC20,* 3.
50. Justice Nigel Rein, *Submission SC32,* [24].

to a plaintiff 'ordinarily resident outside New South Wales', it provides that security may be ordered on the basis that a plaintiff is 'ordinarily resident outside Australia'.

Recommendation 2.2

Rule 42.21(1)(a) of the *Uniform Civil Procedure Rules* 2005 (NSW) should be amended to remove the reference to a plaintiff 'ordinarily resident outside New South Wales', and to insert instead 'ordinarily resident outside Australia'.

Change of address

2.41 Rule 42.21(1)(c) of the UCPR 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'.

2.42 Rule 4.2(1)(g) of the UCPR requires a plaintiff to state his or her personal address in the originating process. There is, however, no obligation for the plaintiff to advise the defendant and the court of any change of residency subsequent to the commencement of the proceedings.[51]

2.43 The defendant will not always know if the plaintiff has moved out of Australia to become a resident of another country. If the defendant is not notified of the plaintiff's change of residence, he or she will not be able to exercise the option of applying for security based on the ground specified in UCPR r 42.21(1)(c).

2.44 In a preliminary submission, Fairfax Media argued that this unfairly prejudices defendants 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'.[52]

2.45 Fairfax Media proposed the adoption of a requirement in the UCPR for 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.[53]

2.46 In Consultation Paper 13, we asked the following questions:

(1) Should the UCPR 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 time of any change of address?

51. 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.
52. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13,* [5.6]–[5.7].
53. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13,* [5.9].

(2) If so, should failure to comply with such requirement be specified in UCPR r 42.21 as a ground for an application for security for costs?[54]

Stakeholders' views

2.47 The submissions that commented on these questions unanimously supported a requirement that, if plaintiffs change their address during the proceedings, they should be required to notify the court and the defendants of their new address within a reasonable time.[55]

2.48 The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee ('Young Lawyers') submitted that 'a requirement that a plaintiff inform the defendants in writing of that fact, within a reasonable period of time after the change in residency status is appropriate'.[56] The Law Society was of the same view because this would 'assist in ensuring compliance with any costs orders of the court'.[57] The Local Court supported the proposed requirement 'to prevent a change in address from being used as a tool to frustrate or avoid the consequence of the proceedings'.[58]

2.49 Three submissions argued that the proposed requirement should apply not only to the plaintiffs but also to the defendants.[59]

2.50 Apart from the preliminary submission of Fairfax Media, no submission supported the proposal that failure by the parties to keep their address accurate should be a ground for ordering security. Two submissions opposed it.[60] Justice Brereton submitted that 'a mere failure to disclose such a change, the necessity for which might often be overlooked, should not be a ground for ordering security'. He asserted that the current ground in r 42.21(1)(c) — a change of address coupled with reason to believe that it was with a view to avoiding the consequences of the proceeding — is the appropriate test.[61]

The Commission's conclusion

2.51 In accordance with the weight of submissions, we recommend that the UCPR be amended to provide that, if a party changes his or her address during the course of the proceedings, that party should notify the court and the other parties of their new address within a reasonable time. This requirement should apply to all parties.

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54. See NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.4.
55. The NSW Local Court, *Submission SC2,* 2; Clayton Utz, *Submission SC 18*, 2; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 4; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 8; Justice Nigel Rein, *Submission SC32,* [24].
56. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 8.
57. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 4.
58. The NSW Local Court, *Submission SC2*, 2.
59. The NSW Local Court, *Submission SC2*, 2; Clayton Utz, *Submission SC 18*, 2; Justice Paul Brereton AM RFD, *Submission SC24*, 4.
60. Clayton Utz, *Submission SC 18*, 2; Justice Paul Brereton AM RFD, *Submission SC24*, 4.
61. Justice Paul Brereton AM RFD, *Submission SC24*, 4.

2.52 We do not support the argument that failure to disclose a change of address should, on its own, be a ground for ordering security. The grounds relating to failure to provide a change of address presently specified in r 42.21(1)(b) and (c) require that there be reason to believe that there was an intention to deceive or to avoid the consequences of proceedings. We agree with the weight of submissions that these are appropriate tests, and that mere failure to inform about a change of address should not be sufficient to ground an application for security for costs.

Recommendation 2.3

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that, if a party changes his or her address during the course of the proceeding, that party should notify the court and the other parties of his or her new address within a reasonable time.

Expanding the grounds in UCPR 42.21?

2.53 The matters listed in UCPR r 42.21(1) codify the types of cases where courts have traditionally made security for costs orders. In *Green (as liquidator of Arimco Pty Ltd) v CGU Insurance Ltd*[62] ('*Green v CGU Insurance*') the Court of Appeal identified situations where security for costs may be ordered beyond those listed in UCPR r 42.21:

> where (in addition to proof that there is reason to believe the plaintiff will be unable to pay the defendant's costs) the plaintiff has dissipated assets and/or has not paid previous costs orders (especially if those costs orders were in favour of the defendant) and/or brings a weak case to harass the defendant and/or brings a case for the benefit of others.

2.54 We note that the last category of cases listed by the Court of Appeal – where the plaintiff is suing for the benefit of others – is covered by UCPR r 42.21(e).

2.55 To see if cases arise frequently where the provisions of the UCPR do not cover the situation, we surveyed cases from 2000 to the present, where the inherent jurisdiction of the Supreme Court alone was used to deal with security for costs applications. This revealed the following categories of cases where the inherent jurisdiction is often used.

(1) The plaintiff has divested assets with the intention of avoiding the consequences of the proceedings.

(2) There are reasonable grounds to believe that the action is vexatious or instituted with the motivation of harassing the defendant.

(3) The plaintiff is in default of any costs ordered to be paid by him or her.[63]

62. [2008] NSWCA 148, [45] (Hodgson JA).

63. See Appendix C.

2.56 This list substantially replicates the list in *Green v CGU Insurance*. It may be argued, therefore, that including these categories of cases in UCPR 42.21 would be appropriate.

2.57 However, it may be that these categories of cases are better dealt with through means other than security for costs. Vexatious claims may be dealt with under the *Vexatious Proceedings Act 2008* (NSW), which authorises courts to make orders, including orders to stay proceedings, and prohibit further proceedings.[64]

2.58 In relation to unpaid costs, courts have power to stay proceedings based on legislation[65] or on their inherent or implied jurisdiction.[66] An order to stay the proceedings until payment of the unpaid costs is made, or perhaps ultimately to dismiss the proceedings, is arguably more appropriate than making a security for costs orders.[67]

2.59 We note also that security applications frequently involve multiple and competing factors, some of which weigh in favour, and some against, an order for security. While the matters canvassed above may be relevant as one factor in the context of multiple factors that are weighed in the balance, what is under consideration is adding further grounds to UCPR r 42.21 each of which, on its own, provides a 'gateway' to an application for security.

2.60 In our consultations we asked the stakeholders whether UCPR r 42.21(1) should be amended to include the categories of cases listed above.

Stakeholder's views

2.61 There was support amongst some stakeholders for adding new categories of cases in which security for costs may be ordered under UCPR r 42.21. It was argued that if a case does not fall under any of the current categories, significant work is often required to convince the court it has jurisdiction under its inherent or implied power. The addition in UCPR r 42.21 of further categories of cases in which security for costs are traditionally made would make it easier and less costly for the parties to meet the jurisdictional threshold.[68]

2.62 However, while the first category listed above (divestment of assets) was supported by the stakeholders, the other two categories were not supported. Stakeholders submitted that where the claim is vexatious or the plaintiff has unpaid costs against the defendant, the better course of action is to strike out the claim, stay the

64. *Vexatious Proceedings Act 2008* (NSW) s 8.

65. UCPR r 12.10 (stay of further proceedings to secure costs of discontinued proceedings); *Civil Procedure Act 2005* (NSW) s 67 (general power to stay of proceedings).

66. See *Bruce Maples v Siteberg* [2012] NSWSC 435 for a discussion on the various sources of power to stay proceedings involving unpaid costs.

67. See, for example, where the proceedings constituted abuse of process *Diamond v Birdon Contracting Pty Ltd* [2008] NSWLEC 302; where such an order is in the interests of justice *Duynstee v Dickins* [2011] NSWSC 408; where the amount of unpaid costs is less than the amount of security sought *Byrnes v John Fairfax Publications Pty Ltd* [2006] NSWSC 251.

68. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

proceedings or make other orders to prevent abuse of the court's processes.[69] Security for costs is not the best remedy in these situations.

The Commission' conclusion

2.63 Our evaluation of the cases and the agreement of stakeholders persuade us that UCPR r 42.21(1) should be amended to add the category of cases where the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings. We agree with the assessment of stakeholders that the other two categories of cases (relating to vexatious claims and unpaid costs) should not be included as grounds for application for security in UCPR r 42.21(1). These factors may be relevant to the exercise of the court's discretion in security applications, but they should not form a ground of application. Other remedies are more appropriate to deal with these matters.

Recommendation 2.4

Rule 42.21(1) of the *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that the court may order security where the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings.

Discretionary factors

Discretionary factors found in common law

2.64 The defendant must initially show that one or more of the jurisdictional grounds in UCPR r 42.21(1), or the requirements of s 1335 of the Corporations Act, are met.[70] Once its jurisdiction is established, the court has a discretion as to whether to order security or not. Considerable jurisprudence has been developed concerning the factors that may be taken into account when courts exercise their discretion on security for costs. Factors that may be relevant to the decision include the following:[71]

2.65 **The impecuniosity of the plaintiff:** There is a general rule that poverty is not a bar to a litigant. This is a fundamental principle in security for costs applications by natural persons. Consequently, the mere fact that an individual plaintiff is impecunious does not 'provide a gateway into security for costs.'[72] This is reflected in UCPR r 42.21(1) where the impecuniosity of an individual plaintiff is not a jurisdictional ground for ordering security for costs, although the impecuniosity of a

69. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012; Land and Environment Court, *Consultation SC2*, Sydney NSW, 18 September 2012; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; District Court, *Consultation SC5*, Sydney NSW, 10 October 2012.

70. *Juelle Pty Ltd t/as Castrian Homes v Buildev Properties Pty Ltd* [2006] NSWSC 302, [28].

71. See also the often cited list in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 197–198 (Beazley J).

72. *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, [53].

corporate plaintiff is a ground.[73] In Western Australia, the rules of court of the Supreme Court provide the following general principle prior to setting out the grounds for ordering security and the discretionary factors:

> 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.[74]

2.66 The general rule that poverty is not a bar to litigation does not mean that the poverty of the plaintiff is completely irrelevant. It may be a factor which, among others, the court takes into account when considering whether or not to exercise its discretion to order security.[75] Justice Heydon in the High Court case of *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* stated that '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)'.[76] This is so because there are instances when an order for security may be made against an impecunious natural person if other factors weigh in favour of such an order.

2.67 In *Green v CGU Insurance,* the Court of Appeal held that:

> There is now no rule that the impecuniosity of a natural person plaintiff prevents the court ordering the provision of security for costs. The impecuniosity of the plaintiff is a factor to be weighed in the exercise of the discretion and is neither a sufficient condition for the ordering of security nor a sufficient condition for the court to decline the order for security.[77]

2.68 Hence, in *Viavattene v Morton*[78] the Supreme Court, in making a security for costs order against the plaintiffs who are natural persons, took into account their impecuniosity, as well as their failure to pay previous costs orders made in favour of the defendants, that their impecuniosity was not caused by the defendants, the costs already incurred by the defendants, that the defendants' application for security was made promptly and was not being used to deny the plaintiffs' the ability to litigate, and the weakness of the plaintiffs' claim.[79]

2.69 Whereas in relation to plaintiffs who are natural persons, impecuniosity is one factor that may be relevant among many, the impecuniosity of corporate plaintiffs is a

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73. *Uniform Civil Procedure Rules 2005* (NSW) r 42.21(1)(d)..
74. *Rules of the Supreme Court 1971* (WA) O 25 r 1.
75. *Lucas v Yorke* (1983) 50 ALR 228, 228 (Brennan J); *Grant v Hall* [2012] NSWSC 779, [14] (Nicholas J).
76. *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, 239 CLR 75, [91] (Heydon J).
77. *Green (as Liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [6] (Hodgson JA).
78. [2011] NSWSC 1173.
79. *Viavattene v Morton* [2011] NSWSC 1173, [23]–[25]. For another example, see *Morris v Hanley* [2000] NSWSC 957 where Justice Young ordered security for costs against a plaintiff who is a natural person. He balanced, on one hand, the stultification of proceedings that would likely be occasioned by an order for security against the plaintiff against, and on the other hand, the nature and strength of the plaintiff's case, that there was an element of harassment in bringing it, and the impecuniosity of the defendants.

gateway to the court's jurisdiction, and a factor of considerable weight in the court's discretion whether to order security.[80]

> The inability of a plaintiff company to pay the costs of the defendant not only opens the jurisdiction for the giving of security, but also provides a substantial factor in the decision whether to exercise it.[81]

2.70 **The stultification factor**: 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 which, on its face, is legitimate.[82]

2.71 **The bona fides of the claim**: Whether the claim is bona fide or not is a relevant consideration, and the court will take into account the motivation of a plaintiff in bringing the proceedings.[83] Examples include vexatious claims,[84] particularly where the plaintiff is self-represented with 'abundant time' to pursue incessant and numerous applications.[85]

2.72 **The strength of the plaintiff's case**: The likelihood that the plaintiff would succeed is a matter that can properly be considered in security for costs applications.[86] The lack of apparent merit in a plaintiff's case might be a reason for ordering it to provide security for costs. However, 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.[87] As a general rule, where a claim is regular on its face and discloses a cause of action, 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.[88]

2.73 **The timing of the application**: The timing of the security for costs application is an important consideration. An order for security may delay the plaintiff's claim (while it is finding resources for the security) or put an end to the action. It is desirable that this occurs before the plaintiff has incurred significant costs.[89] This principle is reinforced by the objectives of the *Civil Procedure Act 2005* (NSW), which are to

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80. UCPR r 42.21 (1)(d). See *Pearson v Naydler* [1977] 3 All ER 531, 537 (Megarry VC); *Watkins Ltd v Ranger Uranium Mines Pty Ltd* (1985) 35 NTR 27, 34 (Nader J); *Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248, 255 (Hill J); *Interwest Ltd v Tricontinental Corpopration Ltd* (1991) 5 ACSR 621, 624 (Ormiston J); *Re Holland Stolte Pty Ltd* [1993] 2 Qd R 247, 248 (Mackenzie J).
81. *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744, [56]
82. *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643, [39] (Spender J).
83. *Bhagat v Murphy* [2000] NSWSC 892, [20]–[21] (Young J); *Morris v Hanley* [2000] NSWSC 957.
84. *Bhagat v Murphy* [2000] NSWSC 892 [26] (Young J).
85. *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310, 313–314.
86. *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074.
87. *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] HCA 41, 193 CLR 502, 514 (Kirby J).
88. *Staff Development & Training Centre Pty Ltd v Commonwealth of Australia* [2005] FCA 1643 [12]–[13] (Spender J).
89. *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).

facilitate a just, quick and cheap resolution of proceedings[90] in order to ensure efficient management of cases by the courts.[91]

2.74 **The causation factor**: 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.[92] 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.[93] Courts are wary of attempts by plaintiffs to cast upon defendants the consequences of their financial woes, which 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.[94]

2.75 **Nominal or representative plaintiffs**: As a general principle, where the real plaintiff does not appear on the record, the proper course is to stay the proceedings until security for costs is given.[95] 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.[96] 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.

2.76 **Proportionality**: The court may consider the proportionality of the amount of security for costs sought in relation to the issues at stake. For example, in *Maritime Services Board v Citizens Airport Environment Association Inc*, the court, in granting the application for security, considered 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.[97]

2.77 **The public interest**: The court may consider the public interest when 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

90. *Civil Procedure Act 2005* (NSW) s 56(1).

91. *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd* [2005] NSWSC 1169 [7] (Einstein J).

92. *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.

93. 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).

94. *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194, 198 (Master Cohen QC).

95. *Evans v Rees* (1842) 2 QB 334.

96. *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 505 (French J).

97. *Maritime Services Board v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.

interpretation or clarification,[98] or where the claim is brought by the plaintiff to pursue some interest that is common to other members of the community.[99] 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.

2.78 **Enforcement procedures outside Australia.** In relation to UCPR r 42.21(a) regarding cases where a plaintiff is resident outside Australia, courts have regarded the ease and convenience of enforcement procedures in the plaintiff's country of residence as a primary consideration in deciding whether or not to order security.[100] Where a judgment on costs would be simple to enforce in the foreign jurisdiction, this weighs against the making of a security order.[101] A relevant consideration is whether the foreign jurisdiction in question has legislation allowing judgments of Australian courts to be enforced in that jurisdiction.[102] The lack of such legislation is a weighty factor that would favour an order for security.[103]

Legislative factors in other jurisdictions

2.79 There is precedent for including a list of discretionary factors in the rules of court. In Queensland, r 671 *Uniform Civil Procedure Rules 1999*, which is quoted below, is the equivalent of UCPR r 42.21:

> **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

98. *Smail v Burton* [1975] VR 776.
99. *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.
100. *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; *Castillejo v Botella* [2008] QSC 333.
101. See, for example, *Knott v Signature Security Group Pty Ltd* [2001] NSWIRComm 12 (Wright J).
102. 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.
103. 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).

(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.

2.80 Rule 671 is to be read in conjunction with r 672 of the *Uniform Civil Procedure Rules 1999* (Qld), which provides:

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.

2.81 The Australian Capital Territory has a rule of court that is identical to r 672 of the *Uniform Civil Procedure Rules 1999* (Qld).[104] The rules of court of the Supreme Court of Western Australia also contain a list of discretionary factors,[105] although it is substantially shorter than the lists in Queensland and the Australian Capital Territory. The factors in these lists mirror some of the key factors recognised by the case law.

104. *Court Procedure Rules 2006* (ACT) r 1902(h).

105. *Rules of the Supreme Court 1971* (WA) O 25 r 3.

Issues for consideration

2.82 In Consultation Paper 13, we asked the following questions:

- Should the UCPR be amended to provide a list of discretionary factors that courts may consider when deciding whether or not to order security for costs?
- If so, should r 672 of the *Uniform Civil Procedure Rules 2009* (Qld) be used as the basis for such a list?
- If so, do you agree or disagree with any of the factors listed in r 672? Are there factors that are not listed in r 672 which should be included in the UCPR?
- If the UCPR were amended to include a list of discretionary factors, what should be the relationship of those factors with the jurisdictional grounds listed in UCPR r 42.21(1)?
- Should such a relationship be stated in UCPR r 42.21 or should it be left for courts to develop? [106]

Stakeholders' views

Adding a list of discretionary factors in the UCPR

2.83 Most of the stakeholders who addressed this topic supported the inclusion of a list of discretionary factors in the UCPR.[107] The following reasons were given:

- A list will make it easier for the courts, legal practitioners, and the parties (particularly self-represented litigants) to identify relevant factors without having to trawl through the cases.[108]
- A list may assist courts in making consistent decisions on security for costs applications.[109]
- A list may assist the users of the UCPR by containing a more comprehensive statement of the law.[110]
- Other statutes contain lists of factors; for example s 363 and 364 of the *Legal Profession Act 2004* (NSW) contain lists of matters that may be considered in

106. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.6–2.7.

107. The NSW Local Court, *Submission SC2,* 2; The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 2; CGU Insurance, *Submission SC11*, 2; Maurice Blackburn Pty Ltd, *Submission SC8*, 4; NSW Bar Association, *Submission SC10*, 2; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 9; C Needham SC, *Submission SC9*, 8; LawCover Pty Ltd, *Submission SC13*, 2; Public Interest Law Clearing House (Victoria), *Submission SC15*, 4; Clayton Utz, *Submission SC 18*, 3; Justice Nigel Rein, *Submission SC32,* 14; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012; Land and Environment, *Consultation SC2*, Sydney NSW, 18 September 2012.

108. The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 1–2; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

109. Maurice Blackburn Pty Ltd, *Submission SC8,* 4–5.

110. C Needham SC, *Submission SC9*, 7.

assessing costs. These lists provide useful guidance for practitioners, clients and costs assessors in applications for costs assessments.[111]

2.84 In consultation with New South Wales courts, it became apparent that security for costs applications are comparatively infrequent. While some practitioners may make such applications as a routine part of their practice, many practitioners would not do so. This fortifies the arguments that access to a clear statement of relevant factors may assist clarity and efficiency. It was also suggested that it might assist precision in applications for security if applicants could point to particular provisions upon which they were relying.

2.85 Some stakeholders opposed a legislative list of discretionary factors.[112] It was argued that a legislative list:

- is unnecessary because the relevant factors are well-established by the case law, and well-known to courts and legal practitioners.[113] Those who need a list for a quick identification of the relevant factors may consult legal commentaries.[114]
- may result in lengthy submissions from lawyers and court judgments that discuss each of the factors in the list even though not all of them are relevant to the particular case.[115]
- may lead to lawyers arguing that a security for costs order should be made if they are able to prove the existence of a substantial of number of factors in the list. The discretion to order security is based not on the number of factors proven but in finding the right balance between the competing factors.[116]
- may divert attention from other pertinent factors that are not included in the list.[117]

Any legislative list should be non-exhaustive

2.86 There was a unanimous view that if a list of factors is to be included in the UCPR, it should be made clear that it is a non-exhaustive list.[118]

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111. The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 1–2.
112. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 5; Justice Paul Brereton AM RFD, *Submission SC24*, 6–7.
113. Justice Paul Brereton AM RFD, *Submission SC24*, 6–7; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 5; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; District Court, *Consultation SC5*, Sydney NSW, 10 October 2012.
114. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; District Court, *Consultation SC5*, Sydney NSW, 10 October 2012.
115. Justice Paul Brereton AM RFD, *Submission SC24*, 6–7; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.
116. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.
117. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*¸ 5.
118. The NSW Local Court, *Submission SC2,* 2; The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 2; CGU Insurance, *Submission SC11*, 2; Maurice Blackburn Pty Ltd, *Submission SC8*, 4; NSW Bar Association, *Submission SC10*, 2; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 9; C Needham SC, *Submission SC9*, 8; LawCover Pty Ltd, *Submission SC13*, 2; Clayton Utz,

Rule 672 of the Uniform Civil Procedure Rules 2009 (Qld) *as model*

2.87 Most of the submissions that agreed with the inclusion of a list of discretionary factors in the UCPR supported the use of r 672 of the *Uniform Civil Procedure Rules 2009* (Qld) as basis for the New South Wales list.[119] However, a number of submissions suggested some modifications.

2.88 **Impecuniosity.** Rule 672(d) of the *Uniform Civil Procedure Rules 1999* (Qld) refers to the impecuniosity of a corporate plaintiff only. A number of submissions supported the inclusion of impecuniosity of the plaintiff, whether a natural person or corporation, in the list.[120]

2.89 However, the Local Court submitted that this factor should be drafted carefully to recognise the principle that impecuniosity by itself is not a barrier to litigation.[121] Public Interest Law Clearing House Victoria ('PILCH Victoria') supported the inclusion of a statement concerning the impecuniosity of an individual plaintiff to emphasise the importance of the common law principle that poverty is no bar to a litigant. It also submitted that the impecuniosity of an individual plaintiff and that of a corporate plaintiff should be listed separately because the impecuniosity of a natural person will tend to go against a security for costs order while that of a corporate plaintiff will generally support an order.[122] The Law Society made a similar suggestion to amend the UCPR to encapsulate the common law principle that security for costs should not be ordered merely on account of the poverty of the plaintiff who is a natural person.[123]

2.90 Two submissions argued that impecuniosity should only be relevant with respect to corporate plaintiffs.[124]

2.91 **Proportionality.** A substantial number of submissions suggested the addition of the proportionality principle to the list.[125]

2.92 **Enforcement procedures outside Australia.** Fairfax Media suggested that 'the UCPR should be amended to make it clear that in granting an order pursuant to

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Submission SC 18, 3; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012; Land and Environment, *Consultation SC2*, Sydney NSW, 18 September 2012.

119. Maurice Blackburn Pty Ltd, *Submission SC8*, 5; C Needham SC, *Submission SC9*, 8; Public Interest Law Clearing House (Victoria), *Submission SC15*, 4; NSW Bar Association, *Submission SC10*, 2; Clayton Utz, *Submission SC 18*, 3; Justice Nigel Rein, *Submission SC32,* 14.

120. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 10; Public Interest Law Clearing House (Victoria), *Submission SC15*, 5; The NSW Local Court, *Submission SC2*, 2; Clayton Utz, *Submission SC 18,* 3; Justice Nigel Rein, *Submission SC32,* [25].

121. The NSW Local Court, *Submission SC2*, 2.

122. Public Interest Law Clearing House (Victoria), *Submission SC15*, 5.

123. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 7. It did not, however, support the inclusion of a list of factors in the UCPR: The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 5.

124. Maurice Blackburn, *Submission SC8,* 6; C Needham SC, *Submission SC9,* 7.

125. The Office of the Legal Services Commissioner (NSW), *Submission SC4,* 2; Maurice Blackburn Pty Ltd, *Submission SC8*, 6; NSW Bar Association, *SC10,* 2; C Needham SC, *Submission SC9,* 8; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 9; Public Interest Law Clearing House (Victoria), *Submission SC15*, 4. *Contra* Public Interest Law Clearing House (Victoria), *Submission SC15,* 5; Justice Nigel Rein, *Submission SC32,* 20.

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'.[126] It argued that 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. It further argued that 'a decision on security for costs will likely be made well before a defendant may need to enforce a costs order in a foreign jurisdiction, during which time the laws of enforceability of foreign orders in that jurisdiction may change'.[127]

2.93 Almost all the submissions that addressed the issue raised by Fairfax Media said that the enforceability of a costs order in the country of a non-resident plaintiff should continue to be a relevant factor.[128] Justice Brereton submitted:

> The enforceability of a costs order in the plaintiff's country of residence is, and should remain, a relevant consideration. If a costs order will be readily enforceable against a foreign plaintiff, that is in principle a good reason for being less inclined than otherwise to make an order for security, because the risk of a successful defendant being unable to enforce a costs order is thereby much diminished. While it is possible that foreign laws in respect of the enforceability of Australian judgments may change, that possibility is a rare one, and can itself be taken into account. In many countries - particularly those with which reciprocal enforcement arrangements are in place - such a change is most unlikely.[129]

2.94 Most of these submissions suggested including in the list of discretionary factors a provision on the ease and convenience or otherwise of the enforcement procedures in the non-resident plaintiff's country of residence.[130]

Relationship between the list of factors and the jurisdictional grounds

2.95 A number of submissions stated that if a list of discretionary factors were included in the UCPR, the current two-stage approach would apply whereby attention is initially focussed on whether a ground for ordering security is established before proceeding to consider the discretionary factors.[131] Some submissions argued that the relationship between the jurisdictional grounds listed in UCPR r 42.21(1) and the discretionary factors should be spelt out in the UCPR to avoid uncertainty and promote consistency in the use of the discretionary factors.[132]

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126. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, [5.17].
127. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, [5.16]–[5.17].
128. Justice Paul Brereton AM RFD, *Submission SC24*, 4–5; The NSW Local Court, *Submission SC2,* 2; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 7; Clayton Utz, *Submission SC 18*, 2. One submission gave a contrary position: Justice Nigel Rein, *Submission SC32,* 14.
129. Justice Paul Brereton AM RFD, *Submission SC24*, 4–5.
130. The NSW Local Court, *Submission SC2,* 2; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 7; Clayton Utz, *Submission SC 18*, 2.
131. The NSW Local Court, *Submission SC2,* 2; *Submission SC15,* 5; C Needham SC, *Submission SC9*, 8; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12,* 11; Clayton Utz, *Submission SC 18,* 3; Justice Paul Brereton AM RFD, *Submission SC24,* 7–8; Justice Nigel Rein, *Submission SC32,* 14.
132. The NSW Local Court, *Submission SC2,* 2; *Submission SC15,* 5; C Needham SC, *Submission SC9*, 8; Public Interest Law Clearing House (Victoria), *Submission SC15,* 5.

The Commission's conclusions

2.96 On balance we are persuaded that a non-exhaustive list of discretionary factors in the UCPR is desirable. It will make the identification of such factors easier and more accessible to those involved in the proceedings. While the case law may be familiar to those few practitioners who use it regularly, security applications are not frequent and these factors will be unfamiliar to many practitioners, as well as to the increasing number of self-represented litigants.

2.97 We agree with the submissions that the legislative list of discretionary factors should be non-exhaustive. The list is intended to identify the key factors that have been recognised by the case law rather than identify all possible relevant factors. Flexibility to respond to the particular circumstances of cases is important, as is making the law open to future development.

2.98 We also agree with the submissions that, for the sake of clarity, the UCPR should specify the relationship between the jurisdictional grounds in UCPR r 42.21(1) and these factors, by providing that the factors may be considered only after the applicant for security has established one of the jurisdictional grounds.

2.99 Rule 672 of the *Uniform Civil Procedure Rules 1999* (Qld) provides a good starting point. However, we recommend some modifications for the purposes of New South Wales. First, the question of whether the security sought is proportionate to the importance and complexity of the subject-matter in dispute should be added to the list. This reflects the case law and statute, which both regard the proportionality principle as an important objective in resolving the issues between the parties[133] and as relevant to security for costs applications.[134]

2.100 Second, the timing of the security for costs application should be added to the list, again to reflect the case law.[135]

2.101 Third, the proposed provision makes reference to the impecuniosity of plaintiffs who are natural persons in line with the case law discussed above.[136] However, we are concerned that the inclusion of the impecuniosity of a natural person in this way may encourage applications aimed at stultifying proceedings where the plaintiff is an individual person of ordinary means. To assist in finding the right balance between promoting access to justice for individuals with limited financial means, on the one hand, and allowing courts to continue to consider the impecuniosity of the plaintiff, on the other hand, as a relevant factor weighed in the balance amongst others, we recommend including a provision clarifying that an order for security for costs should not be made based merely the impecuniosity of a plaintiff who is a natural person.

2.102 Fourth, in accordance with current law and practice and the weight of submissions, we recommend that the ease and convenience or otherwise of the enforcement of

133. *Civil Procedure Act 2005* (NSW) s 60.

134. *Maritime Services Board v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107.

135. See [2.73] above.

136. See [2.65]–[2.69] above.

an Australian judgment or order in the non-resident plaintiff's country of residence should be added to the list.

2.103 Lastly, we have not included 'whether an order for security for costs would be oppressive' as in r 672(g) of the *Uniform Civil Procedure Rules 1999* (Qld). The case law on the oppressiveness of a security for costs order relates to either the stultification of the proceedings or delay in making the security for costs application, which are already covered by Recommendation 2.3(g) and (n).

Recommendation 2.5

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to provide that if the court has jurisdiction under r 42.21(1) to consider a security for costs application, it may have regard to the following factors, among others:

(a) the means of any person standing behind the proceeding;

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

(c) the genuineness of the proceeding;

(d) the impecuniosity of the plaintiff; but if the plaintiff is a natural person, no order shall be made merely on account of his or her impecuniosity;

(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 stifle the proceeding;

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

(i) whether there has been an admission or payment in court;

(j) whether delay by the plaintiff in commencing the proceeding has prejudiced the defendant;

(k) the costs of the proceeding;

(l) whether the security sought is proportionate to the importance and complexity of the subject matter in dispute;

(m) the timing of the application for security for costs;

(n) whether an order for costs made against the plaintiff would be enforceable within Australia; and

(o) the ease and convenience or otherwise of enforcing a New Wales court judgment or order in the country of a non-resident plaintiff.

Security for costs orders against corporate plaintiffs

2.104 Section 1335(1) of the Corporations Act provides another source of power for courts to order security for costs. The section 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.

2.105 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'.

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

2.106 The wording of r 42.21(1)(d) of the UCPR and s 1335(1) of the Corporations Act are slightly different. Rule 42.21 does not contain the words 'by credible testimony' found in s 1335(1). In Consultation Paper 13, we asked whether r 42.21(1)(d) of the UCPR should be amended to reflect the exact wording of s 1335(1) of the Corporations Act.[137]

2.107 While three out of six submissions on this issue supported the amendment of r 42.21 of the UCPR to reflect the wording of s 1335(1) Corporations Act in order to create consistency[138] none identified any problems arising from the differences.

2.108 A number of submissions did not support the amendment of r 42.21 of the UCPR to reflect the exact wording of s 1335(1) Corporations Act on the basis that it is unnecessary.[139] As Justice Brereton submitted, there is no need to amend r 42.21 because '[n]o difficulty has arisen in practice from the semantic differences between two provisions. Both attract precisely the same considerations'.[140]

2.109 Since the case law has settled that the principles that apply to both provisions are the same[141] and because no problems arise from the differences in wording we do not recommend amendment of r 42.21(1)(d) of the UCPR to mirror exactly the terms of s 1335(1) of the Corporations Act.

Different treatment of corporate plaintiffs

2.110 'The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well established'.[142] It is based on the principle that poverty should not be a bar to litigation. However, in the case of a corporation, 'there is no basic rule conferring immunity from any liability to give

137. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.8.

138. Law Society of New South Wales Young Lawyers, Civil Litigation and Environmental Law Committees, *Submission SC 12*, 12; Law Society of New South Wales Costs Committee and Legal Costs Unit, *Submission SC 17*, 7; Clayton Utz, *Submission SC 18*, 4.

139. The NSW Local Court, *Submission SC2,* 3; C Needham SC, *Submission SC9,* 8; Justice Paul Brereton AM RFD, *Submission SC24,* 7–9; Justice Nigel Rein, *Submission SC32,* 14.

140. Justice Paul Brereton AM RFD, *Submission SC24,* 9.

141. *Fire Containment Pty Ltd v Peter Robins* [2011] NSWSC 444 [18]; *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* [2010] ACTSC 20 [197].

142. *Pearson v Naydler* [1977] 3 All ER 531, 533 (Megarry VC).

security for costs. The basic rule is the opposite.'[143] The separate legal personality of corporations and their limited liability is the reason for treating corporate plaintiffs differently from plaintiffs who are natural persons. In contrast to impecunious natural persons who commence legal proceedings, the members and creditors of an insolvent company can potentially hide behind the separate legal personality and limited liability of the company and therefore litigate without putting their personal finances at risk.[144]

2.111 The provisions of the UCPR r 42.21 (1) (d) and s 1335(1) of the Corporations Act confirm the principle that corporate plaintiffs constitute an exception to the general rule that mere poverty is not a reason for ordering security for costs.[145]

2.112 In Consultation Paper 13, we sought submissions on whether corporate plaintiffs should continue to be treated differently from plaintiffs who are natural persons in relation to security for costs.[146] The four submissions that addressed the question unanimously supported the retention of the current law.[147]

2.113 In view of the longstanding legal principle, and the views of stakeholders we make no recommendations for change.

Proving the impecuniosity of corporate plaintiffs

2.114 In a preliminary submission, Mr Stephen Epstein SC submitted that an applicant for a security for costs order against a corporate plaintiff faces 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 if ordered to do so.[148]

2.115 To address this problem, Mr Epstein suggested giving defendants the right to request the corporate plaintiff to produce, in a specified and verified form, information on its financial status. While it would not be obligatory for the corporate plaintiff to comply with the request, failure to comply would give rise to a rebuttable presumption that the plaintiff will be unable to pay the defendant's costs within the meaning of s 1335(1) of the Corporations Act and r 42.21(1)(d) of the UCPR.[149]

2.116 In Consultation Paper 13 we reviewed the difficulties that defendants may confront in acquiring information about the financial position of corporate plaintiffs.[150] We noted particular difficulties in relation to small proprietary companies that are not, as a general rule, required to lodge annual financial reports with the Australian

143. *Pearson v Naydler* [1977] 3 All ER 531, 535.
144. G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) 950.
145. See *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 505.
146. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.9.
147. The NSW Local Court, *Submission SC2,* 3; The Law Society of New South Wales, Young Lawyers Civil Litigation and Environmental Law Committees, *Submission SC 12,* 13; C Needham, *Submission SC 9*, 9; Maurice Blackburn, *Submission SC 8*, 7.
148. S Epstein SC, *Preliminary Submission PSC3,* [12]–[14].
149. S Epstein SC, *Preliminary Submission PSC3,* [12]–[14].
150. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) [2.110]–[2.126].

Securities and Investments Commission.[151] We considered the existing procedures for obtaining evidence relating to the corporate plaintiff's financial position under the UCPR, by discovery, pursuant to a notice to produce, or by subpoena. We also noted that these procedures may, in some cases, be expensive or may require the defendant to be able to identify the document or thing that is to be produced.

2.117 However, the standard of proof required is low. The question that courts need to address is whether there is reason to believe that the corporation will be unable to pay the defendant's costs.[152] The phrase 'reason to believe' requires 'a rational basis for the belief — and no more'.[153] This test has been described as a 'fairly modest threshold test',[154] an 'undemanding test',[155] and 'a low threshold'.[156]

2.118 In Consultation Paper 13, we asked whether UCPR r 42.21 should 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?[157]

Stakeholders' views

2.119 Three out of the six submissions that addressed these questions supported a procedure that would allow defendants who are applying for security for costs to request corporate plaintiffs to disclose their financial status and a presumption that a corporate plaintiff is impecunious, if it refuses to comply with the request to disclose its financial status.[158] The NSW Local Court reasoned that the currently available procedures such as discovery, notices of motion and subpoenas 'are often expensive to pursue and hard fought between the parties'.[159]

2.120 Three submissions opposed the procedure proposed by Mr Epstein.[160] Justice Brereton submitted that, while the proposal is not without merit, it may shift the focus of the inquiry from whether the corporate plaintiff's impecuniosity has been

151. A proprietary company is considered small for a financial year if it satisfies at least two of the following criteria: (a) the consolidated revenue for the financial year of the company and any entities it controls is less than $25 million; (b) the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than $12.5 million; (c) and the company and any entities it controls have fewer than 50 employees at the end of the financial year: *Corporations Act 2001* (NSW) s 45A(2).

152. *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377, [14].

153. *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377, [15].

154. *Meni's Tailoring & Alterations Pty Limited v Jeanswest Corporation Pty Ltd* [2003] FCA 1108, [4] (Merkel J).

155. *Hurworth Nominees Pty Ltd v ANZ Banking Group Ltd* [2005] NSWSC 1360, [25] (White J).

156. *Livingspring Pty Ltd v Kliger Partners* (2008) 20 VR 377, [15] (Maxwell P and Buchanan JA).

157. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.10.

158. The NSW Local Court, *Submission SC2*, 4; C Needham SC, *Submission SC 9*, 9; Justice Nigel Rein, *Submission SC32,* 14.

159. The NSW Local Court, *Submission SC2,* 4.

160. New South Wales Bar Association, *Submission SC 10*, 4; Justice Paul Brereton AM RFD, *Submission SC24,* 10–11; Maurice Blackburn, *Submission SC 8*, 8.

sufficiently established to whether the plaintiff has made adequate disclosure of its financial status. He noted the problems that arise in family law proceedings, where a great deal of effort may be expended to show that a party has not made adequate financial disclosure, in order to prove an adverse inference that he or she could not satisfy a reasonable order.[161]

2.121 Justice Brereton also submitted that difficulties of proof in security for costs applications can be overstated and that the test under s 1335(1) and r 42.21(1)(d) is an undemanding one. The Bar Association considered the proposed procedure unnecessary. It said that it would expose corporate plaintiffs to excessive burdens.[162] Maurice Blackburn submitted that the current procedures are adequate to enable defendants to obtain the relevant information from corporate plaintiffs. It said that:

> the new Civil Dispute Resolution Act 2011 requiring the parties to engage in correspondence prior to the commencement of claims, the provision of documents on discovery and Practice Notes issued by the Supreme Court of New South Wales which require the plaintiff to provide details of its claim in the initial stages of the proceeding, all assist to put the defendant in a position where it has sufficient information at an early stage in the proceeding to assess whether an application for security for costs may be warranted and can make the necessary enquiries by correspondence.[163]

2.122 Baker and McKenzie did not take a position on this issue, but noted that a survey of other jurisdictions did not find similar provisions to those proposed.[164]

The Commission's conclusion

2.123 We consider it unnecessary to recommend the adoption of the proposed procedure to allow a defendant to request a corporate plaintiff to disclose its financial position and for a presumption that the plaintiff is impecunious to arise if it refuses to make the disclosure. In taking this view, we are persuaded by the weight of the submissions, by the fact that there are existing mechanisms to acquire necessary information; that the standard of proof that the defendant must meet is not high. A commonsense approach to the evidence required to meet the test appears to us to be preferable to the proliferation of rules relating to the nature of evidence and resulting presumptions.

Removing the ability of former directors, officers and shareholders of an insolvent company to apply for security for costs from the liquidator or the company

2.124 In his preliminary submission, Mr Stephen Epstein SC proposed that s 1335(1) of the Corporations Act 'be made inapplicable to claims brought by insolvency

161. Justice Paul Brereton AM RFD, *Submission SC24,* 10.
162. New South Wales Bar Association, *Submission SC 10*, 4.
163. Maurice Blackburn, *Submission SC 8*, 8.
164. Baker and McKenzie *Submission SC 2,* 3.

administrators against former directors, controlling shareholders and their associates'.[165]

2.125 Mr Epstein argued 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).[166]

2.126 The proposal effectively seeks to remove the ability of former directors, officers and shareholders of an insolvent company who caused or materially contributed to the company's financial problems to apply for security for costs against the plaintiff liquidator of the company or the insolvent company itself. The apparent concern is that they might use the application for security as a means of obstructing the case against them.

2.127 Mr Epstein acknowledged that an application for security in the situation being discussed may be resisted on the basis that it was the defendants who brought about the corporation's impecuniosity. However, he said that in practice that consideration will normally be unsuccessful because:

> it will generally encounter the insuperable obstacle that to make out such a case, the impecunious corporate plaintiff's success in the overall proceedings would have to be either assumed or proved – neither of which is usually an available course for the court to take.[167]

2.128 A number of issues are relevant to orders for security for costs against liquidators. First, liquidators are usually not ordered to give security for costs, even though they may be ordered to pay the costs if the proceeding fails.[168] The reasons for this approach were outlined in by Justice Campbell in *Green v CGU Insurance*:

- The liquidator is exercising a public function under statutory authority.
- A liquidator is potentially liable for costs. However there are statutory provisions, such as s 545 of the Corporations Act, that enable a liquidator to decide not to sue if he or she is not properly funded. Since eligibility to be a liquidator is regulated, liquidators tend not to bring litigation unless satisfied that they can pay the costs if they were to lose.
- In exposing his or her personal assets to the risk of an adverse costs order, a liquidator is in a similar position to a natural person plaintiff who is suing for his or her own benefit.
- The liquidator's personal gain from the litigation consists only of professional costs and disbursements, which are subject to a measure of public control.
- Even when the liquidator is being funded by a creditor, where the creditor is entitled to a preferential dividend under s 564 of the Corporations Act by reason

165. S Epstein SC, *Preliminary Submission PSC3,* [20].
166. S Epstein SC, *Preliminary Submission PSC3,* [19].
167. S Epstein SC, *Preliminary Submission PSC3,* [18].
168. *Hession v Century 21 South Pacific Ltd (in liq)* (1992) 28 NSWLR 120, 123 (Meagher J); *Green (as Liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [45] (Hodgson JA), [83] (Campbell JA).

> of having funded the litigation, the most that the creditor can recover for its own benefit is a return of its outlay for costs, and a 100 per cent dividend on its proved debt. A creditor who funds the litigation in those circumstances is thus doing nothing more than protecting its own legal right to be paid its debt by the company.[169]

2.129 There are exceptions to the general rule. A liquidator may be ordered to give security if he or she is being funded by:

- a creditor who is in commercial substance a funder who has taken assignments of debts for a fraction of the face value;[170] or
- a commercial litigation funder who stands to receive a proportion of the proceeds of the litigation.[171]

2.130 Where the insolvent company is the plaintiff, the court is more likely to make a security for costs order under s 1335(1) of the Corporations Act than if the plaintiff were the liquidator.[172] However, there is no rule that predisposes courts to order security against corporate plaintiffs. The discretion under s 1335(1) of the Corporations Act and r 42.21(d) of the UCPR 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'.[173]

2.131 Relevant to this issue may be whether the plaintiff's impecuniosity was caused or materially contributed to by the defendant's conduct. A court is unlikely to order security in those circumstances.[174] However, in many cases where a plaintiff has alleged that its impecuniosity has been caused by the conduct complained of against the defendant, the court has not been satisfied of the relevant causation.[175] Courts are alert to attempts by plaintiffs to attribute to the defendants the consequences of their financial problems, which may be due to multiple causes. Where, for instance, the evidence shows the plaintiff has been in a poor financial

169. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [83] (Campbell JA).
170. *Jarbin Pty Ltd v Clutha Ltd (in liq)* [2004] NSWSC 28, 208 ALR 242.
171. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148.
172. *Hession v Century 21 South Pacific Ltd (in liq)* (1992) 28 NSWLR 120, 123 (Meagher J); *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [45] (Hodgson J), [83] (Campbell); *Ryberg Telecommunications Pty Limited (in liquidation) v Optus Mobile Pty Limited* [2011] NSWSC 1268, [3] (Black J).
173. *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) [29.4]–[29.5].
174. *Lucas v Yorke* (1983) 50 ALR 228, 229–230 (Brennan J); *North Groongal Pty Ltd v ANZ McCaughan Ltd* (1993) 61 SASR 302, 306 (Perry J).
175. See, for example, *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194; *Drumdurno Pty Ltd v Braham* (1982) 42 ALR 563; *APEP Pty Ltd v Smalley* (1983) 8 ACLR 260; *Fat-sel Pty Ltd v Brambles Holdings Ltd* (1985) ATPR ¶40-544; *Equity Access Ltd v Westpac Banking Corp* (1989) ATPR ¶40-972; *Jodast Pty Ltd v A & J Blattner Pty Ltd* (1991) 104 ALR 248; *Pasdale Pty Ltd v Concrete Constructions* (1995) 131 ALR 268; *BPM Pty Ltd v HPM Pty Ltd* (1996) (1996) 14 ACLC 857; *Melunu Pty Ltd v Claron Constructions Pty Ltd* [2004] NSWSC 1064.

position for a long time, it will be difficult to draw the causative link that its lack of funds has been caused by the defendant.[176]

2.132 The insolvent corporate plaintiff or its liquidator may use other considerations to resist the application for security, including that the case would be stifled if the plaintiff was ordered to give security.

Stakeholders' views

2.133 Four submissions disagreed with Mr Epstein's proposal and expressed a preference for the courts to exercise their existing discretion in such cases.[177] Justice Brereton submitted that the usual discretionary considerations provide adequate protection to the liquidator and the insolvent company including

- whether the defendant caused or contributed to the plaintiff's impecuniosity,
- whether the proceeding will be stultified if the plaintiff was ordered to give security)
- the principle that security is not lightly ordered against a liquidator, and
- the court's wide discretion not to make an order for security of costs.[178]

2.134 Only one submission gave conditional support to Mr Epstein's proposal.[179] Ms Caroline Needham SC submitted that she would not support the proposal of Mr Epstein unless insurers who provide directors' and officers' insurance ('D&0 insurers') that are joined as a defendants are exempted.[180]

The Commission's conclusion

2.135 It is a legitimate concern that applications for security for costs may be used as a means of thwarting litigation brought by the company or its liquidator against former directors, officers and shareholders or members of an insolvent company who have caused or materially contributed to the financial troubles of the company. However, we agree with the preponderance of the submissions, and in particular with the arguments of Justice Brereton, that the current law is sufficient to deal with these issues. On balance there is no demonstrated need to propose any change to the relevant provisions.

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176. See, for example, *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194, 198 (Master Cohen QC); *Michael Bickley Pty Ltd v Westinghouse Electric Australasia Ltd* (1983) 1 ACLC 967, 970 (McLelland J); *Fat-sel Pty Ltd v Brambles Holdings Ltd* (1985) ATPR ¶40-544, 46,428. (Beaumont J); *Impex Pty Ltd v Crowner Products Ltd* (1994) 13 ACSR 440, 444 (Pincus JA), 445 (Macrossan CJ); *Jarraman Arts Aboriginal Corp v Tourism Australia* (No 2) [2005] FCA 30, [20]–[24] (Mansfield J).
177. Justice Paul Brereton AM RFD, *Submission SC24,* 11–12; The NSW Local Court, *Submission SC2,* 4; New South Wales Bar Association, *Submission SC 10*, 4; Clayton Utz, *Submission SC 18*, 4; ; Justice Paul Brereton AM RFD, *Submission SC24,* 7–8; Justice Nigel Rein, *Submission SC32,* 14.
178. Justice Paul Brereton AM RFD, *Submission SC24,* 11–12.
179. C Needham SC, *Submission SC9*, 10–11.
180. C Needham SC, *Submission SC9*, 10–11.

Security for costs orders against defendants

2.136 Rule 42.21 of the UCPR refers to the power of the court to order a *plaintiff* to give security for costs. It is not readily apparent from the rule that the court may order security against a defendant.

2.137 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.

2.138 Further, the case law states that the usual principles on security for costs apply to defendants who are pursuing cross-claims in which substantive causes of action are raised.[181]

2.139 The rules of court of some States reflect the principle developed by the case law. For example, in Victoria, the rules of court of the Supreme Court provide that for purposes of security for costs orders, the term 'plaintiff' is defined as 'any person who makes a claim in a proceeding'.[182] South Australia, Queensland and Western Australia have similar provision in their rules of court, although formulated differently.[183]

2.140 In Consultation Paper 13, we requested submissions on whether r 42.21 of the UCPR should 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, and if so, how should such provision be formulated.[184]

Stakeholders' views

2.141 Few stakeholders made submissions on this issue. Two submissions supported the amendment of r 42.21 of the UCPR 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.[185]

2.142 However, two submissions opposed such an amendment.[186] Justice Brereton argued that it would be redundant in light of the definition of 'plaintiff' in s 3 of the *Civil Procedure Act 2005* (NSW). He cited evidence that the courts are able to deal adequately with any issues that arise in this respect under present provisions.

181. *Classic Ceramic Importers Pty Lid v Ceramica Antiga SA* (1994) 12 ACLC 334; *Motakov Ltd v Commercial Hardware Suppliers Pty Ltd* (1952) 70 WN (NSW) 64.
182. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.01.
183. *Supreme Court Civil Rules 2006* (SA) r 194; *Uniform Civil Procedure Rules 1999* (Qld) r 677; *Rules of the Supreme Court* (WA) O 25 r 4.
184. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 2.12.
185. The NSW Local Court, *Submission SC2*, 4; C Needham, *Submission SC 9*, 12.
186. Justice Paul Brereton AM RFD, *Submission SC24,* 13; Justice Nigel Rein, *Submission SC32,* 14.

Moreover, he foresaw difficulties in encapsulating in legislation the test formulated by the case law.[187]

The Commission's conclusion

2.143 We are of the view that there is no need to amend r 42.21 of the UCPR to provide that courts may order security for cost against defendants who are making cross-claims. The evidence that the present law creates practical problems is not strong. The provision of s 3 of the *Civil Procedure Act 2005* deal with any apparent limitation of UCPR 42.21.

Self-represented litigants

2.144 In Consultation Paper 13, we canvassed some data on self-represented litigants, which suggest that they constitute a significant proportion of litigants particularly in the Local Court and the Land and Environment Court.[188] While data on self-represented litigants is limited,[189] there is anecdotal evidence or at least a perception that the number of self-represented litigants is increasing.[190] The increase has been linked to restrictions on legal aid funding.[191] However, some litigants also choose not to be represented.[192]

Access to justice issues arising from self-representation

2.145 Self-representation presents a number of issues for the administration of justice. First, self-represented litigants often struggle to represent themselves effectively. They place their substantive rights at risk because they have difficulty presenting their cases, negotiating the court's processes and objectively viewing their

187. Justice Paul Brereton AM RFD, *Submission SC24*, 13.

188. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) [1.55]–[1.60].

189. There are a number of reasons for this. First, definitions of what constitutes self-represented litigants vary. Second, the status of self-represented litigants changes throughout the court process. Third, their status as self-represented litigants is not ordinarily known to a court or a tribunal until late in the proceedings: see E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants Literature Review' (Australian Centre for Court and Justice System Innovation, Monash University, 2012) Available: <http://www.law.monash.edu.au/centres/accjsi/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> 7.

190. Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice* (2004) 181; E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants Literature Review' (2012) *Monash University*: <http://www.law.monash.edu.au/centres/accjsi/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> 7; Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-Represented Litigants – Report* (2004) 2; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

191. E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants Literature Review' (2012) *Monash University* Available: <http://www.law.monash.edu.au/centres/accjsi/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> 15; Parliament of Australia, senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice* (2004)183-185.

192. Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice* (2004) 185.

prospects of success.[193] Consequently, self-represented litigants are less successful than represented parties and more likely to discontinue their actions and have costs ordered against them.[194]

2.146 Second, self-presented litigants adversely affect the efficient administration of justice because they require substantial assistance from courts. They lengthen the amount of time to finalise a case,[195] and take up more of the court's staff resources,[196] because they need procedures to be explained and assistance in completing forms and applications.[197] This requires court staff to tread the difficult line between providing procedural advice and avoiding the provision of legal advice.[198] Furthermore, judges often need to depart from their role as impartial arbiter in adversarial proceedings to assist the self-represented litigant.[199] These factors ultimately increase the costs of the represented parties.

2.147 Third, self-represented litigants cannot recover costs to recompense the time spent in preparing for and conducting a case. They can only recover out-of-pocket expenses. This is because the indemnity principle states that costs are awarded as indemnity for costs actually incurred and are not intended to be comprehensive compensation for any loss suffered by a litigant.[200] The right to be self-represented was not intended as a means for litigants to earn 'fees, charges or remuneration'; it is 'a practice which enables them to save money, not to make money'.[201]

Self-represented litigants and security for costs

2.148 The general rule in security for costs that poverty should not be a bar to litigation is particularly important where the plaintiff is self-represented and as a consequence courts are reluctant to order security against a self-represented impecunious plaintiff, unless he or she has adopted a vexatious mode of conducting litigation.[202]

193. Victorian Law Reform Commission, *Civil Justice Review*, Final Report (2008) 563–565.
194. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (2000) 80; H Gamble and R Mohr, *Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal – A Research Note* (Paper presented at the Sixteenth Annual Conference of the Australian Institute of Judicial Administration, 4-6 September 1998, Melbourne).
195. E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants Literature Review' (2012) *Monash University* Available: <http://www.law.monash.edu.au/centres/accjsi/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> 17.
196. Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-Represented Litigants – Report* (2004) 2.
197. Victorian Law Reform Commission, *Civil Justice Review*, Final Report (2008) 565-566.
198. E Richardson, T Sourdin and N Wallace, 'Self-Represented Litigants Literature Review' (2012) *Monash University* Available: <http://www.law.monash.edu.au/centres/accjsi/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf> 18.
199. Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-Represented Litigants – Report* (2004) 2.
200. C*achia v Hanes* (1994) 179 CLR 403, 410–411.
201. *Cachia v Hanes* (1991) 23 NSWLR 304, 317.
202. *Mbuzi v Hall* [2010] QSC 359.

2.149 The stultification factor – whether a security for costs order would force the plaintiff to abandon a claim – is an 'extremely important factor' to consider when the plaintiff is self-represented.[203]

2.150 However, while courts are conscious of the duty to afford procedural fairness to self-represented litigants, they should not deprive the defendants of their entitlements. 'The court cannot extend to a litigant in person a positive advantage over a represented opponent'.[204] Hence, courts are particularly mindful of the motivations of self-represented litigants in instituting the proceeding. Whether the claim was vexatious or initiated to harass the defendant is a factor that militates against the making of a security for costs order.[205] This approach is fortified by the fact that self-represented litigants 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, unless they themselves are legal practitioners.

The Commission's conclusion

2.151 Our terms of reference ask us to consider whether the law relating to security for costs applies satisfactorily in relation to self represented litigants. We have not identified issues of concern in scholarly commentary, policy documents, or case law in relation to the law and practice on security for costs as they relate to self-represented litigants. Consequently, we make no recommendation on this topic.

203. *Morris v Hanley* [2000] NSWSC 957, [29].

204. *Viavattene v Morton* [2011] NSWSC 1173, [12].

205. *Lall v 53–55 Hall Street Pty Ltd* [1978] 1 NSWLR 310; *Morris v Hanley* [2000] NSWSC 957.

3. Parties assisted by particular forms of costs agreements

Introduction

3.1 This chapter examines cases where parties have litigation funding arrangements from:

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

3.2 It also examines representative proceedings, which are usually funded by one or more of the funding arrangements mentioned above.

Litigation funders

Litigation funders

3.3 Litigation funders are entities that contract with potential or actual litigants to finance litigation.[1] The financial assistance usually includes lawyer's fees, disbursements, project management fees and claim investigation costs. However, funding could be limited to certain costs of the litigation, for example the costs of expert evidence. Although litigation may be funded in numerous ways, in this context when we refer to litigation funders we mean those entities that, in return for the funding, take a percentage of the proceeds of the litigation, which ranges from 15 percent to 75 percent.[2] Professional litigation funders usually also accept the risk of paying the other party's costs if the claim fails by providing the funded plaintiff with an indemnity.[3] There are, however, cases where the funding agreement does not include indemnity for adverse costs orders.[4] To ensure the success of the litigation, the funder takes control of major decisions, including retaining and giving instructions to the solicitor who acts for the plaintiff, prohibiting the solicitor from directly liaising with the plaintiff, and reserving the right to settle the claim.[5]

3.4 Litigation funding is commonly provided by organisations whose main business is to provide litigation funding.[6] However, litigation funding may also be provided by those that are not conducting such business. *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*,[7] which is discussed below,[8] provides an example. In that case, the plaintiff obtained funding from a creditor, which was not a professional litigation funder.

New legal obligations imposed on litigation funders

3.5 The significant role of litigation funders in court proceedings has recently been recognised by statute. The *Civil Procedure Act 2005* (NSW) now defines a person with a relevant interest in court proceedings and imposes obligations on them.

1. For a general overview of litigation funders, see NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011), [1.50]–[1.51]; M 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.
2. M Legg et al, 'Litigation Funding in Australia' [2010] *University of New South Wales Legal Research Series* 12; R 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).
3. See, for example, *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148.
4. See, for example, *Leonie's Travel Pty Ltd v British Airways Plc* [2012] FCA 635, [17]; *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, 239 CLR 75.
5. See, for example, the arrangements in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386.
6. The litigation funders operating in Australia, including the types of cases they fund, are examined in G Barker, *Third Party Litigation Funding in Australia and Europe* (Centre for Law and Economics, Australian National University College of Law, Working Paper No 2, 2011) 22–34.
7. (2009) 239 CLR 75.
8. At [3.13]–[3.15].

Section 56 defines a person with a relevant interest in civil proceedings as a person who:

> (a) provides financial assistance or other assistance to any party to the proceedings, and
>
> (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.
>
> **Note.** Examples of persons who may have a relevant interest are insurers and persons who fund litigation.[9]

3.6 Section 56 requires a person with a relevant interest in the proceedings not to cause a party to the proceedings to breach his or her duty to assist the court to further the overriding purpose of the Act and rules of court, which is to facilitate the just, quick and cheap resolution of the real issues in dispute in the proceedings, 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.[10]

The relevance of litigation funding and insurance agreements in security for costs applications

3.7 According to the case law, the existence of a litigation funding agreement is a relevant factor when considering a security for costs application. In *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd,*[11] ('*Green v CGU Insurance*') Justice Hodgson, who wrote the leading judgment, said 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'.[12] His Honour 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'.[13]

3.8 The decision in *Green v CGU Insurance* that a litigation funding agreement is a relevant consideration in security for costs applications has been cited with approval in *The Australian Derivatives Exchange Ltd v Doubell*.[14] However, the court in that case decided not to make an order for security based on the existence of an indemnity for adverse costs orders in the funding agreement, and the consideration that the matter could be dealt with by an undertaking given by the plaintiff to the

9. *Civil Procedure Act 2005* (NSW) s 56(6).
10. *Civil Procedure Act 2005* (NSW) s 56(4).
11. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148.
12. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [51].
13. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [61].
14. *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174.

court to the effect that he would pursue the indemnity for the benefit of the defendants if he suffered an adverse costs order.

3.9 In Consultation Paper 13, we raised the question of the desirability of a list of discretionary factors in the UCPR that courts may consider when deciding security for costs. In that context we asked whether the list should include the consideration that the plaintiff is receiving funding from a litigation funder.[15]

Stakeholders' views

3.10 A number of submissions supported the amendment of the UCPR 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. [16] The basis for supporting such a change was generally that the present law is correct.

3.11 Some submissions opposed the addition of a provision in the UCPR listing the existence of a litigation funding agreement as a factor to be considered by courts in security for costs applications.[17] Maurice Blackburn and Professor Vince Morabito considered it unnecessary because the law is clear that courts may take the existence of litigation funding into account when deciding security for costs applications.[18]

The Commission's conclusion

3.12 We recommend in Chapter 2 the amendment of the UCPR to include a list of factors that courts may consider when exercising their discretion on security for costs. One of the reasons for that recommendation is that a list of discretionary factors in the UCPR may make the identification of the key factors easier and more accessible to those involved in the proceedings. The list includes, at Recommendation 2.3(a), 'the means of those standing behind the proceeding.' This provision is intended to include cases where the plaintiff is supported by a litigation funding agreement, and to confirm the existing case law.

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15. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.1.

16. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12,* 14–15; The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 5; The NSW Local Court, *Submission SC2,* 5; Clayton Utz, *Submission SC 18,* 4; LawCover Pty Ltd, *Submission SC13,* 8; Justice Nigel Rein, *Submission SC32,* 14. IMF Australia Ltd, the largest litigation funder in Australia, was among those that agreed that the existence of a litigation funding agreement is relevant in security for costs applications. However, it submitted that the defendant's funding, if any, should also be a relevant factor: IMF Australia Ltd, *Submission SC1,* 10–11.

17. Maurice Blackburn Pty Ltd, *Submission SC8*, 9; Professor V Morabito, *Submission SC3*, 1; Justice Paul Brereton AM RFD, *Submission SC24*, 16–17.

18. Maurice Blackburn Pty Ltd, *Submission SC8*, 9; Professor V Morabito, *Submission SC3*, 1.

Power to order costs and security for costs against litigation funders and insurers

3.13 When the then Attorney General announced that he had asked the Commission to examine the law relating to security for costs and other related orders,[19] he cited the case of *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd*[20] ('*Jeffery*') as illustrative of problems with the law. In *Jeffery,* the defendant obtained a security for costs order against the plaintiff in the amount of $187 750. Subsequently, the plaintiff obtained money from one of its creditors to fund the litigation. Pursuant to their agreement, the litigation funder would have made a substantial profit if the plaintiff won its court case.

3.14 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 applied, by more than $465 000. The defendant applied for a costs order against the litigation funder based on r 42.3(2)(c) of the UCPR. This rule stated that the court may not make any order for costs against a person who is not a party, except if, among other things, the costs of a party were occasioned by abuse of process.[21] The case reached the High Court, which held that there was no abuse of process and confirmed that the Supreme Court did not have the power to order costs against the litigation funder under the circumstances.

3.15 Subsequent to *Jeffery,* the Uniform Rules Committee repealed UCPR r 42.3 effective from July 2010. As a result, the courts in New South Wales now have power to order costs against non-parties based on s 98 of the *Civil Procedure Act 2005* (NSW), which provides that costs are at the discretion of the court and the court has full power to determine by whom and to what extent the costs are to be paid.

3.16 A recent District Court judgment has confirmed the power of New South Wales courts to make costs orders against non-parties.[22] In other jurisdictions, provisions equivalent to s 98 have been construed as giving courts power to make costs orders against litigation funders.[23] The courts have said that costs orders against non-parties are exceptional but are warranted in cases where a person could fund litigation in order to pursue his or her own interest without risk to himself or herself should the proceeding fail.[24] The discretion will not be exercised against 'pure

19. New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 December 2009, 20524 (John Hatzistergos, Attorney General).
20. *Jeffery and Katauskas Pty Limited v SST Consulting Pty Ltd* [2009] HCA 43, 239 CLR 75.
21. The rule was first introduced in 1993 as an amendment to the Supreme Court rules of court. Its effect was to abolish the categories of cases in which costs orders against non-parties have been recognised by the case law: see *& Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75, [24] (French CJ, Gummow, Hayne, and Crennan JJ).
22. *Younan v GIO General Limited (ABN 22 002 861 583) (No 2)* [2012] NSWDC 149 (a costs order was made against a non-party who had conduct of the proceedings, where the plaintiff was a 'person of straw', and the conduct of the litigation was unreasonable and improper).
23. *Gore (trading as Clayton Utz) v Justice Corporation Pty Ltd* [2002] FCA 354; *Arkin v Bouchard Lines Ltd* [2005] EWCA Civ 655, [41].
24. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, 1 WLR 2807 (Privy Council), [26] quoting *Arklow Investments Ltd v MacLean* (Unreported, High Court of New Zealand, 19 May 2000), [20].

funders', which are 'those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course'.[25]

3.17 In relation to costs orders against litigation funders, the problem has therefore been resolved. The situation in relation to security for costs is different. An order for security is not an order for costs, and s 98 of the *Civil Procedure Act 2005* (NSW) and the case law discussed in the preceding paragraph cannot be relied upon. Rule 42.21 of the UCPR does not provide such a power either because its provisions are confined to security for costs orders against a 'plaintiff'.

3.18 The Supreme Court arguably has jurisdiction to make security for costs orders against non-parties on the basis of its inherent jurisdiction, and other courts may rely on their implied jurisdiction. However this remains untested. The case law recognising the power of courts to make costs orders against non-parties is based on statute (s 98 of the *Civil Procedure Act 2005* (NSW) or its equivalent in other jurisdictions) rather than on the inherent jurisdiction.[26] It may therefore be argued that it is desirable to make explicit in legislation the power of New South Wales courts to make security or costs orders against non-parties.

3.19 In practice it seems likely that an order for security for costs will rarely be required, particularly against a litigation funder, since it will usually be the party that will be the subject of an order. Security for costs orders are likely to be infrequent where there is a litigation funding agreement because the agreement will typically contain an indemnity against costs orders. This indemnity, when accompanied by an undertaking by the plaintiff to pursue it if it loses the case, may make a security for costs order unnecessary.[27] However, even with such an indemnity and undertaking, a security for costs order may be necessary where there is doubt about the funder's financial capacity to pay costs orders.[28] There is no certainty about the financial capacity of litigation funders to meet their financial obligations because they are not (except those incorporated under the *Corporations Act 2001* (Cth)) subject to prudential regulation.[29]

3.20 There are other situations where security for costs orders against the litigation funder may be desirable. The first is where the litigation funder is based overseas,

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25. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, 1 WLR 2807 (Privy Council), [25(2)] quoting *Hamilton v Al Fayed (No 2)* [2002] 3 All ER 641, [40].
26. *Bent v Gough* (1992) 36 FCR 204, 213 (Northrop, Ryan JJ) ('in the absence of some legislative grant of power, there is, in general, no jurisdiction to order that a person who is not a party to litigation should pay in whole or part the costs of any party to that litigation').
27. See for example *The Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174.
28. See for example *Bufalo Corp Pty Ltd (recs and mgrs apptd) (in liq) v Lendlease Primelife Ltd (No 3)* [2010] VSC 263, [66].
29. The *Corporations Amendment Regulations 2012 (No.6)* (Cth) exempt litigation funding agreements from certain requirements of the *Corporations Act 2001* (Cth). The regulations are intended to overturn the Federal Court's decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 that litigation funding agreements are managed investment schemes, and the decision of the NSW Court of Appeal in *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50 that such agreements are financial products under the *Corporations Act 2001* (Cth). The NSW Court of Appeal's decision was recently overtured by the High Court in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45.

which may make it difficult to enforce any indemnity in the funding agreement for costs orders.[30] The second situation is where the funding agreement does not provide for indemnity for costs orders, which may happen where the funder is not a professional funder using the standard agreements in the industry.[31] However, a professional funder may also decide not to provide indemnity for costs orders.[32] The third situation is where the litigation funder has a right to terminate the agreement at any time and the defendant is concerned the funder would use this option,[33] for example, if the costs of the litigation have gone significantly beyond the estimated costs.[34] In such a case a security for costs order would give the defendant assurance that some of its costs will be paid, even if the funding agreement were terminated at a later stage.

3.21 In the United Kingdom, courts have express power in legislation to make security for costs orders against non-parties. Rule 25.14 of the *Civil Procedure Rules 1998* (UK) 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
>
> is a person against whom a costs order may be made.

3.22 It would appear that this provision is rarely used[35] and one likely reason for this is that it is parallel to the power to make costs orders against non-parties, which is exercised only in exceptional cases.[36]

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30. Supreme Court, Consultation SC4, Sydney NSW, 26 September 2012.
31. See, for example, *Jeffery and Katauskas Pty Limited v SST Consulting Pty Ltd* [2009] HCA 43, 239 CLR 75.
32. See, for example, *Leonie's Travel Pty Ltd v British Airways Plc* [2012] FCA 635.
33. M Legg et al, 'Litigation Funding in Australia' [2010] *University of New South Wales Faculty of Law Research Series* 12, 23.
34. See, for example, *Karl Suleman Enterprizes Pty Ltd (in liq) v Pham* [2010] NSWSC 886.
35. See, for example, *Arkin and Bouchard* [2003] EWHC 3088, [12] (security application denied).
36. *Symphony Group PLC v Hodgson* [1994] QB 179, 192–193 (Balcombe LJ). See however *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807, 2815 where Lord Brown said that '"exceptional" in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order'.

3.23 In Consultation Paper 13, we asked whether legislation should be adopted giving courts the express power to make security for costs orders against litigation funders.[37]

Stakeholders' views

3.24 There was considerable support in submissions and consultation meetings for the adoption of legislation giving courts the power to award security for costs against litigation funders.[38] Policy considerations constitute the first basis for the support. It was submitted that since a litigation funder stands to make a commercial profit from the proceeds of the case if successful, it should assume the risks associated with the litigation,[39] and be accountable for its involvement in court processes.[40]

3.25 The second basis for the support for legislative reform is to achieve clarity; it was submitted that legislation is desirable in view of the lack of case law on the power of the courts, particularly those without inherent jurisdiction, to make security for costs orders against litigation funders.[41] It was argued that litigation funding occurs infrequently in the District and Local Courts but that it is desirable for the different courts to have uniform rules.[42] This is particularly important since the jurisdiction of lower courts are constantly increasing and may eventually reach the threshold at which litigation funding would be commercially viable for professional litigation funders.[43] Rule 25.14 of the *Civil Procedure Rules 1998* (UK) was cited as a template that could be adopted in New South Wales.[44]

3.26 Some submissions argued that legislative change is unnecessary, that courts already have sufficient power to make security for costs orders against litigation funders,[45] although no authority was given for this proposition.[46] It was also submitted that, in most cases, a security order would not be necessary because the funding agreement provides indemnity for costs orders which, if coupled with an undertaking by the party to pursue the indemnity, constitutes sufficient security.[47] If

37. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.4.
38. Justice Nigel Rein, *Submission SC32,* 16; The NSW Local Court, *Submission SC2*, 5; IMF Australia Ltd, *Submission SC1,* 15; M McHugh SC, *Submission SC6,* 1; C Needham SC, *Submission SC9,* 14; Clayton Utz, *Submission SC 18,* 5; Office of the Legal Services Commissioner (NSW), *Submission SC4,* 2; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.
39. The NSW Local Court, *Submission SC2,* 5; Clayton Utz, *Submission SC 18,* 5.
40. IMF Australia Ltd, *Submission SC1,* 15.
41. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
42. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012.
43. Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012.
44. NSW Bar Association, *Submission SC10,* 2 [11].
45. Professor V Morabito, *Submission SC 3,* 1; Maurice Blackburn Pty Ltd, *Submission SC8*, 12.
46. Professor V Morabito, *Submission SC 3,* 1 cited the repeal of UCPR r 42.3 as basis but that rule pertained to costs and not security for costs.
47. Maurice Blackburn Pty Ltd, *Submission SC8*, 13.

a security for costs order was necessary under the circumstances of the case, the order should be made against the party and not the litigation funder. [48]

The Commission's conclusion

3.27 The arguments in favour of law reform in this area are limited. There is little evidence of a practical problem that requires legislation. It is apparent that such a power to award costs would be used infrequently. It appears that standard litigation funding agreements cover adverse costs orders so that there may be no good reason to apply for, or to make, an order for security. Where the defendant has concerns, they may be dealt with by methods that are simpler than an order for security, such as the provision of undertakings.

3.28 The only area of concern remaining is that a power to order security for costs against third parties may be required where the litigation funder does not adopt responsibility for costs. This may be an issue better dealt with by industry regulation than through the provision of a power to order security for costs.

3.29 Nevertheless, the absence of a power to order security, when there is a power to order costs, is inconsistent. Although most litigation funders may be reputable and agree to be responsible for costs, where a litigation funder does not agree to adopt responsibility for costs, that funder may be ordered to pay costs, but not to provide security. While it may be that industry regulation will deal with this problem in the fullness of time, it is not clear whether or when this may occur. We are also influenced by the weight of the submissions in favour of giving the court the power to make an order for security against third parties.

3.30 At Recommendation 2.1 we recommend that 'the *Civil Procedure Act 2005* (NSW) should be amended to provide that, subject to the rules of court, the court may order security for costs where the order is necessary in the interests of justice, on such terms and in such manner as the court thinks fit'. If adopted, this provision is broad enough to give courts power to make security for costs orders against non-parties including litigation funders. Nevertheless, we recommend that the Uniform Rules Committee should give consideration to amending the UCPR to make specific provision that courts have discretion to make security for costs orders against litigation funders. Rule 25.14 of the *Civil Procedure Rules 1998* (UK) provides an appropriate model for this purpose. We make this recommendation for clarity, to remove any uncertainty, to prevent litigation on this issue and to clarify the criteria for the exercise of discretion.

Recommendation 3.1

The Uniform Rules Committee should give consideration to amending the *Uniform Civil Procedure Rules 2005* (NSW) to provide courts with the power to make security for costs orders against litigation funders in terms similar to the provisions of r 25.14 of the *Civil Procedure Rules 1998* (UK).

48. Maurice Blackburn Pty Ltd, *Submission SC8*, 14; Justice Paul Brereton AM RFD, *Submission SC24,* 18.

Disclosure of litigation funding and insurance agreements

3.31 The existence of a litigation funding agreement that supports a party to proceedings gives rise to the question of whether a funded party should be required to disclose the existence and terms of the agreement to the court and the other parties. Disclosure is arguably desirable in the interests of effective case management because it would assist in identifying whether there are issues relating to costs and security for costs at the earliest stages of the proceedings. For example the agreement may have indemnity for adverse costs orders (which the defendant may find satisfactory because the funder has a good reputation and there is no upper limit on the indemnity) and an undertaking by the funder to submit to the jurisdiction of the court in relation to any court order. In such a case an application for security for costs would be unnecessary, thus saving time, costs and other resources of the parties and the court. On the other hand, if the agreement does not satisfy concerns about the ability of the funded plaintiff to comply with costs orders, the defendant would have the opportunity to consider applying in a timely manner for security for costs or other means of securing its costs such as an undertaking from the funder that it will comply with costs orders.

3.32 There are procedures for defendants to obtain a copy of the funding agreement, such as by notice to produce and subpoena. However, these procedures assume the defendant knows the plaintiff is supported by a litigation funder. Furthermore, these procedures would entail substantial costs for both the parties and the courts and would certainly delay the resolution of the case. Mandatory disclosure of the funding agreement would, therefore, advance the objectives of the *Civil Procedure Act 2005* (NSW) of facilitating the just, quick and cheap resolution of proceedings.[49] It would arguably also be consistent with other disclosure requirements in civil proceedings.[50]

3.33 In Consultation Paper 13, we requested submissions on 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.[51]

3.34 When we asked this question, we cited a Federal Court practice note as a precedent for mandatory disclosure of the terms of litigation funding agreements. The practice note, which applies in representative proceedings, states:

> 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

49. *Civil Procedure Act 2005* (NSW) s 56(1).

50. See, for example, s 18E of the *Civil Procedure Act 2005* (NSW) which requires claimants, before commencing any court proceedings in relation to a dispute, to take reasonable steps to resolve the dispute by agreement, including exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute.

51. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.2.

information which might reasonably be expected to confer a tactical advantage on the other party.[52]

Stakeholders' views

3.35 Most of the submissions that gave views on this topic supported mandatory disclosure of any agreement to fund the proceedings.[53] They submitted that mandatory disclosure would:

- facilitate the determination of security for costs applications as litigation funding is an important factor in assessing whether or not to make an order;[54]
- enable the courts to consider properly potential costs orders against litigation funders;[55]
- allow counsel to make a realistic appraisal of the case, which may facilitate settlement;[56]
- make funders accountable for their involvement in the court process, which would protect the integrity of the civil justice system;[57]
- facilitate the collection and analysis of information concerning the involvement of funders in the civil justice system and whether they facilitate quick, inexpensive and efficient dispute resolution;[58] and
- make New South Wales law consistent with that of the Federal Court.[59]

3.36 Two submissions did not support mandatory disclosure of funding agreements. Justice Brereton submitted that litigation funding arrangements are private matters for the parties, arguing that 'where relevant, litigation funding arrangements can be ascertained by notice to produce and subpoena'.[60] The Law Society submitted that mandatory disclosure should be limited to circumstances where a failure to disclose would amount to an abuse of process. In these circumstances, parties should be required to disclose only to the court and not to the other party, as knowledge of the terms of the agreement may distort the litigation process.[61]

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52. 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].
53. IMF Australia Ltd, *Submission SC1*, Appendix B, 2–4; The NSW Local Court, *Submission SC2,* 5; Professor V Morabito, *Submission SC3*, 1; The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 2; Maurice Blackburn Pty Ltd, *Submission SC8*, 10; C Needham SC, *Submission SC9*, 13; LawCover Pty Ltd, *Submission SC13*, 7; Clayton Utz, *Submission SC 18*, 5; Justice Nigel Rein, *Submission SC32,* [17].
54. LawCover Pty Ltd, *Submission SC13*, 7.
55. Clayton Utz, *Submission SC 18*, 5; Maurice Blackburn Pty Ltd, *Submission SC8*, 10.
56. IMF Australia Ltd, *Submission SC1*, Appendix B, 2–4.
57. IMF Australia Ltd, *Submission SC1*, Appendix B, 2–4.
58. IMF Australia Ltd, *Submission SC1*, Appendix B, 2–4.
59. Professor V Morabito, *Submission SC3*, 1; LawCover Pty Ltd, *Submission SC13*, 7.
60. Justice Paul Brereton AM RFD, *Submission SC24,* 17.
61. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 9.

Recent development

3.37 Subsequent to the publication of Consultation Paper 13, a rule of court of the Western Australian Supreme Court has been adopted which provides a different approach to disclosure. It requires parties to proceedings to disclose to the court the identity of an interested non-party. From June 2012, Order 9A of the *Rules of the Supreme Court 1971* (WA) requires a party to a case to notify in writing, as soon as is reasonably practicable, the Principal Registrar and each other party to the case of the identity of any person who is an interested non-party. Such person is defined as a person other than a practitioner for the party who (a) provides funding or other financial assistance to the party for the purposes of conducting the case; and (b) exercises direct or indirect control or influence over the way in which the party conducts the case.

The Commission's conclusion

3.38 On balance, we recommend that a funded party to proceedings should disclose the existence and terms of any funding agreement. Such disclosure will frequently obviate the need for an application for security, and will save public costs and costs to the parties. We take seriously the argument that such an agreement is a private matter between the parties to the agreement. We also acknowledge the role of litigation funders in increasing access to justice. Nevertheless, such an agreement is one that seeks to make a profit from the litigation for one party to the agreement. There is a public interest in saving the expense of unnecessary satellite litigation.

3.39 We acknowledge the concerns of the Law Society about the potential distortion of the litigation process as a result of disclosure. However, this issue may be addressed by allowing the redaction of the agreement to conceal information that has no relevance to costs and security for costs.

3.40 The terms of a funding agreement in relation to which disclosure may be required include:

- The identity of the litigation funder: this may assist the defendant in assessing the funder's capacity to meet its obligations under the agreement.
- Any indemnity for costs orders and whether that indemnity contains limitations such as a maximum amount.
- Any undertaking by the funder to submit to the jurisdiction of the court for purposes of costs, since such an undertaking when coupled with an indemnity for costs orders, may dispense the need for security for costs.[62]
- Whether the funder can readily terminate the agreement.
- The extent to which the funder will profit from the litigation if successful: this is relevant to the question of whether the security for costs order should be made against the funded plaintiff, as well as to the quantum of security to be ordered.[63]

62. *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174.
63. *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148, [88] (Basten JA).

- The extent of the funding provided, including the date when it became effective. A funder that finances only part of a plaintiff's costs of litigation (for example if funding is provided part way through the proceedings or for particular expenses such as the expenses of the expert evidence) will be potentially liable for costs only to the extent of the funding provided.[64]

Recommendation 3.2

(1) The *Uniform Civil Procedure Rules 2005* (NSW) should be amended by adding a provision requiring each party 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.

(2) Any funding agreement disclosed may be redacted to conceal information that has no relevance to costs and security for costs.

(3) The disclosure should be made at or prior to the initial case management conference, or if the agreement was entered into at the later stages of the proceedings, within a reasonable period from the time the agreement was reached.

Lawyers acting pro bono

Pro bono costs orders

3.41 In some situations a plaintiff may be assisted by a lawyer who is acting 'pro bono', a term we use in this report to mean the provision of legal services without any fee. There are broader definitions of pro bono, for example that it includes cases where the lawyer renders services without an expectation of a fee, which would cover cases that are underwritten on a speculative (no win no fee) basis.[65] During our consultations, it emerged that some lawyers who claim to work on a pro bono basis are in fact providing services on a no win no fee basis.[66] We are of the firm view that the distinction between pro bono legal work on the one hand, and providing legal services on a contingent or similar basis on the other hand, is an important one and that the two categories should not be confused.

3.42 Lawyers acting pro bono cannot recover costs.[67] The purpose of an order that the losing party pay the legal expenses or costs of the winning party is to provide an indemnity in relation to the whole, or usually part, of the contractual obligation incurred by the latter to pay the fees of his or her lawyers.[68] If a successful party is

64. *Arkin v Bouchard Lines Ltd* [2005] EWCA Civ 655, [41].

65. For a survey and analysis of various definitions of pro bono, see C Arup, 'Defining pro bono: models and considerations' (A paper presented at the First National Pro Bono Conference, For the Public Good, Canberra, 4–5 August 2000). <http://www.nationalprobono.org.au/ssl/CMS/files_cms/DefiningProBono-ChristopherArup.pdf>.

66. *Consultation SC1,* Sydney NSW, 11 September 2012; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.

67. *Wentworth v Rogers* [2006] NSWCA 145, 66 NSWLR 274.

68. *Wentworth v Rogers* [2006] NSWCA 145, 66 NSWLR 274, [102].

under no legal obligation to pay lawyers' fees, the indemnity principle states that the successful party cannot recover costs from the opponent.[69]

3.43 There is, however, an exception. Division 9, Part 7 of the UCPR allows courts to refer litigants to legal services under a court-appointed referral scheme. Rule 7.41 provides that if an order for costs is made in favour of a litigant who is assisted under that scheme 'the barrister or solicitor who has provided the legal assistance is entitled to recover the amount of costs that another person is required to pay under the order'. However, the barrister or solicitor 'must account to the litigant for any money received by the barrister or solicitor in respect of any disbursements that have been paid by the litigant'.[70] These provisions have recently been applied in *Babolas v Waverley Council*[71] where the Court of Appeal ordered that the barrister who provided legal assistance to the appellants under this scheme was entitled to recover the amount of costs that the respondent was ordered to pay.

3.44 In their preliminary submissions two pro bono legal assistance schemes, the National Pro Bono Resource Centre ('NPBRC') and the Public Interest Law Clearing House NSW ('PILCH NSW'), 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 defences or vexatious actions, and may encourage litigants to settle out of court and conduct their cases expediently. 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.[72] In such situations, the opposing party may be 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'.[73]

3.45 The NPBRC and PILCH NSW both further submitted that there is inconsistency in the law with respect to costs recovery by pro bono lawyers.[74] On the one hand, lawyers acting under the pro bono scheme established by the UCPR can recover a costs order made in favour of the assisted litigant.[75] On other hand, lawyers who are acting pro bono outside of that scheme do not have the same entitlement to recover costs from the opposing side.

3.46 In the United Kingdom, courts have the power to make 'pro bono costs orders'. Section 194 of the *Legal Services Act 2007* (UK) provides that where the legal representation of a party is provided free of charge, in whole or in part, the court may order any person to make a payment to the prescribed charity in respect of such representation.[76] In considering whether to make an order under s 194 and the

69. *Wentworth v Rogers* [2006] NSWCA 145, 66 NSWLR 274, [45], [102].
70. *Uniform Civil Procedure Rules 2005* (NSW) r 7.41.
71. [2012] NSWCA 126.
72. National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 8; Public Interest Law Clearing House, *Preliminary Submission PSC14*, [6.1].
73. National Pro Bono Resource Centre, *Preliminary Submission PSC6,* 8.
74. National Pro Bono Resource Centre, *Preliminary Submission PSC6*, 9; Public Interest Law Clearing House NSW, *Preliminary Submission PSC14*, [6.1].
75. *Uniform Civil Procedure Rules 2005* (NSW) r 7.41(2).
76. *Legal Services Act 2007* (UK) s 194(5)–(6).

terms of such an order, the court must have regard to: (a) whether, had the legal representation not been provided free of charge, it would have ordered the losing party to pay the costs of the successful party in respect of his or her legal representation; and (b) if it would, what the terms of the order would have been.[77]

3.47 The prescribed charity for purposes of s 194 is the Access to Justice Foundation. It distributes the funds it receives under s 194 and other funds it has raised to Legal Support Trusts (which support law centres, legal advice agencies by providing them with funding grants alongside other forms of support), national pro bono organisations and strategic projects.[78] In 2011, the Access to Justice Foundation distributed over £110 000. Grants included supporting the creation of a 'nutshell' guide on court procedure for self-represented litigants; projects to build and support collaboration between the advice sector and the pro bono sector; the expansion of the Personal Support Units (where self-represented litigants can get emotional support and practical information about what happens in court) to more court centres; and existing initiatives such as the Law Centres Federation project to increase efficiency and collaboration between Law Centres across the nation.[79]

3.48 In Consultation Paper 13, we requested submissions on two issues: first whether it is desirable to permit costs orders to be made in favour of pro bono litigants; second, if such orders are considered desirable, whether the costs should be awarded to the pro bono lawyer or given to a pro bono litigation fund, as in the United Kingdom.[80]

Stakeholders' views

3.49 On the first question, most submissions supported the passage of legislation giving courts the power to make costs orders in favour of litigants whose lawyers are acting pro bono.[81] A number of reasons were given for this position.

3.50 First, it was argued that pro bono costs recovery would improve access to justice by encouraging pro bono participation.[82] Lawyers and law firms would be able to maintain their capacity for pro bono work by using the costs awarded to pay for litigation disbursements (including counsel's fees) and directing funds back to their pro bono budgets.[83] PILCH NSW said that litigation matters are the most difficult to

77. *Legal Services Act 2007* (UK) s 194(4).

78. The Access to Justice Foundation <http://www.accesstojusticefoundation.org.uk/>.

79. The Access to Justice Foundation, 'Access to Justice Foundation Announces Vital National Grants' (Media Release, 15 February 2011). <http://www.accesstojusticefoundation.org.uk/downloads/ATJF_grant_news_15022012.pdf>

80. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.8.

81. Public Interest Law Clearing House (Victoria), *Submission SC15*, 8; Public Interest Law Clearing House NSW, *Submission SC21,* 2; National Pro Bono Resource Centre, *Submission SC14*, 8–9; NSW Bar Association, *Submission SC10,* 5; M McHugh SC, *Submission SC6,* 1 The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 13; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 20; Clayton Utz, *Submission SC 18,* 6; Justice Nigel Rein, *Submission SC32,* 16.

82. Public Interest Law Clearing House (Victoria), *Submission SC15*, 6; Public Interest Law Clearing House NSW, *Submission SC21,* 2; National Pro Bono Resource Centre, *Submission SC14*, 8–9.

83. Public Interest Law Clearing House (Victoria), *Submission SC15*, 6.

refer to its member law firms because substantial resources are required to run them. For example, one of its member law firms recently estimated that the costs of an appeal for a case it was running would exceed $300 000. This was a significant part of their annual pro bono budget, which meant that they had to take less pro bono work.[84]

3.51 Secondly, pro bono costs orders would promote a level playing field between the opposing parties since they will all be subject to the potential for adverse costs orders, which play a part in deterring unmeritorious claims and defences, encouraging settlement or the use of alternative dispute resolution, and promoting expeditious litigation.[85]

3.52 Thirdly, pro bono costs orders would create consistency and fairness among lawyers acting pro bono. At the moment, only lawyers acting through the pro bono referral scheme of the Supreme Court are entitled to get their costs paid. There is no logical basis for placing some pro bono lawyers in less favourable position than others.[86]

3.53 Finally, pro bono costs orders would prevent unsuccessful litigants from gaining a bonus or windfall.[87]

3.54 Some stakeholders opposed pro bono costs orders. They submitted that costs orders are compensatory in nature and it is contrary to logic and justice for a successful litigant who incurs no expense to be recompensed by the other party if the winning party has not incurred any costs for legal services.[88] Justice Brereton also submitted that it is necessary to distinguish between acting on a pro bono basis and acting on a contingency basis. He said that preserving the rule against pro bono costs recovery will 'promote transparency of the basis on which lawyers are acting'.[89]

3.55 On the second question (where costs should go) most of the stakeholders that supported pro bono costs orders argued that the pro bono lawyer should be entitled to the costs awarded.[90]

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84. Public Interest Law Clearing House NSW, *Submission SC21,* 2.
85. Public Interest Law Clearing House (Victoria), *Submission SC15*, 6; National Pro Bono Resource Centre, *Submission SC14*, 8–9; M McHugh SC, *Submission SC6,* 1; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 13; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 20.
86. Public Interest Law Clearing House (Victoria), *Submission SC15*, 6.
87. Public Interest Law Clearing House (Victoria), *Submission SC15*, 6; Clayton Utz, *Submission SC 18,* 6; NSW Bar Association, *Submission SC10,* 5.
88. Justice Paul Brereton AM RFD, *Submission SC24*, 21–22; C Needham SC, *Submission SC 9,* 16; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.
89. Justice Paul Brereton AM RFD, *Submission SC24*, 21–22.
90. Public Interest Law Clearing House (Victoria), *Submission SC15*, 9; Clayton Utz, *Submission SC18,* 6, 9; National Pro Bono Resource Centre, *Submission SC14*, 11; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 20; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 13; Public Interest Law Clearing House NSW, *Submission SC21,* 2; M McHugh SC, *Submission SC6,* 1; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

3.56 PILCH Victoria and PILCH NSW both submitted that allowing lawyers acting pro bono to recoup their costs directly would enable them to increase their capacity for pro bono work and would, therefore, promote greater access to justice to disadvantaged people.[91] The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee ('Young Lawyers') submitted that this approach would encourage lawyers to act on a pro bono basis, particularly in matters that have the potential to be intellectually consuming or lengthy.[92]

3.57 It was also argued that the establishment of pro bono fund is unnecessary because pro bono participation in Australia is well-established.[93] PILCH Victoria argued that there is, therefore, less imperative for governmental intervention in Australia through a centralised fund.[94] The Law Society submitted that, assuming one purpose for the establishment of a pro bono litigation fund is to deter lawyers from acting pro bono in frivolous cases since the fund would allocate funds to cases that have reasonable prospects of success, this aim is already being achieved through other means. It said that pro bono schemes usually conduct rigorous merit tests before lawyers agree to act. Moreover, lawyers are aware of laws that impose penalties for providing services in matters that are frivolous or do not have reasonable prospects of success.[95]

3.58 It was further submitted that the UK experience 'has not been a positive one'.[96] Clayton Utz and PILCH Victoria said the administrative costs for maintaining the UK fund could be expensive and the funds it has raised have been limited so far.[97]

3.59 The Bar Association submitted that there may be utility in the establishment of a scheme such as that (described above) in the UK.[98] It argued that this might have the function of making the lawyer focus on whether they should act on a pro bono or contingent fee basis; might deprive unsuccessful litigants of a windfall; and may assist the funding of pro bono activities. It suggested the Public Purpose Fund as alternative recipient of the costs recovered in pro bono cases.[99] The Public Purpose Fund (which is sourced from funds from solicitors required by law to be deposited with the Law Society) provides some funding to organisations that provide pro bono services, including the Law Society pro bono scheme, the Bar Association's Legal

91. Public Interest Law Clearing House (Victoria), *Submission SC15*, 9; Public Interest Law Clearing House NSW, *Submission SC21,* 2.
92. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 20.
93. For a snapshot of the amount of pro bono work done in 2010-2011 by law firms across Australia with at least 50 full-time lawyers, the participation rates within firms, the proportion of pro bono work done for individuals and organisations, and sources of pro bono work, see National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian Firms With More Than Fifty Lawyers*, Interim Report (October 2012).
94. Public Interest Law Clearing House (Victoria), *Submission SC15*, 8.
95. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 13.
96. Clayton Utz, *Submission SC18,* 6.
97. Public Interest Law Clearing House (Victoria), *Submission SC15*, 8; Clayton Utz, *Submission SC18,* 9.
98. NSW Bar Association, *Submission SC10,* 5.
99. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

Assistance Referral Scheme, the Public Interest Law Clearing House NSW (PILCH NSW) and the Public Interest Advocacy Centre.

3.60 Justice Rein submitted that the costs awarded should go a pro bono litigation fund.[100]

The Commission's conclusions

3.61 We see merit in providing courts with the ability to make a costs order in cases where a lawyer is acting pro bono. We are particularly influenced in this respect by the importance of pro bono legal advice, assistance and representation in securing access to justice. We are also influenced by the role played by costs orders in encouraging responsible conduct on the part of litigants.

3.62 We note that costs for pro bono representation are presently recoverable in some cases, for example in New South Wales where the lawyer acts under the court appointed referral scheme, and note that there does not appear to be a principled reason why costs should be recoverable in some cases but not others. We note the broad discretion of courts in relation to costs orders, and the consequent ability of courts to take into account all relevant factors in making costs orders.

3.63 If costs were to be available in pro bono cases, we have doubts about the wisdom of paying those costs to the lawyer who is acting pro bono. To do so would, as Justice Brereton pointed out in his submission, risk confusing and conflating pro bono work by lawyers with contingent fee work. Another way of redirecting the funds to pro bono work seems to us to be a better option. We do not support the establishment of a special fund to receive and re-allocate pro-bono costs to general community legal needs, as in the United Kingdom, but would prefer investigation of a model that would direct such funds into pro bono litigation.

3.64 Our terms of reference do not directly cover the topic of costs orders in pro bono cases and the ways in which such costs might appropriately be dealt with. The topic is closely related to issues raised by our terms of reference; we did seek the views of stakeholders on pro bono costs and security for costs orders; and we received nine submissions on those questions. However, the issue of whether the court should have power to order costs in pro bono cases has significant implications for the indemnity rule on costs, and for the way that pro bono litigation is funded in New South Wales. It also raises questions of propriety in legal practice and the ethical implications of failure to distinguish between pro bono and contingent fee arrangements.

3.65 Because our terms of reference are focussed for the most part on security for costs, stakeholders may not have devoted to this review the attention it may have attracted had it been apparent that significant change was to be proposed to pro bono costs regimes. We have set out the issues, as the fruits of submissions and consultations to this inquiry, and suggest that further consultation would be desirable before such changes to pro bono funding are contemplated.

100. Justice Nigel Rein, *Submission SC32,* 16.

Exempting lawyers acting pro bono from personal costs orders

3.66 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'.[101]

3.67 Under s 99 of the *Civil Procedure Act 2005* (NSW), 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'.[102]

3.68 In their preliminary submissions, the NPRCB, PILCH NSW and 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.[103]

3.69 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. It was argued that the deterrent effect of personal costs orders would likely be more pronounced where lawyers are considering whether or not to undertake test cases on a pro bono basis, since often the prospects of success in such cases can be difficult to ascertain.[104] The statutory provisions mentioned above may, therefore, reduce access to justice 'by making pro bono solicitors subject to and fearful of personal liability where they are not receiving any financial gain'.[105]

3.70 There are, however, arguments against the proposed exemptions. These are that the standards required by the relevant statutory provisions are minimal standards of competence and skill that should be complied with by all lawyers, whether acting pro bono or not. Further, these standards have been applied with great care by the courts.

3.71 In Consultation Paper 13, we asked for submissions on whether s 99 of the *Civil Procedure Act 2005* (NSW) and s 348 of the *Legal Profession Act 2004* (NSW) be

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

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

103. 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].

103. 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).

104. Justice Paul Brereton AM RFD, *Submission SC24,* 24; 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).

104. 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).

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

amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis.[106]

Stakeholders' views

3.72 A majority of the submissions that commented on this topic opposed exemptions for lawyers in pro bono cases.[107] Justice Brereton submitted that there is no reason to exempt lawyers acting pro bono from personal liability for costs arising under s 99 of the *Civil Procedure Act 2005* (NSW). He further stated that the power to order costs under s 348 of the *Legal Profession Act 2005* (NSW) is better left to the discretion of the court rather than carving out an exception and

> [t]he fact that a legal practitioner was acting pro bono for a client who would otherwise be unrepresented before the court would be a powerful discretionary consideration against making such an order.[108]

3.73 A number of submissions, including that from the Law Society, argued that lawyers must discharge their duties with honesty, fairness, competence and diligence to all clients regardless of whether they are providing their services pro bono.[109] The Young Lawyers submitted that the statutory provisions under consideration are discretionary and set a high threshold for the award of costs against a practitioner. The courts have exhibited great reluctance to make costs orders under these provisions, holding that these statutory powers are only to be exercised in clear cases and only with careful consideration.[110]

3.74 Three submissions supported some form of exemption. The NPBRC and the PILCH Victoria both submitted that s 348 of *the Legal Profession Act* (NSW) should be amended because it has a chilling effect on practitioners' willingness to take on a matter on a pro bono basis. However, both said there should be no exemption to s 99 *Civil Procedure Act 2005* (NSW) for lawyers acting pro bono. They argued that all lawyers should be held to the same standard of professional conduct regardless of the fee arrangement.[111]

3.75 The Bar Association argued that exemptions to both sections should be confined to lawyers who provide services as part of a legal aid or pro bono scheme approved by Legal Aid NSW, or referred by the Bar Association or the Law Society. It

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106. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.9.
107. Justice Paul Brereton AM RFD, *Submission SC24*, 21; The Law Society of New South Wales, Young Lawyers, Civil Litigation Committee and Environmental Law Committee, *Submission SC12,* 20; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 13; M McHugh SC, *Submission SC6*, 1; Clayton Utz, *Submission SC18*, 6; C Needham SC, *Submission SC9*, 17.
108. Justice Paul Brereton AM RFD, *Submission SC24*, 21.
109. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 13; The Law Society of New South Wales, Young Lawyers, Civil Litigation Committee and Environmental Law Committee, *Submission SC12,* 20; M McHugh SC, *Submission SC6*, 1; Clayton Utz, *Submission SC18*, 6; C Needham SC, *Submission SC9*, 17.
110. The Law Society of New South Wales, Young Lawyers, Civil Litigation Committee and Environmental Law Committee, *Submission SC12,* 20.
111. National Pro Bono Resource Centre, *Submission SC14*, 14; Public Interest Law Clearing House (Victoria), *Submission SC15,* 9.

considered that confining the exemption in this way is necessary to monitor its operation and because the expression 'pro bono' is too imprecise a term.[112]

The Commission's conclusion

3.76 We agree with the preponderance of the submissions that s 99 of the *Civil Procedure Act 2005* (NSW) and s 348 of the *Legal Profession Act 2005* (NSW) should not be amended to provide exemptions for lawyers who are acting on a pro bono basis. These sections provide for basic standards of professional conduct. They are applied with great care by the courts. We find the arguments that these standards should be applied to all lawyers, including those acting on a pro bono basis, to be compelling.

Conditional costs agreements

3.77 In *Del Bosco v Outtrim*[113] the Supreme Court was considering the plaintiff's argument that a security order would stultify her ability to pursue the case and in that context took into account the fact that she had a contingent fee arrangement with her lawyer. Slater & Gordon expressed concern about this case, and 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. It 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 the court to regard this as a factor that speaks in favour of plaintiff paying for the defendant's legal costs up-front.[114]

3.78 We note that the Court in *Del Bosco* did not hold that a conditional costs agreement is a factor that favours the making of a security for costs order. On the contrary, courts recognise the utility and importance of conditional costs agreements and have not shown a predisposition to make an order for security on the basis of such agreements. For example, in *Shackes v Broken Hill*,[115] the Supreme Court of Victoria rejected the argument that because the lawyers were acting on a no win no fee basis, an order for security should be made. The Court said that:

> it is not correct to say that the solicitors are the persons for whose benefit the litigation has been brought. In any litigation the solicitors acting for a plaintiff stand to benefit from its prosecution. This is no less true in the case where the fee agreement is such that the solicitors are entitled to be paid only in the event of success. It cannot be suggested in the former case that the solicitors stand to benefit from the litigation in the sense that a shareholder in a corporate plaintiff does. Solicitors who undertake to act for an impecunious client at risk to themselves are in principle in no different position. Indeed, it has been said that

112. NSW Bar Association, *Submission SC 10*, 3.
113. *Del Bosco v Outtrim* [2008] NSWSC 105, [22]–[24].
114. Slater & Gordon, *Preliminary Submission PSC8*, 5.
115. [1996] 2 VR 427.

> by so acting they are performing a commendable public service, consistent with the best traditions of the legal profession.[116]

3.79 In a more recent New South Wales case, the Court of Appeal denied an application for security for costs: the court held that an appellant whose legal representatives are conducting the appeal on a no win no pay basis differs from an appellant (or plaintiff) supported by a litigation funder and 'the potential unfairness of the appellant/plaintiff's costs being secured by a third party, while the respondent/defendant's costs are not, is therefore absent'.[117]

3.80 In Consultation Paper 13, we asked whether courts, in determining applications for security for costs, should be able to take into account the fact that the plaintiff's lawyer is acting pursuant to a conditional costs agreement.**[118]**

3.81 With some variations of approach, the general tenor of submissions was that there is no problem with the present approach of the law. A conditional costs agreement may be relevant, for example to the stultification argument. However, the existence of a conditional costs agreement is not a factor in favour of security for costs.**[119]**

3.82 Accordingly we make no recommendations for change in relation to this matter.

Plaintiffs supported by legal aid

3.83 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.[120] 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.[121] 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.[122]

3.84 The Legal Aid Commission Act does not have provision regarding security for costs. However, it contains provisions regarding costs. Section 47 of the Legal Aid Commission Act provides that where a court or tribunal makes a costs order against

116. *Shackes v Broken Hill* [1996] 2 VR 427, 430.
117. *Zakka v George Elias t/as Cadmus Lawyers* [2012] NSWCA 277, [10] (Macfarlan JA). See also *Hughes v Janrule Pty Ltd* [2011] ACTCA, 177 ACTR 1, 30 [170] (Penfold J) ('an appeal being conducted on a no-win no-fee basis is not a basis for requiring security for costs').
118. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.5.
119. Justice Paul Brereton AM RFD, *Submission SC24,* 19; The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 3; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 12; Clayton Utz, *Submission SC 18*, 5; NSW Bar Association, *Submission SC10*, 5; IMF Australia Ltd, *Submission SC1,* 18; C Needham SC, *Submission SC9*, 14.
120. Legal Aid New South Wales, *About Us* <http://www.legalaid.nsw.gov.au>.
121. Legal Aid New South Wales, *Legal Aid NSW Policy*, [6.2].
122. *Legal Aid Commission Act 1979* (NSW) s 46; Legal Aid NSW, *Legal Aid NSW Policy*, [6.2.3]–[6.2.4].

a legally assisted person, Legal Aid NSW will pay those costs and the legally assisted person will not be liable for any amount, subject to certain exceptions. There is, however, a maximum amount that Legal Aid NSW will pay for costs, which is currently $15 000.[123]

3.85 In *Rajski v Computer Manufacturer & Design Pty Ltd*, it was argued that s 47 impliedly deprived the Supreme Court of jurisdiction to order security for costs against a legally aided plaintiff. The Court of Appeal rejected this argument and held that s 47 'cannot operate to destroy the jurisdiction or power to order security for costs'.[124] The Court of Appeal also reconciled the making of a security for costs order with the immunity from costs granted by s 47. It said the grant of legal aid at an early stage of the case is no guarantee that the person will continue to be immune from costs orders until the matter is finalised. This is because the legal aid granted could be withdrawn or one of the exemptions to the immunity could arise during the course of the matter. In those circumstances, a security for costs order will be applied to cover the costs ordered against the plaintiff.[125]

3.86 The fact that a person against whom an application for security is made is assisted by legal aid has been treated as a relevant factor, in addition to others, which courts consider when exercising their discretion. For example, in *O'Neill v De Leo*[126] the Supreme Court of Tasmania listed the following factors as relevant to the application for security: the plaintiffs were impecunious and would not be able to proceed with the case if they were ordered to give security; they were unlikely to be able to satisfy an adverse costs order; they were natural persons who resided within the court's jurisdiction; and the case was not vexatious or unmeritorious. The court said the fact that the plaintiffs were receiving legal aid was also a relevant factor. However, the court held that the addition of this factor to other factors was not sufficient to justify a security for costs order.[127]

3.87 In Consultation Paper 13, we sought submissions on whether the law and practice on security for costs apply satisfactorily in the case of plaintiffs who are supported by legal aid.[128] Legal Aid NSW submitted that 'the law and practice on security for costs apply satisfactorily in relation to legally assisted plaintiffs'.[129] No submission identified any significant problem with this area of the law. Accordingly we make no recommendations for change in this respect.

123. *Legal Aid Commission Act 1979 (NSW)* s 47(2); *Legal Aid Commission NSW Guidelines* [16.11.4].

124. *Rajski v Computer Manufacture & Design Pty Ltd* [1983] 2 NSWLR 122, 127 (Moffitt P). See also *Ciappina v Ciappina* [1983] FCA 95; (1983) 70 FLR 287 (the circumstance that the appellant is legally aided does not preclude the making of a security for costs order).

125. *Rajski v Computer Manufacture & Design Pty Ltd* [1983] 2 NSWLR 122, 126 (Moffitt P).

126. (1993) 2 Tas R 225.

127. *O'Neill v De Leo* (1993) 2 Tas R 225, 228. See also *Rajski v Computer Manufacture & Design Pty Ltd* [1983] 2 NSWLR 122; *Loizos v Carlton and United Breweries* [1993] NTSC 40.

128. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.7.

129. Legal Aid New South Wales, *Submission SC 20*, 4.

Representative proceedings

3.88 On 4 March 2011, new provisions on representative proceedings before the Supreme Court became effective. These provisions, in Part 10 to the *Civil Procedure Act 2005* (NSW), are modelled on provisions in Part IVA of the *Federal Court of Australia Act 1976 (Cth)* ('Federal Court Act').[130]

3.89 Under these provisions, representative proceedings may be commenced if:

- seven or more persons have claims against the same person,
- the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
- the claims of all those persons give rise to a substantial common question of law or fact.[131]

3.90 Section 181 of the *Civil Procedure Act 2005* (NSW) grants immunity from costs orders to the represented group members. Costs orders can be made against the representative party. The section states:

> Despite section 98, 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.

3.91 Sections 168 and 169 deal with situations where issues arise that are not common to the whole group. Under s 168 sub-groups with a representative party may be created. Section 168 gives the court the power to permit an individual group member to appear for the purposes of determining questions that relate only to that group member. In such cases the individual group member or the representative party of the sub group, is liable for costs associated with determining the questions relevant to the sub-group or party.

3.92 Security for costs in representative proceedings raises a number of legal policy issues. Security in these cases may be an issue of particular concern for defendants. The implications of losing a representative action may be significant and the costs of defending it substantial. Defendants may therefore be strongly motivated to seek some costs protection at an early stage of the litigation. However, the represented group members are immune from costs orders and it may be that the representative party is also impecunious. It is also not unknown for the representative party to be a 'person of straw' behind whom a plaintiff of means is sheltering.[132]

3.93 On the other hand, provisions relating to representative proceedings are generally intended to increase access to justice to those who may not have the means to institute individual claims in court. Some representative proceedings are funded, for

130. Victoria is the only other jurisdiction that has adopted provisions similar to those in Federal Court Act: see Part 4A of *the Supreme Court Act 1986* (Vic).

131. *Civil Procedure Act* (NSW) s 157(1).

132. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* Report 89 (2000) [7.110]–[7.112].

example, by law firms under various fee arrangements, to provide access to the courts for those who could not fund the litigation themselves. If orders for security for costs are made, and group members must be called upon to fund that security, then the immunity from costs for group members may be defeated and the access to justice created by the provisions relating to representative actions may be negated.[133] These tensions are apparent in the case law relating to the cognate federal legislation.

3.94 In *Woodhouse v McPhee* ('*Woodhouse'*), Justice Merkel denied an application for security for costs. Among the relevant factors was the representative nature of the proceedings.[134] The fact that a proceeding is brought for the benefit of others is a relevant consideration in security for costs applications. Justice Merkel stated that:

> 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. In my view, in order to deal with that incongruity and anomaly the fact that an impecunious applicant is bringing a Pt VA proceeding for the benefit of represented persons, while a relevant consideration in favour of granting security, ought not of itself be as significant a consideration as it might otherwise be in favour of the granting of security.[135]

3.95 Justice Merkel said there may be circumstances that warrant a different approach; for example, 'if the claim was spurious, oppressive or clearly disproportionate to the costs involved in pursuing it or if the proceedings were structured so as to immunise persons of substance from costs orders'.[136]

3.96 In *Ryan v Great Lakes* ('*Ryan*') Justice Wilcox at first instance and Justice Lindgren on appeal denied security for costs based on the approach taken in *Woodhouse.*[137] They said that s 43(1A) should, as general rule, be regarded as a substantial impediment to the 'financial pool' approach suggested by counsel for the defendants, under which group members might contribute to the security. Justice Lindgren concluded that 'it is contrary to the spirit of s 43(1A) that the individuals constituting the group members be compelled to contribute to a fund to enable their impecunious representative party to satisfy an award of costs against him'.[138]

3.97 However, in *Bray v F Hoffmann-La Roche Ltd* ('*Bray*')[139] the full Federal Court took a somewhat different approach. The Court reversed the order of Justice Merkel at first instance denying the security for costs application. In doing so, the Court said that, depending on the circumstances, an order for security would not necessarily

133. See the discussion in V Morabito, 'Class Actions in the Federal Court of Australia – The Story so Far' (2004) 10 *Canterbury Law Review* 229.
134. See the discussion in *Woodhouse v McPhee* (1997) 80 FCR 529, 532.
135. *Woodhouse v McPhee* (1997) FCR 529, 532.
136. *Woodhouse v McPhee* (1997) FCR 529, 532.
137. *Ryan v Great Lakes* (1998) 155 ALR 447.
138. *Ryan v Great Lakes* (1998) 155 ALR 447, 454.
139. *Bray v F Hoffmann-La Roche Ltd* (2003) [2003] FCA 1505, 155 ALR 454.

operate indirectly to remove the effect of the immunity provided by s 43(1A). Justice Carr reasoned that:

> It is one thing for a group member to be saddled with an order for what might be joint and several liability for a very substantial costs order at the end of the hearing of a representative proceeding, but it is another thing to have the choice of contributing what might be a modest amount to a pool by which the applicant might provide security for costs.[140]

3.98 Justice Finkelstein agreed with Justice Carr. He reasoned that the section in the Federal Court Act that gives the Court power to order security for costs in representative proceedings operates independently from s 43(1A). Consequently, an order for security would not be incongruous with s 43(1A).[141]

3.99 Both Justice Carr and Justice Finkelstein noted the need to balance a number of different factors in making such decisions. Justice Carr noted the need to balance the policy of facilitating access to justice lying behind the provision of representative actions with the risk of injustice to the respondent.[142] Justice Finkelstein noted the variable characteristics of representative actions that may be relevant to decisions about security for costs, including the characteristics of the plaintiff group, their funding arrangements, the merits of the case, and which party is responsible for expensive and extensive interlocutory actions.[143]

3.100 In Consultation Paper 13, we asked for submissions on the issue of security for costs in representative actions, and whether legislation is required on this matter, or whether it should be for case law to develop.[144]

Stakeholders' views

3.101 Many of the submissions on this issue recognised the significance of promoting access to justice that lies behind the costs provisions in representative actions and its relevance to decisions about security for costs. For example the Bar Association submitted that s 181 of the *Civil Procedure Act 2005* (NSW) should be amended to confirm the existence of the power to award security for costs. However, in exercising the power, courts should take into account the representative status as relevant to whether the order should be made.[145] Clayton Utz submitted that representative plaintiffs should not be exempted from security for costs orders, but that their status should be taken into consideration in the assessment of the application.[146]

3.102 Submissions also noted the relevance of other factors that may need to weighed in the balance in some cases. Maurice Blackburn submitted that representative proceedings should not be subject to applications for security for costs, unless the

140. *Bray v F Hoffmann-La Roche Ltd* [2003] FCA 1505, 155 ALR 454, [141] (Carr J).
141. *Bray v F Hoffmann-La Roche Ltd* [2003] FCA 1505 155 ALR 454, [250] (Finkelstein J).
142. *Bray v F Hoffmann-La Roche Ltd* [2003] FCA 1505, 155 ALR 454, [141] (Carr J).
143. *Bray v F Hoffmann-La Roche Ltd* [2003] FCA 1505, 155 ALR 454, [252] (Finkelstein J).
144. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 3.6.
145. NSW Bar Association, *SubmissionSC10,* 2.
146. Clayton Utz, *Submission SC 18*, 6.

claims are lacking in merit or funded by a third party litigation funder. It argued that representative proceedings should be treated differently to individual actions because they often involve a public interest element and facilitate access to justice.[147]

3.103 There was some support for legislative change to clarify the position in New South Wales. Professor Morabito submitted that the approach adopted by the Full Federal Court in Bray is inappropriate. To prevent judges in New South Wales from applying *Bray*, Professor Morabito recommended a legislative formulation of the factors that should be considered in security for costs applications against representative plaintiffs. These factors should 'seek to introduce for NSW class actions the scenario that existed with respect to Federal class actions in the pre-*Bray* era'.[148] One of those factors is the immunity from costs orders granted to the represented claimants.

3.104 Justice Brereton submitted that a power to order security against representative plaintiffs is not incongruous with the immunity of represented plaintiffs under s 181 of the *Civil Procedure Act 2005* (NSW). He submitted that the policy objectives secured by the immunity can be taken into account as a matter of discretion in determining whether or not an order should be made. He also submitted that this power should be expressed in legislation as doubt has arisen in the Federal Court.[149]

3.105 Justice Rein and Mr Michael McHugh SC also supported legislation giving courts a discretionary power to order security against representative plaintiffs.[150]

3.106 However, IMF Australia was of the view that this matter should be left to the common law to develop, except in proceedings funded by a litigation funder. In funded proceedings, legislation should provide that security should not be ordered where it is reasonable to believe that the litigation funder will be able to pay the costs of the defendant, and where the litigation funder is subject to capital regulations and has provided an undertaking to the defendant.[151]

3.107 In consultation meetings, there was general support for the adoption of legislation that would provide that the Supreme Court has power to make security for costs orders in representative proceedings and that, in exercising that power, the court should take into account the immunity from costs orders of the represented group members, and the function of representative actions in providing access to justice.[152] Some stakeholders also pointed out that courts should also be able to consider the other usual factors relevant to security for costs matters, such as

147. Maurice Blackburn Pty Ltd, *Submission SC 8*, 16.

148. Professor Vince Morabito, *Submission SC 3*, 2 citing V Morabito, 'Class Actions in the Federal Court of Australia – The Story so Far' (2004) 10 *Canterbury Law Review* 229, 252-253.

149. Justice Paul Brereton AM RFD, *Submission SC24*, 19-20.

150. Justice Nigel Rein, *Submission SC32,* 16; Michael McHugh SC, *Submission SC 6*, 1.

151. IMF (Australia) Ltd, *Submission SC 1*, 19.

152. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

whether an order for security would stifle the proceedings, and the means of those standing behind the representative claimants.[153]

The Commission's conclusion

3.108 As in many other areas of costs, the court is called upon to balance a number of relevant factors in considering security for costs in representative proceedings. The legal policy aim of facilitating access to justice is clearly a relevant factor to be weighed in the balance. We note that the Federal Court in *Bray* did find the immunity from costs conferred in representative actions to be a relevant factor. However, unlike earlier cases, the court treated it as a factor that should not predispose the court to refuse security applications, because it found no necessary inconsistency between the immunity and a security for costs order.

3.109 In common with previous cases, and in line with the weight of submissions to us, the court in *Bray* emphasised the variability of representative proceedings and the need to weigh in the balance a range of factors relevant to security for costs. The court needs to respond to a variety of different cases. For example, in some cases a security for costs order would stultify the proceedings and prevent access to justice by plaintiffs with no money but a strong case. In other representative proceedings, the plaintiff group may include a person with financial means but who is hiding behind a 'person of straw.'

3.110 On balance therefore we recommend that the *Civil Procedure Act 2005* (NSW) be amended to provide that, in any representative proceedings, the court may make an order for security for costs. In considering any application for security for costs, the court should take into account as a relevant factor the immunity from costs orders for group members provided in section 181 and the function of representative actions in providing access to justice, among other factors.

Recommendation 3.3

(1) The *Civil Procedure Act 2005* (NSW) should be amended to provide that, in any representative proceedings, the court may make an order for security for costs if the justice of the case requires it.

(2) In considering any application for security for costs, the court may take into account, among other factors, the immunity from costs orders for group members provided in s 181 of the Act, and the function of representative actions in providing access to justice.

153. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

4. Public interest and protective costs orders

Introduction

4.1 This chapter examines costs and security for costs in public interest proceedings.

4.2 When the Attorney General announced this reference to Parliament he referred to costs in public interest proceedings being a matter that requires consideration.[1] Hence our terms of our reference authorise us to examine public interest costs orders and protective costs orders.

4.3 Costs and security for costs are significant issues for litigants in public interest proceedings. The potential for adverse costs orders can deter public interest

1. New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 December 2009, 20524 (John Hatzistergos, Attorney General).

litigants from initiating and continuing with court proceedings.[2] While litigants who have a strong case in the public interest may be able to secure support from publicly funded agencies or pro bono schemes, they may not be able to secure protection against adverse costs orders. Since these may involve very significant sums, sufficient in some cases to bankrupt individuals and community groups, they may prevent access to justice on important public interest issues.[3]

4.4 For defendants, litigation by impecunious plaintiffs in public interest cases may leave them out-of-pocket for the costs of defending the case. Defendants may fear incurring costs that they will not recover in relation to litigation they believe to be ill-advised, or ideologically driven. In some cases defendants have argued that litigation to protect private interests may be presented as a public interest matter.

What are public interest proceedings?

4.5 There is currently no clear legal definition of 'public interest proceedings'. The term is generally used to refer to cases that raise issues affecting a significant sector of the community and/or that seek to secure the correct interpretation of a law which is of wide importance and which has not yet been resolved in previous cases. Two examples of cases held to be public interest cases are set out below.

4.6 *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]*[4] was considered a public interest proceeding because the subject matter affected a wide section of the community. In this case an association of residents in the suburb of Darlinghurst challenged the validity of a development consent given by the local council to a developer to build a residential tower. The Land and Environment Court dismissed the challenge. The association then submitted to the court that no costs order should be made against it because the case was brought in the public interest. The court agreed with the plaintiff and held that it was a public interest case because of the following factors:

- The proposed skyscraper, due to its visibility, was likely to have a significant impact not only on its immediate neighbours but also on a number of other neighbouring suburbs, the central business district of Sydney and Sydney harbour.
- The challenge by the association to the consent for the building represented 'far wider objections than the narrow private amenity of residents living in close proximity to the proposal'. The broad public interest in the proposal was demonstrated by the number of submissions received by the council. The

2. It has been argued that the threat of adverse costs orders is the most significant obstacle to public interest environmental litigation: C McGrath 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324, 348.
3. C McGrath 'Flying foxes, dams and whales: using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324; Justice Brian Preston 'The role of public interest environmental litigation' (2006) 23 *Environmental and Planning Law Journal 337.*
4. (1992) 75 LGRA 214.

objectors were numerous, including residents, a school, the National Trust, and professional bodies and individuals such as architects and planners.[5]

4.7 *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand*[6] was considered a public interest proceeding because it raised an unresolved and important issue of law that had an impact on a significant section of the community. The plaintiffs brought a case in the High Court challenging the validity of the cross-vested jurisdiction of the Federal Court in relation to matters arising under certain provisions of the *Corporations (New South Wales) Act 1990* (NSW), the *Corporations Act 1989* (Cth) and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). The defendant applied for security for costs. The High Court denied the application because it considered it important to resolve quickly the constitutional issue in the case. The Court said the resolution of that issue was important not just to the plaintiffs but also to the public. It considered it desirable to resolve the issue quickly 'so that the many proceedings under way in courts throughout this country are relieved of the uncertainty which has been produced by the present state of authority, or lack thereof.'[7]

4.8 However, the characterisation of a case as a public interest cases is not a simple matter. We consider the factors relevant to such a characterisation in our discussion of the case law, below.[8]

The current law and practice

Legislation on costs and security for costs

4.9 Public interest proceedings are subject to the same legislation on costs and security for costs that apply to other civil proceedings. These have been considered in Chapter 2, but in summary s 98 of the *Civil Procedure Act 2005* (NSW) gives courts wide discretion on costs. It provides that '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.'[9] Section 98 is subject to the rules of court. Relevant rules include r 42.1 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') which provides that costs follow the event; that is, the loser pays the reasonable costs incurred by the winner. The rule is expressed to be subject to the qualification 'unless it appears to the Court that some other order should be made'. The relevant case law, discussed below, provides that one circumstance where the usual costs order may be departed from is when the proceedings are brought in the public interest.[10] UCPR r 42.21 provides the grounds for ordering security for costs.[11] As discussed below, courts may consider the public interest nature of the proceedings when exercising their discretion on security for costs.

5. *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214, 216.
6. [1998] HCA 41, 193 CLR 502.
7. [1998] HCA 41, 193 CLR 502, [32].
8. At [4.18]–[4.21].
9. *Civil Procedure Act 2005* (NSW) s 98(1)(a)–(b).
10. *Oshlack v Richmond River Council* (1998) [1998] HCA 11, 193 CLR 72.
11. See Chapter 2 for a detailed discussion of UCPR r 42.21.

Legislation relating to costs in public interest cases

4.10 Particular provision is made for public interest cases in the Land and Environment Court. Rule 4.2 of the *Land and Environment Court Rules 2007* (NSW) provides:

> **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.[12]

4.11 Rule 4.2 applies only to proceedings in class 4 of the Land and Environment Court's jurisdiction, which relate to civil enforcement and judicial review of decisions under planning or environmental laws.[13] It does not, for example, apply to mining matters.[14]

4.12 In *Delta Electricity v Blue Mountains Conservation Society Inc*[15] Justice Basten identified three significant aspects of r 4.2 of the *Land and Environment Court Rules* (NSW):

(1) It removes any argument that bringing proceedings in the public interest might be an extraneous factor that could not influence an order on costs.

(2) The court's satisfaction that the proceedings have been brought in the public interest provides an affirmative reason for not making an order against an unsuccessful applicant, and thus qualifies the operation of UCPR r 42.1, which would otherwise be applicable.

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12. This rule prevails over the UCPR to the extent of any inconsistency between them: *Hastings Point Progress Association Inc v Tweed Shire Council* [2010] NSWCA 39, 172 LGERA 157, [11], [5] (Basten JA); *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164, [4] (Biscoe J); *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, 176 LGERA 424, [200] (Basten JA).
13. The Class 4 jurisdiction of the Land and Environment Court can be found in s 20 of the *Land and Environment Court Act 1979* (NSW).
14. UCPR 42.1 applies to matters that do not fall within the Land and Environment Court's class 4 jurisdiction: see, for example, *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280 which is discussed below.
15. [2010] NSWCA 263, 173 LGERA 280, [203] (Basten JA).

(3) It qualifies any expectation by the respondent that it may receive its costs if successful.

Legislation on cost capping

4.13 Also of importance in relation to costs in public interest cases are provisions on cost capping. Rule 42.4 of the UCPR 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'. Public interest proceedings have been identified as a category of cases in which UCPR r 42.4 may be useful. This rule and its application in public interest cases are discussed below.[16]

Case law

4.14 Apart from the statutory law on costs and security for costs discussed above, the case law has developed principles on costs and security for costs as they relate to public interest proceedings.

Costs

4.15 As noted, public interest proceedings are subject to the same general rule developed by the case law and restated in UCPR r 42.1 that costs follow the event. However, the public interest nature of the issues raised in a case, when considered with other factors, may convince a court to depart from the general rule on costs. *Oshlack v Richmond River Council*[17] is the leading case on this topic. The plaintiff brought a case before the Land and Environment Court to annul a development consent granted by a local council to a developer. The court dismissed the case. However, the court decided not to order the plaintiff to pay the costs of the defendants (the local council and developer) because there were factors, including the public interest nature of the issues raised, which justified a departure from the usual rule on costs. On appeal, the Court of Appeal ordered the plaintiff to pay the local council's costs both at first instance and on appeal. Subsequently, the High Court upheld the Land and Environment Court's original decision.

4.16 Justices Gaudron and Gummow, who wrote the leading judgement, noted the following factors that the Land and Environment Court considered in deciding not to order the plaintiff to pay the costs of the defendants:

- 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 around the site. 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 on the preservation of the endangered fauna around the proposed development site. In that sense, there was a public interest in the outcome of the litigation.

16. At [4.62]–[4.72].
17. (1998) 193 CLR 72.

- The case raised significant issues about the interpretation and future administration of the statutory provisions on the protection of endangered fauna, and to the ambit and future administration of the subject development consent. These issues had implications for the council, the developer and the public.[18]

4.17 Justices Gaudron and Gummow agreed that these factors were relevant to the court's exercise of its discretion on costs, including an order not to follow the general rule.

4.18 **A three-step process for departing from the general rule on cost.** In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd*[19] ('*Caroona No 3*') Chief Judge Preston of the Land and Environment Court developed a three-step process for deciding whether to depart in public interest cases from the general rule that the costs follow the event.[20] The first step involves the question of whether the litigation can be characterised as having been brought in the public interest, for which there are variety of considerations, including:

(a) the public interest served by the litigation;

(b) whether that interest is confined to a relatively small number of members from the group or association in the immediate vicinity of the development, concerned with their own private amenity; or whether the interest is wider, involving a significant number of members of the public and concern for a wider and significant geographic area;

(c) whether the applicant sought to enforce public law obligations;

(d) whether the prime motivation of the litigation is to uphold the public interest and the rule of law;

(e) whether the applicant has no pecuniary interest in the outcome of the proceedings.[21]

4.19 These considerations are not exclusive; courts may consider other factors. Further, they are relevant not only to the characterisation of litigation as having being brought in the public interest, but also to the second and third steps.[22]

4.20 The second step involves the question of whether there is something more than the mere characterisation of the litigation as having been brought in the public interest. The presence of one or more of the following circumstances may justify departure from the usual rule that costs follow the event:

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18. (1998) 193 CLR 72, 80 [20].
19. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC, 173 LGERA 280, 59.
20. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [13]. See also *Gray v Macquarie Generation (No 2)* [2010] NSWLEC 82, [12]; *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164, [5]; *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231, [171].
21. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59. 173 LGERA 280, [38].
22. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [41]–[42].

(a) the litigation raises one or more novel issues of general importance;

(b) the litigation contributes in a material way to the proper understanding, development or administration of the law;

(c) the litigation is brought to protect the environment or a component of it, is of significant value and importance;

(d) the litigation affects a significant section of the public;

(e) the plaintiff does not gain financially from the proceedings.[23]

4.21 The third step involves the question of whether there are any countervailing circumstances that speak against departure from the usual rule on costs. The following matters may constitute such countervailing circumstances:

(a) the plaintiff is seeking to vindicate rights of a commercial character and stands to benefit from the litigation;

(b) the plaintiff is an incorporated association and the litigation would legally or financially affect the private interests of members of the association;

(c) the plaintiff is supported financially by persons or bodies who would benefit from, or would have their legal or financial interests affected by, the outcome of the litigation;

(d) the question of the public interest raised is narrow, such as involving only a discrete point of interpretation without broad ramifications;

(e) the plaintiff unreasonably pursues issues without merit;

(f) the plaintiff has conducted the litigation with impropriety or unreasonableness.[24]

4.22 This three-step process may be applied in cases where either UCPR r 42.21 or r 4.2 of the *Land and Environment Court Rules 2007* (NSW) is used. For example, in *Caroona No 3*, UCPR r 42.21 was applied because it was a mining matter to which r 4.*2* of the *Land and Environment Court Rules 2007* (NSW) was not applicable. A group consisting of agricultural landowners challenged the validity of the renewal or transfer of a mining exploration licence issued by the Minister for Mineral Resources to a mining company. The Land and Environment Court said the case could be characterised as a public interest case because the plaintiff sought to uphold and enforce public law obligations under natural resources legislation – the *Mining Act 1992* (NSW). Those obligations form part of a regulatory scheme for ensuring the wise use of the mineral resources of the State. If the breaches had been established, the regulatory scheme would have been impaired to some degree.[25] However, the court found no additional factors required by the second step. The

23. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [60].
24. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [61].
25. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [81]–[82].

court said that the case did not raise any novel issues of general importance, and did not directly concern the environment or affect the general community.[26] Further, there were countervailing factors: the litigation was of considerable consequence on the private interests of the members of the applicant action group, whose agricultural properties were of high value, and who had the financial means to fund the litigation.[27]

4.23 There have been a number of cases where the Land and Environment Court, using its r 4.2 and the three-step process outlined above, has decided to depart from the general rule on costs.[28]

Security for costs

4.24 There have been cases where, applying common law principles, courts have decided not to make a security for costs order after considering the public interest nature of the issues raised and other factors such as the strength of the plaintiff's case, the timing of the application for security for costs, whether the security sought is proportional to the issues at stake, and whether an order for security would force the plaintiff to abandon the proceedings.[29]

4.25 It bears emphasis that courts do not deny applications for security for costs based on public interest considerations alone. Hence in *Sales-Cini v Wyong City Council,*[30] where the defendants applied for security for costs from Mr Sales-Cini, the court accepted that the plaintiff was raising matters involving the public interest, as the case was brought to protect Aboriginal property and heritage.[31] However, the court said that 'of itself, this is not enough' to displace a security for costs order.[32] 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.[33]

4.26 In relation to r 4.2(2) of the *Land and Environment Court Rules 2007* (NSW), which allows the Land and Environment Court to decide not to make a security for costs order if it is satisfied that the proceedings have been brought in the public interest, the court uses the three-step process outlined above in exercising its discretion.[34]

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26. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [84]–[88].
27. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280, [82]–[92].
28. See for example *Hill Top Residents Action Group Inc v Minister for Planning (No 3)* [2010] NSWLEC 155, 176 LGERA 20; *Oshlack v Rous Water (No 3)* [2012] NSWLEC 132 (the court found that the three-step process was satisfied in *Oshlack v Rous Water* but not in *Oshlack v Rous Water (No 2)*).
29. *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107; *Smail v Burton* [1975] VR 776.
30. [2009] NSWLEC 201.
31. *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [47], [60].
32. *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [60].
33. *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [61].
34. See for example *Friends of King Edward Park Inc v Newcastle City Council* [2012] NSWLEC 113 (no security for costs was ordered).

Negotiated agreements concerning costs

4.27 During consultations stakeholders informed us that government agencies that are successful in defending cases sometimes do not pursue costs from impecunious public interest litigants.[35] The NSW Government has a *Model Litigant Policy for Civil Litigation*, which obligates the State and its agencies to act fairly in handling claims and litigation. The obligation includes keeping the costs of the litigation to a minimum and 'not taking advantage of a claimant who lacks the resources to litigate a legitimate claim'.[36] While the *Model Litigant Policy for Civil Litigation* does not prevent the State and its agencies from acting firmly to protect its interests, enforcing costs orders and seeking security for costs,[37] it provides some basis for public interest litigants with limited resources to negotiate with defendant government agencies regarding litigation costs.

Policy issues and reforms in other jurisdictions

4.28 The Australian Law Reform Commission ('ALRC') has argued that public interest litigation presents a number of benefits including the following:

- development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to less disputes and less expenditure on litigation)
- economies of scale
- impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law)
- contribution to market regulation and public sector accountability by allowing greater scope for private enforcement reduction of other social costs by stopping or preventing costly market or government failures.[38]

4.29 It has been argued that the current law on costs and security for costs deters the realisation of these benefits.[39] There has been judicial recognition that public interest litigation is a category of litigation 'where the fear of an adverse costs order may impede access to justice'.[40] While there has been some judicial acceptance that the indemnity principle should be flexible in relation to public interest litigation, a question arises as to whether this should be followed through with legislation to

35. National Pro Bono Resource Centre, *Submission SC27,* 2.
36. NSW Department of Attorney General and Justice, *Model Litigant Policy for Civil Litigation* (2008) <http://www.lsc.lawlink.nsw.gov.au/lsc/legal_manage_govt_legalprac/legal_manage_model_litigant.html> [3.2(e) and (f)].
37. Department of Attorney General and Justice, *Model Litigant Policy for Civil Litigation* (2008) <http://www.lsc.lawlink.nsw.gov.au/lsc/legal_manage_govt_legalprac/legal_manage_model_litigant.html> [3.2(e) and (f)].
38. Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report 75 (1995) [13.6].
39. Public Interest Advocacy Centre Ltd, *Submission SC16,* 5.
40. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* [2009] NSWLEC 165, 170 LGERA 20, [18].

provide impetus for the development on the law on costs and security for costs in public interest proceedings.[41]

4.30 Some Australian jurisdictions have considered or adopted legislation giving courts power to make orders protecting public interest litigants from adverse costs orders. In its 1995 report titled *Costs Shifting – Who Pays for Litigation,* the ALRC recommended the adoption of legislation giving federal courts and tribunals the power to make public interest costs orders. Its recommendations on public interests costs orders have been endorsed by other law reform bodies,[42] but have not been implemented.

4.31 The Victorian Law Reform Commission ('VLRC') has also recommended that there should be express legislative provision empowering courts to make orders protecting public interest litigants from adverse costs in appropriate cases.[43] In reaching this conclusion, the VLRC considered the ALRC recommendations on public interest cost orders, as well as developments in other jurisdictions such as the United Kingdom and Canada.[44] This recommendation has also not yet been implemented.

4.32 In Queensland s 49 of the *Judicial Review Act 1991* (Qld) gives the court power to order that each party bear their own costs regardless of the outcome of the judicial review. In making such an order, the court is to have regard to the financial resources of the applicant and any person who has an interest in the outcome of the proceeding; whether the proceeding involves an issue that affects the public interest, in addition to any personal right or interest of the applicant; whether the proceeding discloses a reasonable basis for the review application; and whether the case in the review application can be supported on a reasonable basis.[45]

Should there be New South Wales legislation providing for public interest costs orders?

4.33 In Consultation Paper 13, we sought submissions on whether there is a need for new legislation to give courts the power to make public interest costs orders,[46] that is, orders that would give protection to public interest litigants such as an order that

41. As was argued by the Public Interest Advocacy Centre Ltd, *Submission SC16,* 5.
42. See Rt Hon Lord Gill, *Report of the Scottish Civil Courts Review* (2009), ch 12; Senate Legal and Constitutional References Committee, Parliament of Australia, *Access to Justice* (2009); Victorian Law Reform Commission, *Civil Justice Review*, Final Report (2008) 667–668.
43. Victorian Law Reform Commission, *Civil Justice Review*, Final Report (2008) 676.
44. Victorian Law Reform Commission, *Civil Justice Review*, Final Report (2008) 6.72–674.
45. *Judicial Review Act 1991* (Qld) s 49(2). For cases where the court used this provision to order that each party pay their own costs, see *Gilchrist v Queensland Parole Board* [2011] QSC 328; *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355; *Crew v Mitchell* [2004] QSC 307; *Save Bell Park Group v Kennedy* [2002] QSC 174; *Brogden v Commissioner of the Police Service* [2001] QSC 123. See also *Shanvale Pty Ltd v Council of the Shire of Livingstone* [1999] QCA 483 (respondent liable only for 50 per cent of the appellant's costs of the primary proceedings).
46. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 4.1.

a public interest litigant does not need to provide security for costs or pay the costs of the defendant.

Stakeholders' views

4.34 Most of the submissions that responded to this question supported legislation giving courts power to make public interest costs orders.[47] In particular, agencies engaged in public interest litigation supported legislation for the following reasons:

- to overcome the courts' reluctance to use their discretion on costs to make public interest costs orders because of concerns about judicial legislating;[48]
- to introduce coherent and distinct costs rules in public interest matters, which would remove some of the barriers to public interest litigation;[49]
- the current law on public interest costs orders 'does not go far enough in recognising that departure from the usual costs rule is the preferred course in public interest cases';[50] and
- to strengthen Australia's compliance with article 14(1) of the *International Covenant on Civil and Political Rights* (which Australia has ratified) and which states that everyone is entitled to a fair hearing.[51]

4.35 The submissions that supported legislative change provided a number of examples of cases illustrating the need for public interest costs orders. However, the examples initially given related to cases in the Land and Environment Court, which already has provision for public interest costs and security for costs orders, or in the federal jurisdiction.[52]

4.36 These examples probably came first to the minds of stakeholders because public interest cases commonly arise in environmental and human rights matters. Further, in New South Wales public interest issues are often raised in tribunals where costs and security for costs issues do usually not arise because the law requires the parties to bear their own costs as a general rule.[53] In the absence of evidence to support the arguments in favour of legislation on public interest costs orders, we requested stakeholders to furnish relevant examples, including cases where such orders may have prevented the litigation.

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47. M McHugh SC, *Submission SC6,*1; National Pro Bono Resource Centre, *Submission SC14*, 15; Public Interest Advocacy Centre Ltd, *Submission SC16,* 2; Environmental Defender's Office (NSW) Ltd, *Submission SC22,* 7; Pro Bono Animal Legal Service, Public Interest Law Clearing House NSW, *Submission SC19*; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 14.
48. Public Interest Law Clearing House (Victoria), *Submission SC15*, 11–12; Public Interest Law Clearing House (Victoria), *Submission SC30,* 6; Public Interest Advocacy Centre Ltd, *Submission SC16,* 2; Environmental Defender's Office (NSW) Ltd, *Submission SC22,*7.
49. Public Interest Advocacy Centre Ltd, *Submission SC16,* 2.
50. National Pro Bono Resource Centre, *Submission SC14*, 15.
51. Public Interest Law Clearing House (Victoria), *Submission SC15*, 11–12.
52. See for example Public Interest Advocacy Centre Ltd, *Submission SC16,* 2–3.
53. See for example *Administrative Decisions Tribunal Act 1997* (NSW) s 88.

4.37 A number of stakeholders provided examples of such cases including appeals to the Court of Appeal from Land and Environment Court decisions and those seeking judicial review of tribunal decisions, which involved public interest issues.[54]

4.38 The Public Interest Advocacy Centre ('PIAC'), for example, mentioned a client who was seeking to challenge the lawfulness of her detention under the *Mental Health Act 2007* (NSW) as an involuntary patient. PIAC obtained legal advice from senior counsel that the client had reasonable prospects of success in an action for unlawful imprisonment. The case would have tested the meaning of the term 'protection from serious harm' (which is part of the test for involuntary detention) and was likely to have an impact beyond the interests of the client. However, the client decided not to proceed with the case based solely on the risk of an adverse costs order.[55]

4.39 The Public Interest Law Clearing House Victoria ('PILCH Victoria') provided examples of public interest cases drawn from recent experiences of their colleagues at the Victorian Community Legal Centres.[56] These examples arise in the Victorian and High Court jurisdictions but are nevertheless relevant for present purposes. In one case the Flemington and Kensington Community Legal Centre ('FKCLC') applied to the Victorian Civil and Administrative Tribunal ('VCAT') pursuant to the *Freedom of Information Act 1982* (Vic) ('Victorian FOI Act') for the release of a report commissioned by Victoria Police, which examined the practices of a police station in response to alleged use of excessive force and racism. The FKCLC was unsuccessful at first instance. Although it obtained a positive advice from senior counsel on the merits of an appeal, it decided against making an appeal because of the risk of an adverse costs order, which it said could have closed the Centre and its work in the community. It was submitted that the potential for an adverse costs order deprived it and the community of the opportunity to test the scope of the provisions of the Victorian FOI Act relating to the power of the VCAT to grant access to documents that are exempt from release if the public interest requires that access to the document should be granted.[57]

4.40 However, some stakeholders were less supportive of, or were opposed to, legislative reform, for the following reasons:

- 'the existing case law largely provides sufficient discretion to mould appropriate costs and security orders in cases where there is a "public interest" element';[58]
- UCPR r 42.1, which gives courts discretion to depart from general rule that costs follow the event, may be used to provide protection to public interest litigants;[59]

54. National Pro Bono Resource Centre, *Submission SC28,* 1; Public Interest Advocacy Centre Ltd, *Submission SC3,* 2; Environmental Defender's Office (NSW) Ltd, *Submission SC29* 5–8.
55. Public Interest Advocacy Centre Ltd, S*ubmission SC30,* 3.
56. See Public Interest Law Clearing House (Victoria), *Submission SC31.*
57. Public Interest Law Clearing House (Victoria), *Submission SC31,* 5.
58. Justice Paul Brereton AM RFD, *Submission SC24*, 22. Justice Brereton, did not, however, oppose legislative reform. See also The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12,* 21 and Justice Nigel Rein, *Submission SC32*,16 in which it was argued that the current law is adequate.
59. District Court, *Consultation SC5*, Sydney NSW, 10 October 2012.

- public interest cases in the Supreme, District and Local Courts are rare,[60] and consequently legislation relating to public interest costs orders should continue to be confined to the Land and Environment Court, where public interest cases are more frequently encountered;[61] and
- there is a risk that parties may misuse legislation on public interest costs orders by arguing that a case is important for the proper interpretation of a legislative provision even though they are pursuing private interests.[62]

The Commission's conclusion

4.41 Public interest litigation plays an important role in contributing to the development of legal principles that affect a broad section of the community, in making government more accountable, and in providing civil society (including those who are disadvantaged or marginalised) with an avenue for effecting social change. Existing laws, including UCPR r 42.1 and r 42.4 (cost capping) and the relevant case law, give courts discretion to provide some protection to public interest litigants.

4.42 However, outside of the Land and Environment Court, cases where this discretion has been used are scarce. This may, in part, be due to reluctance to commence public interest cases out of fear of adverse security for costs and costs orders. We are persuaded on balance that it is desirable to legislate to make the power of New South Wales courts in this respect explicit.

4.43 Such legislation would provide an affirmative basis for applications for public interest costs orders and support access to justice in appropriate cases. We note concerns of some stakeholders that such provisions could encourage unmeritorious applications and the proliferation of satellite litigation which, paradoxically, could increase costs. Consequently we recommend that public interest costs provisions should be based on r 4.2 of the *Land and Environment Court Rules 2007* (NSW).

4.44 This rule has been in effect since 2007 and enables the Land and Environment court to balance the competing interests in providing access to the justice system and protecting defendants.[63] The case law that has been developed around the rule provides a strong framework for the exercise of discretion in relation to security and costs orders in public interest proceedings that can readily be adapted to other jurisdictions.

Recommendation 4.1

The *Uniform Civil Procedure Rules 2005* (NSW) should be amended to adopt a rule based on r 4.2 of the *Land and Environment Court Rules 2007* (NSW) that will provide courts in New South Wales with the power to make appropriate costs and security for costs orders in public interest proceedings.

60. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; District Court, *Consultation SC5*, Sydney NSW, 10 October 2012; Local Court, Consultation SC3, Sydney NSW, 20 September 2012.
61. NSW Bar Association, *Submission SC10*, 4.
62. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.
63. Land and Environment Court, *Consultation SC2*, Sydney NSW, 18 September 2012.

Should legislation define public interest proceedings?

4.45 In Consultation Paper 13, we sought submissions on whether the legislation on public interest costs orders, if recommended, should define the meaning of public interest proceedings.[64]

4.46 We raised the definition developed by the ALRC as a possible model. It provides courts with a number of criteria for making public interest costs orders:

> A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that
>
> - the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
> - the proceedings will affect the development of the law generally and may reduce the need for further litigation
> - the proceedings otherwise have the character of public interest or test case proceedings.
>
> A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.[65]

4.47 The ALRC developed these criteria to reflect the case law.[66] The first limb of the recommendation mirrors court decisions to the effect that a case that raises issues affecting a significant sector of the community, when considered with other factors, may be considered a public interest proceeding.[67] The second limb reflects cases that have been considered to be in the public interest because they sought to determine a point of law of significant interest or public importance that has not yet been resolved in previous cases.[68] The third limb appears to be a catch all provision, allowing the court to take into account other considerations. This reflects the case law principle that the relevant factors for determining whether a case has been brought in the public interest are not exclusive.[69] The final paragraph of the recommendation mirrors the case law principle that a plaintiff's financial stake or private interest in the litigation will not necessarily disqualify the case from being considered a public interest case.[70]

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64. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 4.2.
65. Australian Law Reform Commission*, Costs Shifting — Who Pays for Litigation*, Report 75 (1995) Recommendation 45.
66. Australian Law Reform Commission*, Costs Shifting — Who Pays for Litigation*, Report 75 (1995) [13.16].
67. See, for example, *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd* (1992) 75 LGRA 214.
68. See, for example, *Smail v Burton* [1975] VR 776*; Merribee Pastoral Industries Pty Ltd v Australia and New Zealand* [1998] HCA 41, 193 CLR 502.
69. See for example *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280.
70. See, for example, *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGRA 214, 216.

Stakeholders' views

4.48 Most of the submissions that commented on this topic supported the setting of legislative criteria for making public interest costs orders in order to clarify the law.[71] The main reasons given were to 'allow litigants (or potential litigants) to more easily determine whether their case would be considered to be in the public interest by the court, and to assist the development of jurisprudence regarding the meaning public interest litigation.[72] It was, however, submitted that the criteria should function as guides only instead of fixed categories.[73]

4.49 Those who advocated the setting of legislative criteria for public interest costs orders were in general supportive of the ALRC recommendation discussed above.[74]

4.50 One submission, from the Law Society of New South Wales, Young Lawyers ('Young Lawyers'), opposed a legislative definition of public interest proceedings, because it was concerned that a legislative definition would be too restrictive and become a barrier to public interest litigation.[75]

The Commission's conclusion

4.51 While we note the support from stakeholders for assistance in defining the scope of public interest costs orders, and the utility of the ALRC recommendations, we do not recommend that public interest costs proceedings be defined. Our recommendation above is for a public costs orders legislative provision modelled on r 4.2 of the *Land and Environment Court Rules 2007* (NSW). One of our aims in so recommending is to preserve the jurisprudence that has developed around that rule, and in particular the decision in *Caroona Coal No 3* detailed above.[76] That decision is more recent than the ALRC recommendations, and provides more detailed and explicit guidance, in addition to a comprehensive review of the relevant jurisprudence. It provides an excellent starting point for the development of law that responds to the contexts of other New South Wales jurisdictions.

Discretionary factors

4.52 The case law has developed a number of factors that a court may consider when exercising its discretion on costs in public interest proceedings. These include, apart from the public interest element of the case, the following:

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71. National Pro Bono Resource Centre, *Submission SC14*, 16; Public Interest Law Clearing House (Victoria), *Submission SC15,* 16*;* Public Interest Advocacy Centre Ltd, *Submission SC16,* 5; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 15; Environmental Defender's Office (NSW) Ltd, *Submission SC22,* 7; Environment Defenders Office (Victoria) Ltd, *Submission SC5,* 24; Justice Paul Brereton AM RFD, *Submission SC24*, 22; Justice Nigel Rein, *Submission SC32*, 16*.*
72. National Pro Bono Resource Centre, *Submission SC14,* 16.
73. Public Interest Law Clearing House (Victoria), *Submission SC15,* 12-13.
74. National Pro Bono Resource Centre, *Submission SC14*, 16; Environmental Defender's Office (NSW) Ltd, *Submission SC22,* 8; Public Interest Advocacy Centre Ltd, *Submission SC16,* 5–6; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 15; Justice Paul Brereton AM RFD, *Submission SC24,* 22.
75. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 22.
76. At [4.18]–[4.26].

- the parties' financial means;
- the merits of the proceeding;
- whether or not the proceeding is frivolous or vexatious;
- the undesirability of the proceedings being abandoned as a result of an order;
- the potential for inefficient litigation since an order that plaintiff will not pay costs or only limited costs will remove an incentive to run its case efficiently;
- any private interest of the plaintiff;
- the timing of the application for the costs order;
- the complexity of the factual or legal issues raised in the proceedings;
- the amount of damages the plaintiff seeks to recover and the extent of any other remedies sought; and
- whether the plaintiff's lawyers are acting pro bono.[77]

4.53 In Consultation Paper 13, we requested submissions on whether any legislation giving courts power to make public interest costs orders should contain a list of discretionary factors that courts may consider when exercising that discretion, and if so, what should be these factors.[78]

Stakeholders' views

4.54 Some submissions supported a legislative list of discretionary factors.[79] They argued that such a list will be helpful because any proposed definition of public interest is likely to be quite broad.[80]

4.55 Other submissions did not support a legislative list of factors. The Law Society did not agree with a legislative list of discretionary factors. It said that '[t]here is ample case law to provide guidance' on this topic.[81] The Environmental Defender's Office (NSW) opposed the use of discretionary factors altogether. It asserted that the discretionary factors formulated by the case law have added 'complexity and uncertainty' to the law. Instead of the current process of courts considering these factors, it suggested that that once a case satisfies the public interest test, the court should make a range of appropriate costs orders.[82]

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77. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, [53]–[62]. See also *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, 173 LGERA 280.
78. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 4.4.
79. National Pro Bono Resource Centre, *Submission SC14,* 17; Public Interest Advocacy Centre Ltd, *Submission SC16,* 7; Public Interest Law Clearing House (Victoria), *Submission SC15,* 14; Justice Paul Brereton AM RFD, *Submission SC24*, 23.
80. Public Interest Advocacy Centre Ltd, *Submission SC16,* 7.
81. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 15.
82. Justice Nigel Rein, *Submission SC32,* 16; Environmental Defender's Office (NSW) Ltd, *Submission SC22*, 9; Environmental Defender's Office (NSW) Ltd, *Submission SC22*, 9.

The Commission's conclusion

We acknowledge that in exercising its discretion to make or refuse a public interest costs order, the court will need to examine a range of factors. We agree with the Law Society that there is no demonstrated difficulty with the case law. We note our conclusions above concerning the likely development of jurisprudence on public interest costs orders. In the circumstances we do not think it is desirable to list these factors in legislation.

Types of orders

4.56 As mentioned above, s 98 of the *Civil Procedure Act 2005* (NSW) provides that, subject to rules of court, costs are in the discretion of the court, and that the court has full power to determine by whom, to whom and to what extent costs are to be paid. Construing this section and r 4.2 of the *Land and Environment Court Rules 2007* (NSW), the Land and Environment Court has been able to make an order that:

- each party pay their own costs;[83] or
- the losing public interest litigant pay a proportion of costs of the defendant.[84]

4.57 Further, under r 42.4 of the UCPR courts may put a cap on the costs that each party may recover from the other.[85] A maximum costs order under this rule may be unidirectional, bidirectional or multidirectional. A unidirectional order would be where only one party, for example the plaintiff, is protected by a maximum costs order. Hence, in such situation the defendant, if it wins the case, would only be able to recover costs from the plaintiff up to the maximum amount but if the plaintiff wins the case, it would be able recover costs from the other party or parties without the limitation imposed by the maximum costs order. The court may also make a maximum costs order that is bi-directional (where there are only two parties) or multidirectional (where there are more than two parties) so that the cap on costs operates on all parties.[86]

4.58 In Consultation Paper 13, we asked the following question: '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?'[87]

Stakeholders' views

4.59 Some submissions argued that the legislation on public interest costs orders should specify a variety of orders, for example that the party applying for the public interest

83. *Hill Top Residents Action Group Inc v Minister for Planning (No 3)* [2010] NSWLEC 155, 176 LGERA 20.
84. *Kennedy v NSW Minister for Planning* [2010] NSWLEC 164, [13]; *Oshlack v Rous Water (No 3)* [2012] NSWLEC 132.
85. *Blue Mountains Conservation Society v Delta Electricity (No 2)* [2009] NSWLEC 150, 170 LGERA 1, affirmed in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, 176 LGERA 424; *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137.
86. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* [2009] NSWLEC 165, 170 LGERA 20, [12]–[13].
87. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Questions 4.5.

costs order, regardless of the outcome of the proceedings, shall not be liable for the other party's costs, or that each party bear his or her own costs.[88]

4.60 In contrast to these submissions, the Law Society submitted that the types of orders that a court can make should be a matter for the court to decide. It said that courts already have broad power to make costs orders under s 98 of the *Civil Procedure Act 2005* (NSW), which is sufficient basis for making a variety of orders in public interest cases.[89]

The Commission's conclusion

4.61 We agree with the Law Society that it is unnecessary for legislation to specify the types of orders courts can make in public interest cases in view of the broad power of the courts under s 98 of the *Civil Procedure Act 2005* (NSW).

Protective costs orders – UCPR r 42.4

4.62 This section discusses r 42.4 of the UCPR, which provides for what has been called costs 'capping'. The rule states:

> (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.

88. Environmental Defender's Office (NSW) Ltd, *Submission SC22,* 10; Public Interest Advocacy Centre Ltd, *Submission SC16*, 8; Environment Defenders Office (Victoria) Ltd, *Submission SC5*, 25; Justice Paul Brereton AM RFD, *Submission SC24*, 23–24.

89. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 16.

> (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).[90]

4.63 An order made under this rule is referred to as a maximum costs order and also as protective costs order,[91] because it protects parties from the consequences of adverse costs orders.[92] However, its purpose is not restricted to giving protection to the parties. It extends to enabling the court to: implement the overriding purpose of the *Civil Procedure Act 2005* (NSW) to facilitate the just, quick and cheap resolution of the real issues in the proceedings; act in accordance with the dictates of justice; and ensure that the costs to the parties is proportionate to the importance and complexity of the subject matter in dispute.[93] A protective costs order has been described as a useful means of achieving proportionality between the amount of costs and the complexity of the proceedings, particularly where the amount involved is not high, for example in family provision proceedings.[94]

4.64 In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited*, Chief Judge Preston of the Land and Environment Court identified a further aim of protective costs orders – to facilitate access to justice.[95] He noted that there can be considerable disparity in the financial resources of a public interest plaintiff and the governmental or corporate defendants. He said that a protective costs order may enable the public interest litigant to continue with the proceedings.[96] However, he denied the application for a protective costs order in that case because the plaintiff had access to sufficient financial resources and would have continued with the litigation regardless of whether a protective costs order was made.

4.65 It is clear that the public interest nature of the proceedings is an important consideration in the exercise of the court's discretion under r 42.4, although it is not decisive and is only one of several factors which a court may consider. *Blue Mountains Conservation Society v Delta Electricity*[97] provides an example of a public interest case where an order under r 42.4 was made. The plaintiff in this case sought orders from the Land and Environment Court for the defendant (a power station operator) to stop polluting a river and repair any harm it had caused to that river. On application by the plaintiff, the court ordered that the maximum costs that could be recovered by the parties from each other was $20 000, even though the

90. Similarly, the Local Court has provisions in *Practice Note Civ 1 Case Management of Civil Proceedings in the Local Court* (2011) [18]–[20] giving it power to make maximum costs orders.
91. See, for example, *Blue Mountains Conservation Society Inc v Delta Electricity (No 2)* [2009] NSWLEC 150, [5] (Pain J).
92. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* [2009] NSWLEC 165, 170 LGERA 20, [10].
93. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* [2009] NSWLEC 165, 170 LGERA 20, [11].
94. See *Nudd v Mannix* [2009] NSWCA 327 for an example of a protective costs made in a family provision proceeding.
95. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* [2009] NSWLEC 165, 170 LGERA 20, [16].
96. *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited* [2009] NSWLEC 165, 170 LGERA 20, [25].
97. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, 170 LGERA 1.

defendant's costs had already reached $97 000 at that stage of the case.[98] The public interest nature of the proceeding, the broad standing provisions of the relevant legislation,[99] and the lack of action by government authorities to resolve the matter contributed to the court's decision to use its discretion under r 42.4.[100] The court also considered other factors: the timing of the application; whether the claim was arguable; any private interest of the plaintiff; the impact of not awarding a protective costs order; the parties' financial means; and whether a protective costs order would reward inefficient litigation, in the sense of removing the incentive provided by adverse costs orders to conduct the proceedings quickly and cheaply.[101]

4.66 The provisions of r 42.4 were first introduced in 2000 in the rules of court of the Supreme Court and extended to other courts with the adoption of the UCPR in 2005.[102] So far there have been very few protective costs orders that have been made in public interest proceedings,[103] and a few unsuccessful applications.[104]

Issues

4.67 In Consultation Paper 13, we sought submissions from stakeholders on:

- The appropriate purposes and scope of application of r 42.4.
- Whether r 42.4 should be used more frequently in public interest proceedings.
- Whether its provisions should be relocated to s 98 of the *Civil Procedure Act 2005* (NSW).[105]

Stakeholders' views

4.68 Some stakeholders submitted that the discretion under r 42.4 is to be exercised in the context of the overriding purposes of the *Civil Procedure Act 2005* (NSW) and

98. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, 170 LGERA 1; Affirmed by the Court of Appeal in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, 176 LGERA 424.
99. Section 252 of the *Protection of the Environment Operations Act 1997* (NSW) provides that any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act or the regulations made under the Act.
100. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, 170 LGERA 1, [59]–[62].
101. *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, 170 LGERA 1, [56]–[68].
102. *Supreme Court Rules 1970* (NSW) r 35A.
103. *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137; *Blue Mountains Conservation Society v Delta Electricity (No 2)* [2009] NSWLEC 150.
104. *John Williams Neighbourhood Group Inc v Minister for Planning & Mural Consulting Pty Ltd* [2011] NSWLEC 100, 183 LGERA 327; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165, 170 LGERA 20.
105. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Questions 4.7 and 4.8.

the UCPR to facilitate the just, quick and cheap resolution of court proceedings, and to ensure the proportionality of costs to the issues at stake.[106]

4.69 Other stakeholders submitted that the purpose of r 42.4 also includes facilitating access to justice.[107] The Young Lawyers suggested adding a provision in r 42.4 that access to justice is a mandatory consideration.[108]

4.70 Some stakeholders supported more frequent use of r 42.4 in public interest proceedings.[109] PIAC and the Environmental Defender's Office (NSW) suggested amending r 42.4 to make it explicit that protective costs orders are available in public interest proceedings[110] and that the intention behind the rule is to assist the initiation and conduct of litigation that affects a significant section of the community or that will develop the law.[111]

4.71 There was minimal support for relocating the provisions of r 42.4 into the *Civil Procedure Act 2005* (NSW).[112]

The Commission's conclusions

4.72 We consider it unnecessary to recommend any amendment to r 42.4. The case law already makes it clear that an important purpose of r 42.4 is to promote access to justice and that public interest proceedings are a category of cases where protective costs orders may be made.

Public interest litigation fund

4.73 Some preliminary submissions suggested that one possible method of addressing the impact of adverse costs on public interest proceedings would be to establish a public interest litigation fund.[113] Such a fund would provide money to persons and organisations that bring public interest proceeding, in appropriate cases and would cover costs and security for costs orders.

4.74 There are currently two Commonwealth funding schemes dedicated to providing funds for public interest proceedings. The Australian Taxation Office ('ATO') has a

106. Justice Paul Brereton AM RFD, *Submission SC24,* 24; National Pro Bono Resource Centre, *Submission SC14*, 18; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 14–15.
107. Environmental Defender's Office (NSW) Ltd, *Submission SC22*, 12; Public Interest Law Clearing House (Victoria), *Submission SC15*, 15; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12,* 23.
108. The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12,* 23.
109. Environmental Defender's Office (NSW) Ltd, *Submission SC22*, 12; Public Interest Law Clearing House (Victoria), *Submission SC15*, 16; Justice Paul Brereton AM RFD, *Submission SC24*, 24.
110. Environmental Defender's Office (NSW) Ltd, *Submission SC22*, 12.
111. Public Interest Advocacy Centre Ltd, *Submission SC16,* 3.
112. Public Interest Law Clearing House (Victoria), *Submission SC15*, 15; Environmental Defender's Office (NSW) Ltd, *Submission SC22*; Public Interest Advocacy Centre Ltd, *Submission SC16*, 3.
113. Public Interest Law Clearing House, *Preliminary Submission PSC14,* 10 [6.3], Public Interest Advocacy Centre Ltd, *Preliminary Submission PSC12,* 7–8.

test case litigation program, which may provide financial assistance to taxpayers whose litigation is 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.[114]

4.75 The other funding program is the Commonwealth Public Interest and Test Case Scheme. This is administered by the Commonwealth Attorney-General's Department. Under this scheme funding may be given in cases involving questions that arise under a law of the Commonwealth which, in the opinion of the Attorney General, are in the public interest or are in the nature of a test case. The Commonwealth Attorney-General's Department has set some eligibility criteria. However, any funding given under this scheme will not cover indemnity for adverse costs orders.[115]

4.76 At the state level, there are resources which may facilitate public interest proceedings including the following:

- Legal Aid NSW can fund public interest environment and human rights matters and test cases.[116]
- PIAC, which is an independent, non-profit law and policy organisation, conducts litigation on a broad range of public interest matters, particularly where the issues affect a significant number of individuals who are subject to some economic or other disadvantage. It has undertaken litigation on human rights, discrimination, consumer protection, administrative law and constitutional matters.[117]
- The Environmental Defender's Office (NSW) provides specialist advice on public interest environmental law matters and has some capacity to provide legal representation on such matters.[118]
- PILCH NSW is a community legal centre which refers individuals and non-for-profit organisations to its member barristers and law firms. It coordinates legal

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

115. 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.

116. Legal Aid Commission of NSW, *Guidelines,* [3.3], [3.4], [3.8].

117. Public Interest Advocacy Centre Ltd, (20 December 2011) *PIAC Strategies* <http://www.piac.asn.au/about/strategies>. PIAC receives funding primarily from the NSW Public Purpose Fund and the Commonwealth/State Community Legal Services Program. Some of its programs are funded by grants from private and government organisations: Public Interest Advocacy Centre Ltd, *Who Funds PIAC* <http://www.piac.asn.au/about-us/who-funds-piac/who-funds-piac>.

118. Environment Defender's Office NSW, *Advice and Representation* (20 June 2012) <http://www.edo.org.au/edonsw/site/casework.php>. The Environment Defender's Office NSW receives financial assistance from: the NSW Public Purpose Fund; Legal Aid NSW; the Commonwealth Attorney-General's Department; the Department of Agriculture, Fisheries and Forestry and the New South Wales Government through its Environmental Trust: Environment Defender's Office NSW, *Introduction* (20 June 2012). <http://www.edo.org.au/edonsw/site/background.php>

assistance free of charge provided the legal issues being considered meet its public interest criteria.[119]

4.77 These sources of assistance for public interest litigation do not cover money required for security for costs and adverse costs orders, except for Legal Aid NSW which can pay up to $15 000 of the costs which a legally-aided person is ordered to pay the other party.[120]

4.78 In Consultation Paper 13, we requested submissions on whether New South Wales should 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.[121]

Stakeholders' views

4.79 A number of submissions supported the establishment of a New South Wales public interest litigation fund.[122] They submitted that such a fund will:

- assist in alleviating the barriers faced by public interest litigants who usually have limited financial means;[123]
- supplement the current mechanisms that facilitate public interest litigation such as legal aid, the work of law firms that operate on a speculative basis and organisations such as the PIAC and other community legal centres that act for claimants who otherwise would not be able to fund meritorious cases which are in the public interest where legal aid is otherwise not available;[124] and
- reduce reliance on other law reforms, particularly public interest costs orders, which may not necessarily be fully satisfactory since the respondents may end up not recovering their costs.[125]

4.80 There were, however, some organisations that expressed concerns about the availability of resources for such a fund.[126] For example, the Bar Association submitted that 'unless an examination is undertaken of the resource implications of

119. Public Interest Law Clearing House NSW, *What we do* <http://www.pilchnsw.org.au/what-we-do>. PILCH NSW is primarily funded through the NSW Public Purpose Fund, annual membership fees, and the Legal Aid NSW Community Legal Centre Partnership Program: Public Interest Law Clearing House NSW, *Our Funding* <http://www.pilchnsw.org.au/our-funding>.

120. *Legal Aid Commission Act 1979* (NSW) s 46.

121. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) Question 4.9.

122. Justice Nigel Rein, *Submission SC32,* 16; Public Interest Advocacy Centre Ltd, *Submission SC16*, 9; Maurice Blackburn Pty Ltd, *Submission SC8*, 17; National Pro Bono Resource Centre, *Submission SC14*, 19.

123. Public Interest Advocacy Centre Ltd, *Submission SC16*, 9.

124. Maurice Blackburn Pty Ltd, *Submission SC8*, 17; National Pro Bono Resource Centre, *Submission SC14*, 19.

125. Public Interest Advocacy Centre Ltd, *Submission SC16*, 9.

126. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17*, 15; Environmental Defender's Office (NSW) Ltd, *Submission SC22*, 13; NSW Bar Association, *Submission SC10*, 5.

the proposal that a "public interest fund" be established, it would be best for the Commission to refrain from entertaining that proposal'.[127]

The Commission's conclusion

4.81 While we recognise the importance of public interest litigation, we do not support the establishment of a public interest litigation fund. In the present environment where funding for programs designed to provide better access to justice is already tight,[128] we consider the attendant set-up and maintenance costs for a public interest ligation fund to be a significant obstacle. We note that there are already several agencies funded to do public interest work, and the establishment of a further fund seems an inappropriate and costly response in this environment.

4.82 We acknowledge the concerns raised by stakeholders that the potential for adverse costs orders is a significant barrier to public interest ligation. If indemnity for adverse costs in public interest proceedings is to be provided, our preference is for such indemnity to be provided through the organisations that currently provide assistance to public interest litigants. For example, the indemnity for costs orders that Legal Aid NSW is allowed to provide could be increased in public interest matters. However, this would have resource implications and therefore requires further investigation and consultations.

127. NSW Bar Association, *Submission SC10*, 5.

128. See M Rix, 'Legal Aid, the Community Legal Sector and Access to Justice: What Has Been the Record of the Australian Government?' (Paper presented at the Proceedings of the International Symposium on Public Governance and Leadership: Managing Governance Changes Drivers for Re-constituting Leadership, University of Plymouth, United Kingdom, 24–25 May 2007); Law Council of Australia, *Legal Aid and Access to Justice Funding* (Submission to the Commonwealth 2009/10 Budget, 2009).

5. Procedures and appeals

Introduction

5.1 This chapter considers issues arising from procedures and appeals relating to security for costs applications. In Consultation Paper 13 many of the questions we asked on these topics were speculative. We asked stakeholders to identify any problems or issues that have arisen. We had identified very few issues of concern in scholarly commentary, policy documents, case law or preliminary submissions. Nevertheless, we sought to explore these issues and establish whether any difficulties arise with the operation of the law in practice.

5.2 However, the submissions provided very little evidence of any need for legal reform. In relation to a number of the questions we asked on this topic we received no or very few submissions, which did not identify any problems in practice. We have therefore not reported on these matters.[1]

1. The questions from Consultation Paper 13 that did not receive any or very few submissions are Questions 5.2 (form of security), 5.4 (dismissal of proceedings for non-compliance with a security for costs order), 5.5 (appeal against a security for costs order), 5.7 (finalising the security when the main proceedings are finalised), and 5.10 (security for costs for leave to appeal).

Determining the amount of security

Current principles and practice

5.3 The amount of security that a plaintiff will be ordered to provide is a matter for the court's discretion. Two basic principles are settled,[2] namely that the court should:

- order 'such sum as the court thinks just, having regard to all the circumstances of the case';[3] and
- fix an amount it considers will be adequate for the services to be rendered.[4]

5.4 Other factors held to be relevant to the quantum of security for costs include:

- The likely costs of the defendant.
- The possibility that the case will settle or collapse before trial.[5]
- The matters advanced in opposition to the application, such as the apparent prospects of success of the main proceeding or the absence thereof, and the fact that an order for security should not be a means of effectively denying the plaintiff the right to pursue the claim.[6]

5.5 Courts have stated that the quantum of security is not intended to be a precise assessment of the costs of the issues at stake[7] and that a security for costs order is not supposed to give a 'complete and certain indemnity' to the defendant.[8]

5.6 The applicant for security bears the onus of adducing evidence to enable the court to order an appropriate security amount.[9] The party against whom security sought usually adduces its own estimate. Most security for costs applications, therefore, involve competing estimates of the likely litigation costs. The Supreme Court has summarised the general approach to determining the appropriate amount of security:

> 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

2. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.32]–[28.33].
3. *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (No 19) (1995) 134 ALR 187, 197.
4. *Sunday Times Newspaper Company Ltd v McIntosh* (1933) 33 SR (NSW) 371, 373.
5. *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, 515 (French J); *Shannon v Australia and New Zealand Banking Group Ltd* (No 2) [1994] 2 Qd R 563, 569 (Williams J).
6. *National Bank of New Zealand Ltd v Donald Export Trading Ltd* [1980] 1 NZLR 97, 103 (Richmond P); *Sabaza Pty Ltd v AMP Society* (1981) 6 ACLR 194, 199; *Bruce Pie & Sons Pty Ltd v R H Mainwaring, English & Peldan* [1985] 1 Qd R 401, 404.
7. *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].
8. *Brundza v Robbie & Co [No 2]* (1952) 88 CLR 171, 175; *Bryan E Fencott and Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497; *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2012] NSWSC 1026, [113] (Ward J).
9. *MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd* [2002] FCA 821, [31]–[34]

> 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.[10]

5.7 Where there are difficulties in forming a reliable assessment of the likely costs, the court may fix the amount of security based on a general estimate,[11] or in rare instances refer the matter to a referee.[12]

5.8 Courts can order security in respect of costs that the applicant has already incurred,[13] or in tranches so that costs are estimated up to a certain stage of the proceedings. This mitigates the difficulties in predicting the future course of the case and the associated costs. The applicant is permitted to reapply for further security at a later stage.[14]

5.9 The case law provides principles and guidance on the evidence required for assessing the quantum of security. In *April Fine Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd*,[15] for example, the court provided guidance on the proper approach to assembling relevant documents and taking statements of evidence in commercial law matters to ensure the quantum of security sought is proportionate to the importance and complexity of the subject-matter in dispute.

Difficulties

5.10 Determining an appropriate amount of security presents challenges[16] because it involves considering the future course of the proceedings and many 'imponderable' factors,[17] such as:

- when the matter will proceed to trial;
- the length of the trial;
- the number of interlocutory applications that may be made;
- the volume of discovery that each party may be required to produce;
- how many subpoenas will be issued in the proceeding; and
- the prospects of settlement.[18]

5.11 There is also a tension between the need to apply promptly for security and the difficulty of predicting at an early stage what the litigation might involve. These

10. *Wollongong City Council v FPM Constructions Pty Ltd* [2004] NSWSC 523, [50].
11. *Allstate Life Insurance Co v ANZ Banking Group Ltd* (1995) 134 ALR 187.
12. See, for example, *Sharjade v Darwinia Estate Pty Ltd* [2006] NSWSC 708, [52]-[54].
13. *Paris King Investments Pty Ltd v Rayhill* [2006] NSWSC 578, [31].
14. See, for example, *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].
15. (2009) 75 NSWLR 619.
16. D Vine-Hall 'Present Difficulties with the Assessment System' (2004) *University of New South Wales Law Journal* 206.
17. *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 19)* (1995) 134 ALR 187, 197.
18. Maurice Blackburn Pty Ltd, *Submission SC8*, 19.

difficulties are compounded by the fact that evidence provided by the opposing parties will generally be at the far end of the spectrum of the possible costs; that is, the defendant's evidence will put the claim at its highest and the plaintiff's evidence will seek to show the claim at its lowest.[19]

5.12 Parties sometimes provide evidence from costs experts in addition to the evidence from their lawyers. However, this may be of limited value because ultimately, costs experts can only provide an opinion based on a prediction of the work that may be done, and the likely length, nature and complexity of the proceedings.[20]

5.13 It was submitted that these problems often result in security amounts that are substantially less than the defendant's costs, leaving the successful defendant out-of-pocket. While it is necessary to ensure that a security for costs order does not stifle the litigation, it is also important to make the award meaningful and not illusory.[21]

5.14 It was submitted that a further problem is a lack of clarity about the type of evidence required in security for costs applications. The evidence presented can be expensive to prepare, particularly where lawyers present detailed itemisations of the work to be done. This results in security for costs applications becoming an additional source of costs to the parties, which 'seems to fly in the face of the purpose of security, that is, to protect the defendant against incurring "unsecured" costs.'[22]

5.15 In contrast to these submissions, the judges we consulted said they generally do not have difficulties in assessing security amounts. The case law provides guidance for this purpose and judges are familiar with the work required for the types of cases they hear.[23] If necessary, they may take evidence from the lawyers, although this happens only occasionally.[24]

Suggested reforms for mitigating the difficulties

5.16 A number of reforms to assist in assessing the quantum of security for costs were suggested in Consultation Paper 13, submissions and consultations.

19. G Salier and D Vine-Hall, *Submission SC7,* 1; Maurice Blackburn Pty Ltd, *Submission SC8*, 18; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 17.
20. The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 3.
21. *Badger Chiyoda v CBI NZ Ltd* [1986] 2 NZLR 599, 607 citing *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516, 521; *Mokau Timber Co v Berry* (1908) 11 GLR 212; G Salier and D Vine-Hall, *Submission SC7,* 1; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 17.
22. G Salier and D Vine-Hall, *Submission SC7, 1.*
23. Land and Environment, *Consultation SC2*, Sydney NSW, 18 September 2012; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012; Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; District Court, *Consultation SC5*, Sydney NSW, 10 October 2012.
24. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012.

5.17 First, a costs assessor might be allowed to sit alongside the judge to assist in determining the quantum of security for costs.[25]

5.18 Second, an inquisitorial method might be adopted where a third party assessor determines the quantum of security.[26]

5.19 Third, a practice note might be adopted that would standardise the form in which the evidence should be presented and streamline the amount of material which the court may consider.[27]

5.20 Fourth, fee scales that provide objective guides for determining lawyers' fees might be adopted by courts purely for security for costs matters. New South Wales courts could, for example, publish fee scales similar to the 'National Guide to Counsel Fees' published by the Federal Court of Australia.[28]

Stakeholders' views

5.21 The idea of costs assessors sitting with judges was opposed by stakeholders who submitted that costs assessors are unlikely to be better equipped than judges, the parties' solicitors and cost consultants in predicting the future course and potential costs of the litigation. The addition of an assessor's view may simply add complication and costs to the process.[29]

5.22 The suggestions to adopt an inquisitorial approach to assessing security amounts, and to introduce a practice note streamlining the procedure and evidence required in security for costs applications were also not supported in submissions and consultation meetings. It was argued that there is already established practice with which lawyers are familiar and that the case law provides adequate guidance regarding the relevant procedures and evidence.[30]

5.23 Three submissions advocated the use of fee scales for security for costs purposes on the basis that this would provide an objective standard for assessing lawyers' fees, as well as greater certainty and consistency in outcomes.[31] Two other submissions, while opposing fee scales, suggested instead the use of a range of gross amounts (expressed as lump sums or a range of lump sums) for different

25. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) [5.25].
26. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
27. G Salier and D Vine-Hall, *Submission SC7*, 2.
28. New South Wales Bar Association, *Preliminary Submission PSC10*, 10 [22].
29. G Salier and D Vine-Hall, *Submission SC7,* 3; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 19; Maurice Blackburn Pty Ltd, *Submission SC8*, 19; Justice Paul Brereton AM, RFD, *Submission SC24,* 26.
30. Clayton Utz, *Submission SC18*, 7; Justice Paul Brereton AM, RFD, *Submission SC24,* 26; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012; Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012.
31. Justice Paul Brereton AM, RFD, *Submission SC 24*, 26; NSW Bar Association, *Preliminary Submission PSC10*, 8; Maurice Blackburn Pty Ltd, *Submission SC8,* 19.

types of cases, structured to take into account matters such as the nature of the case, the length of hearing, and the number of witnesses.[32]

5.24 However, the use of fee scales or a range of gross amounts was overwhelmingly opposed in submissions and consultations. At an expert roundtable, where most of the supporters of fee scales were present, there was strong agreement that fee scales and similar methods should not be adopted.[33] It was noted that New South Wales had abolished the fee scales system in favour of a costs assessment regime.[34] The abolition of fee scales and the requirement to disclose costs agreements were aimed at facilitating competition and addressing the disparity in information between legal services providers and consumers.[35] The opposition of stakeholders was based on the following:

- There is a danger that fee scales, initially confined to security applications, could have an influence on costs more generally.[36]
- Fee scales will not prevent arguments about security amounts because there will be applications for departures from the scale rates.[37]
- Fee scales may support a mechanical approach to assessing security amounts that does not sufficiently consider the particular circumstances of each case, including, for example, the number, nature and complexity of the questions of law or fact involved.[38]
- Developing fee scales and keeping them up-to-date would be expensive and time-consuming.[39]
- Judges are well-equipped to assess security amounts without the need for fee scales or similar means.[40]
- Topping up security for costs amounts that subsequently prove to be inadequate is a better way of managing the problem of inadequate awards.[41]

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32. G Salier and D Vine-Hall, *Submission SC7,* 2; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 18.
33. Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
34. New South Wales, *Parliamentary Debates*, Legislative Council, 16 September 1993, 3269, (John Hannaford); see also B Debus, 'Directions in Legal Fees and Costs' (2004) 27 *University of New South Wales Law Journal* 200.
35. New South Wales, *Parliamentary Debates*, Legislative Council, 16 September 1993, 3269–3275, (John Hannaford).
36. The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 18; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
37. G Salier and D Vine-Hall, *Submission SC7,* 3; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 18; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
38. G Salier and D Vine-Hall, *Submission SC7,* 3; The Office of the Legal Services Commissioner (NSW), *Submission SC4,* 3; Clayton Utz, *Submission SC18*, 7; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
39. Clayton Utz, *Submission SC18*, 7; The Law Society of New South Wales, Costs Committee and Legal Costs Unit, *Submission SC17,* 18; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.
40. Local Court, *Consultation SC3,* Sydney NSW, 20 September 2012.
41. Supreme Court, *Consultation SC4*, Sydney NSW, 26 September 2012; Roundtable Meeting, *Consultation SC1,* Sydney NSW, 11 September 2012.

The Commission's conclusion

5.25 Despite exploring a number of options to assist in determining the amount of security, no option had the support of stakeholders or demonstrated overwhelming advantages in its favour. Although the assessment of security amounts presents some challenges, the present system is meeting them as well as can be reasonably expected. The use of fee scales may resolve some of the difficulties, but it also has disadvantages. In the absence of a more general change in New South Wales in favour of fee scales, we do not think it advisable to recommend their introduction in security for costs cases. Such a recommendation would carry the risk of re-introducing scales 'by the back door', which is not desirable. If fee scales are to be re-introduced, this should be done openly and after full and proper consultation.

Stay of proceedings until security is given

5.26 The *Civil Procedure Act 2005* (NSW) gives the court a general power to stay proceedings subject to court rules.[42] Rule 42.21(1) of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') provides that, along with an order for security, the court may order 'that the proceedings be stayed until the security is given'.

5.27 Fairfax Media Publications Pty Ltd ('Fairfax Media') suggested in a preliminary submission that there should instead be an automatic stay of proceedings because the requirement to apply for a stay potentially increases the length and expense of litigation.[43]

5.28 Victoria,[44] South Australia,[45] and Tasmania[46] mirror New South Wales law in granting courts discretion to stay proceedings. Queensland and the Australian Capital Territory provide for an automatic stay if the plaintiff does not provide security.[47] For example, r 674 of the *Uniform Civil Procedure Rules 1999* (Qld) 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'.[48]

5.29 In Consultation Paper 13, we asked whether the UCPR should 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.[49]

Stakeholders' views

5.30 Few submissions responded to this question.

42. *Civil Procedure Act 2005* (NSW) s 67.
43. Fairfax Media Publications Pty Ltd, *Preliminary Submission PSC13*, 9 [7.3].
44. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.02(1).
45. *Supreme Court Civil Rules 2006* (SA) r 194(3).
46. *Supreme Court Rules 2000* (Tas) r 828.
47. *Court Procedures Rules 2006* (ACT) r 1904; *Uniform Civil Procedure Rules 1999* (Qld) r 674.
48. *Uniform Civil Procedure Rules 1999* (Qld) r 674(b).
49. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) [5.37].

5.31 Clayton Utz supported an automatic stay, arguing that

> there is no point to the award if there is not a stay in place while the security is provided. Without the stay, the costs of the proceedings would continue to be incurred and there would be little incentive for the plaintiff to provide the security.[50]

5.32 Justice Brereton, Justice Rein and the Office of the Legal Services Commissioner submitted that, while it will be important and usual to order a stay, the retention of discretion is important.[51] There may be cases where the particular facts indicate that a stay is not appropriate, for example, where security is to be paid in stages or deferred. In such cases there may be no reason to doubt that payments will be met and preparation (including attempts to settle) can continue.

The Commission's conclusion

5.33 While in most cases proceedings will no doubt be stayed until security is provided, there may be some cases where this is not appropriate. Further, there was little evidence from stakeholders that any major difficulties arose under the present provisions. In the circumstances we do not make any recommendation for change. However, should difficulties arise in this respect, the Uniform Rules Committee could consider amending the UCPR to provide for automatic stay of the proceedings provided that the party who is the subject of the order is able to apply for leave to have the stay lifted.

Varying or setting aside the order

5.34 The Supreme Court's inherent jurisdiction includes the power to vary or set aside a previous interlocutory order made, such as a security for costs order.[52] However, since a variation in the amount of security could lead to injustice and a waste of time and resources, courts have established a practice that limits the 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.[53]

5.35 In *Capital Webworks Pty Ltd v Adultshop.com.Limited* it was decided that, when determining whether there has been a 'material change of circumstances', the court will take into account the following:

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50. Clayton Utz, *Submission SC18,* 7.
51. Justice Paul Brereton AM, RFD, *Submission SC 24,* 27; Office of the Legal Services Commissioner, *Submission SC4,* 4; Justice Nigel Rein, *Submission SC32,* 17.
52. *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].
53. *Truth About Motorways Pty Ltd v Infrastructure Investment Management Ltd* [2001] FCA 1603, [11] (emphasis added); *Darling Harbourside (Sydney) Pty Ltd v Sanirise Pty Ltd* [1996] FCA 1480; *Lawrance v Commonwealth (No 2)* [2008] FCA 1060, [10].

- 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.[54]

5.36 The UCPR does not currently contain a provision explicitly allowing courts to set aside or vary security for costs orders. However, there is a power to set aside or vary interlocutory orders generally in UCPR r 36.16.

5.37 Some Australian jurisdictions provide for varying and setting aside a security for costs order in the rules of court.[55] The rules of court in the Australian Capital Territory and Queensland state that the court may only vary or set aside such an order in 'special circumstances'.[56] The rules do not define 'special circumstances', but it is likely that this phrase reflects the 'material change of circumstances' principle developed by the case law.[57]

5.38 In Consultation Paper 13 we asked whether the UCPR should contain a specific provision relating to varying or setting aside orders for security for costs.[58]

Stakeholders' views

5.39 There was some limited support (from two submissions) for such a change on the basis of promoting clarity.[59] However, three submissions argued that change is unnecessary.[60] Justice Brereton submitted that the power to vary or set aside orders already exists under UCPR r 36.16, and that it is undesirable to make special provision in relation to applications for security for costs that do not apply to other interlocutory orders.[61]

The Commission's conclusions

5.40 In the absence of evidence of any practical problems, and in view of the argument that the powers of the courts under the UCPR are already sufficient in this respect, we make no recommendation for change in relation to the powers of the courts to vary or set aside orders for security for costs.

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54. *Capital Webworks Pty Ltd v Adultshop.com.Limited* [2008] FCA 40.
55. *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.
56. *Uniform Civil Procedure Rules 1999* (Qld) r 675; *Court Procedures Rules 2006* (ACT) r 1905.
57. See G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 2nd ed, 2009) [28.63].
58. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) [5.52].
59. The Office of the Legal Services Commissioner (NSW), *Submission SC4,* 4; The Law Society of New South Wales, Young Lawyers, Civil Litigation and Environmental Law Committee, *Submission SC12*, 26.
60. Justice Paul Brereton AM, RFD, *Submission SC* 24, 29; Maurice Blackburn Pty Ltd, *Submission SC8*, 20; Clayton Utz, *Submission SC 18*, 8.
61. Justice Paul Brereton AM RFD, *Submission SC24,* 29.

Security for costs in appeal proceedings

Special circumstances requirement

5.41 In relation to appeals before New South Wales courts, r 50.8(1) of the UCPR provides:

> 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.

5.42 UCPR r 51.50(1) contains an identical provision in relation to appeals to the Court of Appeal.

5.43 Other jurisdictions, such as South Australia and Victoria, also make 'special circumstances' a prerequisite for the ordering of security for costs of an appeal.[62]

5.44 In contrast, a number of jurisdictions have rules of court that provide an unfettered discretion to order security for costs in appeals. In Queensland, r 772(1) of the *Uniform Civil Procedure Rules 1999* (Qld) 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.

5.45 The relevant law on security for costs in appeals before the High Court, Family Court and Western Australian Court of Appeal are also worded in broad terms without a 'special circumstances' requirement.[63]

5.46 In the context of an appeal, courts are generally more willing to order security against impecunious appellants provided there are other factors justifying such an order. This is because there is an existing decision adverse to the appellant that is presumed correct until displaced. If courts were reluctant to order security in appeals, 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'.[64]

5.47 It may, therefore, be argued that the 'special circumstances' requirement in the relevant provisions of the UCPR is inconsistent with the tenor of the case law. In so far as the requirement seems to raise the bar for 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.

5.48 At best the 'special circumstances' requirement is superfluous because the factors that are regarded as relevant to determining whether 'special circumstances' exist

62. *Supreme Court Rules 1987* (SA) r 290(1)(g); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 64.24(2).
63. *High Court Rules 2004* (Cth) r 59.01; *Family Law Act 1975* (Cth) s 117(2); *Supreme Court (Court of Appeal) Rules 2005* (WA) r 44(1) (interim orders which would include security for costs orders).
64. *Tait v Bindal People* [2002] FCA 322, [4].

are the same factors courts take into account when exercising their broad discretion on security for costs in non-appeal proceedings.[65]

5.49 In Consultation Paper 13 we asked whether the special circumstances requirement in appeals should be removed.[66]

Stakeholders' views

5.50 Justice Rein and the Office of the Legal Services Commissioner submitted that the 'special circumstances' requirement in UCPR r 50.8(1) and r 51.50(1) should be removed.[67] The Office of the Legal Services Commissioner argued that its removal would reflect the case law.

5.51 In contrast, Justice Brereton argued that the 'special circumstances' should be retained because a security for costs order is not a matter of course in appeals, and its removal would risk making a security order 'practically one of course in appellate proceedings'.[68]

5.52 We sought comments on this issue from the Chief Justice of New South Wales and the President of the Court of Appeal both of whom gave the view that the 'special circumstances' requirement in the relevant provisions of the UCPR should be removed

> not because of any particular difficulty experienced by the Court in these applications but to permit the most flexible administration of the provisions. The factors which constitute "special circumstances" are generally the same as those relevant to an unconstrained exercise of discretion.

5.53 Their Honours observed that s 1335(1) of the *Corporations Act 2001* (Cth) (which applies to corporate appellants) and the court's inherent jurisdiction are not constrained by a 'special circumstances' requirement. They concluded that, in order to effect a harmonious administration of the various sources of jurisdiction on security for costs, it would be best to remove the 'special circumstances' requirement in the UCPR r 50.8(1) and r 51.50(1).

Commission conclusion

5.54 There appears to be an inconsistency, or at least a tension, between the common law approach and the statutory requirement of 'special circumstances.' We are persuaded by the arguments presented above that it is appropriate that New South Wales courts have a discretion, unfettered by a requirement of special circumstances, to make orders for security for costs in appeal cases. We are particularly persuaded by the arguments of the Chief Justice and the President of the Court of Appeal that the removal of the 'special circumstances' requirement in

65. See NSW Law Reform Commission, *Security for costs and associated orders*, Consultation Paper 13 (2011) [5.69]–[5.75]
66. NSW Law Reform Commission, *Security for costs and associated orders*, Consultation Paper 13 (2011) Question 5.8.
67. Justice Nigel Rein, *Submission SC32,* 17; The Office of the Legal Services Commissioner (NSW), *Submission SC4,* 4.
68. Justice Paul Brereton AM RFD, *Submission SC24,* 30.

UCPR r 50.8(1) and r 51.50(1) is desirable. It is possible that this proposed amendment may cause litigants to test its implications. This is unavoidable. However, our recommendation is not for a change of the law in this regard. The current law in relation to security for costs for appeals – that courts have broad discretion and defendants are not entitled to a security for cost as a matter of right – appears to us to be the appropriate approach.

Recommendation 5.1

Rules 50.8(1) and 51.50(1) of the *Uniform Civil Procedure Rules 2005* (NSW) should be amended by removing the 'special circumstances' requirement.

Power to dismiss an appeal for failure to provide security

5.55 In New South Wales there is no legislative provision that gives courts the 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 applies to security for costs orders made at first instance pursuant to UCPR r 42.21.[69] It does not apply to security orders in appeal cases, which are governed by UCPR r 50.8 (appeals generally) and r 51.50 (appeals to the Court of Appeal).[70]

5.56 The law in New South Wales is currently analogous to the law in Victoria, where the rules of court also require 'special circumstances' before security can be ordered in appeals. The Victorian rules empower the court to dismiss a claim at first instance if security is not provided.[71] The Victorian Court of Appeal has held that, while the rules of court 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.[72] 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.

5.57 Although the court has the power to dismiss an appeal for failure to provide security under its inherent jurisdiction, it may nevertheless be desirable to amend the UCPR to include an express power to do so. This would provide clarity and certainty in the law, and may be of particular importance for courts that do not have inherent jurisdiction.

5.58 The Queensland court rules explicitly cover the situation where there is a failure to provide security for an appeal. Rule 774 states:

69. *Porter v Gordian Runoff Ltd* (No 3) [2005] NSWCA 377, [36].
70. 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'.
71. 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].
72. *Farnell v Penhalluriack* [2010] VSCA 305, [17]–[18].

> 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
>
> (b) the Court of Appeal may, on the respondent's application, dismiss the appeal.[73]

Stakeholders' views

5.59 In Consultation Paper 13 we asked whether courts should have express legislative power to dismiss an appeal for failure to provide security for costs.[74]

5.60 Four submissions supported an express statutory power.[75] The reasons for supporting this change were to:

- promote consistency;[76]
- promote clarity;[77]
- prevent the generation of unnecessary costs;[78]
- facilitate the just, quick and cheap resolution of disputes;[79] and
- recognise the nature and value of claims now being dealt with by the District Court.[80]

The Commission's conclusions

5.61 While we received a limited number of submissions on this issue, they nevertheless provide sound arguments in favour of an express legislative power to dismiss an appeal where security for costs has been ordered but not provided. We recommend therefore that UCPR r 50.8 and 51.50 be amended to include a power to dismiss an appeal for failure to provide security for costs.

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73. *Uniform Civil Procedure Rules 1999* (Qld) r 774.
74. NSW Law Reform Commission, *Security for costs and associated costs orders*, Consultation Paper 13 (2011) [5.90].
75. Justice Paul Brereton AM, RFD, *Submission SC* 24, 30-31; Maurice Blackburn Pty Ltd, *Submission SC8*, 21; The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 4; Justice Nigel Rein, *Submission SC32,* 17.
76. Maurice Blackburn Pty Ltd, *Submission SC8*, 21. The Office of the Legal Services Commissioner (NSW) submitted that 'it would seem desirable for all courts to be on the same footing as regards the power to order security for costs in applications for leave to appeal, and the power to dismiss an appeal for failure to provide security': The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 4.
77. Maurice Blackburn Pty Ltd, *Submission SC8*, 21. 'While the Supreme Court has the inherent jurisdiction to dismiss an appeal for failure to pay security of costs, it is better to state this power in statute to avoid any doubt about its existence.'
78. Maurice Blackburn Pty Ltd, *Submission SC8*, 21.
79. Maurice Blackburn Pty Ltd, *Submission SC8*, 21.
80. The Office of the Legal Services Commissioner (NSW), *Submission SC4*, 4.

Recommendation 5.2

Rules 50.8 and 51.50 of the *Uniform Civil Procedure Rules 2005* (NSW) should be amended to include a power to dismiss an appeal for failure to provide security for costs.

Appendix A: Submissions

Preliminary submissions

PSC1	Y Elliot
PSC2	Insolvency Practitioners Association
PSC3	S Epstein SC
PSC4	LawCover Insurance Pty Ltd
PSC 5	Maurice Blackburn Pty Ltd
PSC6	National Pro Bono Resource Centre
PSC7	Law Institute of Victoria
PSC 8	Slater & Gordon Lawyers
PSC9	Environmental Defender's Office NSW
PSC10	NSW Bar Association
PSC11	Law Society of NSW, Young Lawyers, Environmental Law Committee
PSC12	Public Interest Advocacy Centre Ltd
PSC13	Fairfax Media Publications Pty Ltd
PSC14	Public Interest Law Clearing House
PSC15	Law Society of NSW, Young Lawyers, Civil Litigation Committee
PSC16	NSW Land & Environment Court
PSC17	M Arthur
CPSC18	Confidential Preliminary Submission
CPSC19	Confidential Preliminary Submission

Submissions

SC1	IMF Australia Ltd
SC2	NSW Local Court
SC3	Professor V Morabito
SC4	Office of the Legal Services Commissioner
SC5	Environment Defenders Office (Victoria) Ltd
SC6	M McHugh SC
SC7	G Salier and D Vine-Hall
SC8	Maurice Blackburn Pty Ltd
SC9	C Needham SC
SC10	NSW Bar Association
SC11	CGU Insurance
SC12	Law Society of NSW, Young Lawyers, Civil Litigation and Environmental Law Committee
SC13	LawCover Pty Ltd
SC14	National Pro Bono Resource Centre
SC15	Public Interest Law Clearing House (Victoria)
SC16	Public Interest Advocacy Centre Ltd

SC17	Law Society of New South Wales, Costs Committee and Legal Costs Unit
SC18	Clayton Utz
SC19	Pro Bono Animal Legal Service, Public Interest Law Clearing House NSW
SC20	Legal Aid Commission of New South Wales
SC21	Public Interest Law Clearing House NSW
SC22	Environmental Defender's Office (NSW) Ltd
SC23	Baker & McKenzie
SC24	Justice Paul Brereton AM RFD
SC25	C Freeman
CSC26	Confidential Submission
SC27	NSW Bar Association
SC28	National Pro Bono Resource Centre
SC29	Environmental Defender's Office (NSW) Ltd
SC30	Public Interest Advocacy Centre
SC31	Public Interest Law Clearing House (Victoria)
SC32	Justice Nigel Rein

Appendix B: Consultations

Roundtable meeting — SC 1

11 September 2012

Alastair McConnahie, Deputy Executive Director, NSW Bar Association
Caroline Needham SC
Michael McHugh SC
Dr John Tarrant, Barrister
Ann-Marie Foord, Manager, Professional Standard Department, NSW Law Society
Marina Wilson, Solicitor, Professional Standards Department, NSW Law Society
Peter Leggo, Solicitor, Practice Department, NSW Law Society
Greg Johnson, Vice-President, NSW Young Lawyers
Ben Slade, Principal, Maurice Blackburn
Deborah Vine-Hall, Principal, DSA Legal Cost Consultants
Gail Hambly, Legal Counsel, Fairfax Media Publications Pty Ltd
Samantha Gulliver, Senior Legal and Policy Officer, Office of the Legal Services Commissioner
John Walker, Executive Director, IMF Australia Ltd

NSW Land and Environment Court — SC 2

18 September 2012

The Honourable Justice Brian Preston, Chief Judge

NSW Local Court — SC 3

20 September 2012

His Honour Judge Graeme L Henson, Chief Magistrate
Alison Passe de Silva, Policy Officer

NSW Supreme Court — SC 4

26 September 2012

The Honourable Justice Robert McDougall – Commercial, and Technology and Construction Lists Judge
The Honourable Justice Paul Brereton, AM RFD – Corporations List Judge

NSW District Court — SC 5

9 October 2012

Her Honour Judge Dianne Truss – Civil List Judge

Appendix C:
Cases on inherent jurisdiction: January 2000 – October 2012

In *Green v CGU Insurance Lt* [2008] NSWCA 148, [45] the Court of Appeal identified situations where security for costs may be ordered beyond those listed in UCPR r 42.21:

> where (in addition to proof that there is reason to believe the plaintiff will be unable to pay the defendant's costs) the plaintiff has dissipated assets and/or has not paid previous costs orders (especially if those costs orders were in favour of the defendant) and/or brings a weak case to harass the defendant and/or brings a case for the benefit of others.

We surveyed cases from 2000 until October 2012 and found 15 cases where the Supreme Court used solely its inherent jurisdiction to deal with security for costs applications involving at least one plaintiff who is a natural person. Of the 15 cases, 11 may be classified under the 4 situations identified in *Green v CGU.* It should be emphasised that, when the court uses its inherent jurisdiction in relation to security for costs, it will usually take into account a number of different factors in exercising its discretion. However, in the 11 cases in the table below, divestment of assets, unpaid costs orders, that the proceedings were vexatious or brought to harass, or that the plaintiff brought the case for the benefit of others, were important considerations.

Case title	Category	Security ordered
Bhagat v Murphy [2000] NSWSC 892	Divestment of assets	Yes
Bhattacharya v Freedman [2000] NSWSC 730	Divestment of assets Unpaid costs orders	Yes
Philips Electronics v Matthews [2002] NSWCA 157	Divestment of assets	Yes
Welzel v Francis [2011] NSWSC 477	Divestment of assets	Yes
Bhattacharya v State of NSW [2002] NSWSC 361	Unpaid costs orders	No
Byrnes v John Fairfax Publications Pty Ltd [2006] NSWSC 251	Unpaid costs orders	No
Sywak v Visnic [No 2] [2010] NSWSC 374	Unpaid costs orders	No
Duynstee v Dickins [2011] NSWSC 408	Unpaid costs orders	No
Grant v Hall [2012] NSWSC 779	Unpaid costs orders	No
Morris v Hanley [2000] NSWSC 957	Vexatious or harassing proceeding	Yes Overturned on appeal: *Morris v Hanley* [2001] NSWCA 374
Daly v Coffs Harbour Shire Council [2004] NSWSC 215	Nominal plaintiff	No

Table of cases

Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd [2010] ACTSC 20

Capital Webworks Pty Ltd v Adultshop.com.Limited [2008] FCA 40

Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited [2009] NSWLEC 165

Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3) [2010] NSWLEC 59

Castillejo v Botella [2008] QSC 333

Ceil Comfort Insulation Pty Ltd v ARM Equipment Finance Pty Ltd [2001] NSWSC 28

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

Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2) [1977] 1 NZLR 516

Corby v Channel Seven Sydney Pty Limited [2008] NSWSC 245

Cowell v Taylor (1885) 31 Ch D 34

Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3] (1992) 75 LGRA 214

Davey v Herbst (No 2) [2012] ACTCA 19

Del Bosco v Outtrim [2008] NSWSC 105

Delta Electricity v Blue Mountains Conservation Society Inc [2010] NSWCA 263, 176 LGERA 424

Diamond v Birdon Contracting Pty Ltd [2008] NSWLEC 302

Drumdurno Pty Ltd v Braham (1982) 42 ALR 563

Duynstee v Dickins [2011] NSWSC 408

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39, 1 WLR 2807

Energy Drilling Inc v Petroz NL (1989) ATPR 40-954

Equity Access Ltd v Westpac Banking Corp (1989) ATPR ¶40-972

Evans v Rees (1842) 2 QB 334

Fat-sel Pty Ltd v Brambles Holdings Ltd (1985) ATPR ¶40-544

Fire Containment Pty Ltd v Peter Robins [2011] NSWSC 444

Fletcher v Commissioner of Taxation (1992) 23 ATR 555

Friends of King Edward Park Inc v Newcastle City Council [2012] NSWLEC 113

Gore (trading as Clayton Utz) v Justice Corporation Pty Ltd [2002] FCA 354

Grant v Hall [2012] NSWSC 779

Grassby v Queen [1989] HCA 45, 168 CLR 1

Gray v Macquarie Generation (No 2) [2010] NSWLEC 82

Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd [2008] NSWCA 148

Hamilton v Al Fayed (No 2) [2002] 3 All ER 641

Hastings Point Progress Association Inc v Tweed Shire Council [2010] NSWCA 39, 172 LGERA 157

Hession v Century 21 South Pacific Ltd (in liq) (1992) 28 NSWLR 120

Merribee Pastoral Industries Pty Ltd v Australia and New Zealand [1998] HCA 41, 193 CLR 502

MHG Plastic Industries Pty Ltd v Quality Assurance Services Pty Ltd [2002] FCA 821

Michael Bickley Pty Ltd v Westinghouse Electric Australasia Ltd (1983) 1 ACLC 967

Mokau Timber Co v Berry (1908) 11 GLR 212

Morris v Hanley [2000] NSWSC 957

Motakov Ltd v Commercial Hardware Suppliers Pty Ltd (1952) 70 WN (NSW) 64

Nasser v United Bank of Kuwait [2002] 1 All ER 401

National Bank of New Zealand Ltd v Donald Export Trading Ltd [1980] 1 NZLR 97

National Mutual Life Assn of Australasia Ltd v Tolfield Pty Ltd (No 4) [2012] FCA 101

North Groongal Pty Ltd v ANZ McCaughan Ltd (1993) 61 SASR 302

Nudd v Mannix [2009] NSWCA 327

O'Neill v De Leo (1993) 2 Tas R 225

Octocane Pty Ltd v SRJ Development Pty Ltd [1999] SASC 231

Olofsson v Minister for Primary Industries [2011] NSWLEC 137

Oshlack v Richmond River Council (1998) [1998] HCA 11, 193 CLR 72

Oshlack v Rous Water (No 3) [2012] NSWLEC 132

Parks and Playgrounds Movement Inc v Newcastle City Council [2010] NSWLEC 231

Pasdale Pty Ltd v Concrete Constructions (1995) 131 ALR 268

Pearson v Naydler [1977] 3 All ER 531

Philips Electronics Australia Pty Ltd v Matthews [2002] NSWCA 157

Porter v Aalders Auctioneers and Valuers Pty Ltd [2011] NSWDC 96

Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074

Pray v Edie (1786) 99 ER 1087

Rajski v Computer Manufacture & Design Pty Ltd [1982] 2 NSWLR 443

Re Energy Drilling Inc v Petroz NL [1989] FCA 146

Re Holland Stolte Pty Ltd [1993] 2 Qd R 247

Re Kent Heating Limited v Cook-On Gas Products Pty Limited [1984] FCA 333

Re Marriage of MA and Brown (1991) 15 Fam LR 69

Ryan v Great Lakes (1998) 155 ALR 447

Ryberg Telecommunications Pty Limited (in liquidation) v Optus Mobile Pty Limited [2011] NSWSC 1268

Sabaza Pty Ltd v AMP Society (1981) 6 ACLR 194

Sales-Cini v Wyong City Council [2009] NSWLEC 201

Shackes v Broken Hill Zakka v George Elias t/as Cadmus Lawyers [2012] NSWCA 277

Shannon v Australia and New Zealand Banking Group Ltd (No 2) [1994] 2 Qd R 563

Table of legislation

Freedom of Information Act 1982

Supreme Court (General Civil Procedure) Rules 2005

r 62.01

r 62.05

r 64.24

Western Australia

Supreme Court (Court of Appeal) Rules 2005 (WA)

r 44

Rules of the Supreme Court 1971

O 25 r 1

O 25 r 3

O 25 r 4

O 9A

United Kingdom

Civil Procedure Rules 1998

r 25.14

Legal Services Act 2007

s 194

Bibliography

Arup, C, 'Defining pro bono: models and considerations' (A paper presented at the First National Pro Bono Conference, For the Public Good, Canberra, 4–5 August 2000)

Australian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-Represented Litigants – Report* (2004)

Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report 75 (1995)

Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System,* Report 89 (2000)

Barker, G, *Third Party Litigation Funding in Australia and Europe* (Centre for Law and Economics, Australian National University College of Law, Working Paper No 2, 2011)

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)

Dal Pont, G, *Law of Costs* (2nd ed, LexisNexis Butterworths, 2009)

Debus, B, 'Directions in Legal Fees and Costs' (2004) 27 *University of New South Wales Law Journal* 200

Gamble, H and Mohr, R, *Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal – A Research Note* (Paper presented at the Sixteenth Annual Conference of the Australian Institute of Judicial Administration, 4–6 September 1998, Melbourne)

Gill, B, *Report of the Scottish Civil Courts Review* (2009)

Legg, M, '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

Legg, M, et al, 'Litigation Funding in Australia' [2010] *University of New South Wales Faculty of Law Research Series 12*

Leon, R, '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)

Mason, K, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449

McGrath, C, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324

Morabito, V, 'Class Actions in the Federal Court of Australia – The Story so Far' (2004) 10 *Canterbury Law Review* 229

New South Wales Department of Attorney General and Justice, *Model Litigant Policy for Civil Litigation* (2008)

Parliament of Australia, Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice* (2004)

Raine, M, 'In locals we trust. Foreigners pay cash. Rethinking Security for Costs Against Foreign Residents' (2012) 1 *Journal of Civil Litigation and Practice* 210

Richardson, E, Sourdin, T and Wallace, N, *Self-Represented Litigants Literature Review* (Australian Centre for Court and Justice System Innovation, Monash University*,* 2012)

Rix, M, 'Legal Aid, the Community Legal Sector and Access to Justice: What Has Been the Record of the Australian Government?' (Paper presented at the Proceedings of the International Symposium on Public Governance and Leadership: Managing Governance Changes Drivers for Re-constituting Leadership, University of Plymouth, United Kingdom, 24–25 May 2007)

Senate Legal and Constitutional References Committee, Parliament of Australia, *Access to Justice* (2009)

Victorian Law Reform Commission, *Civil Justice Review*, Final Report (2008)

Vine-Hall, D, 'Present Difficulties with the Assessment System' (2004) *University of New South*

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