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23 August 2011

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Dear Mr McKnight,

Consultation Paper 13: Security for Costs and Associated Costs Orders

Thank you for your correspondence dated 19 May 2011.

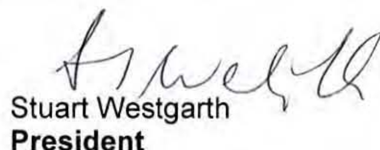
I have pleasure in enclosing a submission in response to Consultation Paper 13, entitled 'Security for Costs and Associated Costs Orders'.

The submission has been prepared by the Law Society's Costs Unit in conjunction with its Costs Committee. The Litigation Law and Practice Committee endorses the submission. The Environmental Planning and Development Committee endorses the following sections of the submission: Introduction, Key Issues, Jurisdiction to order security for costs, Discretionary factors, Litigation funding, Conditional costs and aided plaintiffs, Determining the amount of security and Quantifying security for costs.

If you have any questions in relation to the submission, please do not hesitate to contact Lana Nadj on 9926 0375 or at Lana.Nadj@lawsociety.com.au.

Thank you for the opportunity to comment.

Yours sincerely,



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THE LAW SOCIETY
OF NEW SOUTH WALES

Costs Committee
Legal Costs Unit

Submission to the New South Wales Law Reform Commission

'Security for costs and associated costs orders'

19 August 2011

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Introduction

This submission has been prepared by the Legal Costs Unit of the Law Society of New South Wales and the Costs Committee of the Law Society of New South Wales (together 'Committee').

The New South Wales Law Reform Commission ('Commission') Consultation Paper 13 ('the Paper') seeks to review the law and practice on security for costs and associated costs orders. Where an application for security for costs is successful, but the plaintiff is unable to comply with the order, a court may order that the proceeding on the plaintiff's claim for relief be dismissed[1] or stayed until the security is provided.[2] Appropriately, the Paper seeks to strike a balance to afford protection to the rights of plaintiffs and defendants equally, taking account of the public interest.

Since its inception, the Law Society of New South Wales ('the Law Society') has been committed to upholding access to justice and the right to legal representation in a democratic society. At the same time, the Law Society supports any effort to ensure compliance with court orders including an order for the payment of costs by one party to another party.

The Law Society crest contains the words 'Omnium Jura Defendimus', which means we defend the rights of all. Solicitors adhere to this motto, and a great number of practitioners devote many hours to pro bono work. Practitioners frequently work for impecunious clients with meritorious claims on a speculative basis and bear the risk that they will not be paid. Practitioners in such cases are guided by the important principle that all litigants should have the ability to proceed with a claim that has sufficient merit.

As the court in *Pearson v Naydler*[3] observed, the basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established.[4]

In his Second Reading Speech on 3 December 2009 in the Legislative Council, the Honourable John Hatzistergos referred to a number of matters with respect to which he asked the New South Wales Law Reform Commission to inquire and report. In particular, he referred to the need of the court to 'balance [the] adequate and fair protection of the defendant against avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of proceedings'. He also raised concerns about 'the spate of recent litigation in relation to environmental matters' and the exposure of corporate defendants.

Lastly, Mr Hatzistergos referred to the decision of the High Court of Australia in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Limited & Ors*[5]. In this case litigation funding was used by the plaintiffs but there was no agreement for the funder to indemnify the defendants against their entitlement to inter

[1] *Uniform Civil Procedure Rules (NSW)* 42.21(3)
[2] *Uniform Civil Procedure Rules (NSW)* 42.21(1)
[3] [1977] 1 WLR 899
[4] *Pearson v Naydler* [1977] 1 WLR 899 at 902
[5] (2009) 239 CLR 75

partes costs. A costs order was sought against the funder, a non-party, based on r. 42.3 of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') which provided that the court may not, in the exercise of its discretion under s. 98 of the *Civil Procedure Act 2005*, make any order for costs against a person who is not a party unless certain matters are established, including where the person has committed contempt of court or committed an abuse of process of the court.

This provision circumscribed the court's discretion under s. 98 of the *Civil Procedure Act 2005*. Rule 42.3 was repealed on 1 July 2010 by *Uniform Civil Procedure Rules (Amendment No 32) 2010*.

Key issues

Some of the key issues raised in the Paper are:

- Should courts be given a broad statutory power to make security for costs orders?
- Should courts have the power to order costs and security for costs against litigation funders?
- Should courts have express legislative power to order security for costs against representative plaintiffs?
- Should the statutory provisions allowing costs orders to be made against legal practitioners be amended to provide an exemption to those who are acting pro bono?
- Does the law and practice on security for costs apply satisfactorily in the case of plaintiffs who are supported by legal aid?
- Is there a need for new legislation to give courts the power to make public interest costs orders?
- Should there be greater use of protective costs orders, that is, orders that place a cap on the costs that may be recovered by one party from another?

Jurisdiction to order security for costs

Apart from the inherent jurisdiction of the court to order security for costs, courts have a discretion to order the plaintiff to give such security as the court thinks fit under r. 42.21 UCPR and, for corporate plaintiffs, also under s. 1335(1) of the *Corporations Act 2001* (Cth).

Rule 42.21 of the UCPR provides a list of jurisdictional grounds for making the order for security for costs. The first question posed by the Commission is 'should legislation provide a broad ground for courts to order security for costs where the order is necessary in the interests of justice?' A statutory provision such as this would afford the court a wider discretion to make such an order for the protection of the defendant.

Section 98 of the *Civil Procedure Act 2005* already provides that orders for costs are to be in the discretion of the court. While s. 98 provides that the court has full power to determine by whom, to whom and to what extent costs are to be paid, it does not specifically empower the court to make an order for security for costs. Rule 42.21 provides that if it appears to the court that certain matters can be

established, then the court may order the plaintiff to provide security for costs. It may be read to restrict consideration to these matters and therefore a broad ground for ordering security for costs in the interests of justice may be considered necessary.

Although the courts' discretion to order security for costs is now recognised to be unfettered,[6] the courts' jurisdiction is still limited to those matters in r. 42.21.

On 30 May 2011, in *Kieren Leslie Welzel v Stephen Paul Francis,* [7] the Supreme Court of New South Wales relied on its inherent jurisdiction because the defendant was unable to rely on the jurisdictional grounds specified in r. 42.21 in the factual circumstances of the case, namely, that the plaintiff, a company, had disposed of assets to put them out of reach of any adverse costs order. The case illustrates the potential efficacy of a jurisdictional provision grounded in statute. Had a broad ground such as the 'interests of justice' provision been available, the task of the court would have been significantly simpler.

The Committee agrees with the NSW Bar Association that r. 42.21(1) should be amended to allow the court to order security for costs where such order is required in the interests of justice.

With respect to Question 2.2, it would clearly be appropriate to amend r. 42.21(1)(a) to refer to 'a plaintiff ordinarily resident outside Australia' rather than 'outside New South Wales' as a ground for applying for security for costs.

The Committee agrees with the proposals in questions 2.3(1) and 2.4(1) to assist in ensuring compliance with any costs orders of the court.

Discretionary factors

Heydon J in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd & Ors*[8] gave the following warning on the efficacy of orders for security for costs:

> The lack of judicial generosity (for the amount awarded as security) is one of several signs that applications seeking security for costs have little attraction for judges. In part that is because they are interlocutory, satellite and hypothetical. Their interlocutory character is repellent to courts eager to deal with trials but hard pressed to do so. They are satellite in character because they often involve spending significant time examining complex questions of solvency which are irrelevant to the main proceedings. They are hypothetical in character because their point depends on the hypothesis, which may or may not be realised, that the defendant will succeed, so that through them stalks the fear in many instances that they are a waste of time. They generate additional costs of their own.

[6] *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) FCA 76 at 38
[7] [2011] NSWSC 477
[8] (2009) 239 CLR 75 at [93]

The Commission has posed the question of whether, apart from the jurisdictional grounds, the UCPR should be amended to set out a list of discretionary factors for the court to consider when an application for security for costs is made and, if so, what the relationship of those factors should be with the jurisdictional grounds listed in r. 42.21(1) of the UCPR.

As indicated previously, the Committee agrees that a broad ground for courts to order security for costs in the 'interests of justice' should be enacted. Given the breadth of that ground, it seems clear that at least some of the discretionary factors would need to be considered in order for the court to make a finding that the 'interests of justice' necessitate the order. That is, the discretionary factors would need to be considered in order to establish the jurisdictional ground. A similar interrelationship between the jurisdictional and the discretionary factors can also be identified in the case of a corporation, whereby the impecuniosity of the corporation is the basis on which the court makes a finding that the company would not be able to pay the costs under an adverse costs order.

As the Commission has noted, a list of discretionary factors is set out in r. 672 of the *Queensland Uniform Civil Procedure Rules 1999* ('UCPR Qld') and in r. 1902 of the *ACT Court Procedures Rules 2006* ('*ACT Rule*'). These discretionary factors are identical, except that the *ACT Rule* provides that the rule does not limit the matters to which the court may have regard.

The list of matters to which the court may have regard pursuant to the UCPR Qld is as follows:

(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; and
(m) the costs of the proceeding.

It is doubtful that a list would provide additional assistance to the court in its deliberations. Firstly, there is ample authority to guide parties as to which matters are relevant to the consideration of an application for security for costs; secondly, it should be for parties to raise those matters which are relevant in their particular circumstances. To enact an amendment such as that suggested would only serve to divert attention from other pertinent, discretionary factors which are not included in the list.

As Cooper J stated in *Gentry Bros Pty Ltd v Wilson Brown & Associates Pty Ltd:*[9]

> It is not possible or appropriate to list all of the matters relevant to the exercise of the discretion. The factors will vary from case to case. The weight to be given to any circumstance depends upon its own intrinsic persuasiveness and its impact on other circumstances which have to be weighed: *P S Chellaram & Co Ltd v China Ocean Shipping Co* [1991] HCA 36.

Indeed, a list of discretionary factors similar to the list of factors set out in r. 672 of the UCPR Qld and in r. 1902 of the *ACT Rule* was enumerated by Beazley J in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd*[10] ('*KP Cable Investments*'). These well-established guidelines are:

1. That such applications should be brought promptly.
2. That regard is to be had to the strength and the bona fides of the applicant's case.
3. Whether the applicant's impecuniosity was caused by the respondent's conduct the subject of the claim.
4. Whether the respondent's application for security is oppressive.
5. Whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security.
6. An issue related to the last guideline is whether persons standing behind the company have offered any personal undertaking to be liable for the costs and if so, the form of any such undertaking.
7. Security will only ordinarily be ordered against a party who is in substance a plaintiff, and an order ought not to be made against parties who are defending themselves and thus forced to litigate.

Her Honour went to great pains to stress that the discretion should remain broad and said at 38:

> The law is now settled that the discretion to order security for costs is unfettered and should be exercised having regard to all the circumstances of the case without any predisposition in favour of the award of security.

Paragraph 2.89 of the Paper raises the question of how the discretionary factors should relate to the jurisdictional grounds. Queensland authority suggests that the discretionary factors may be considered in support of the ground under which the application is made. Notably, those factors in the list under r. 672 of the UCPR Qld and those in the guidelines set out by Beazley J in *KP Cable Investments* all pertain to the interests of justice. These would be available to establish the 'interests of justice' if r. 42.21 were to be amended to include the latter as a broad ground for ordering security for costs.

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[9] (1992) 8 ACSR 405 at 415
[10] [1995] FCA 76; (1995) 56 FCR 189 at 196F – 198C at 39

Question 2.6(c) of the Paper asks whether a list of discretionary factors should include the public interest. If such a list is to be included in the legislation, then the list should include this factor. It is already included in r. 4.2(2) of the *Land and Environment Court Rules 2007* which provides:

> 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.

Question 2.6(d) asks whether a list of discretionary factors should include the impecuniosity of the plaintiff, whether a natural person or a corporation. The alternative proposed in this question is whether it would be preferable to adopt a provision in the UCPR separate from this list, indicating that security for costs shall not be ordered merely on account of the poverty of the plaintiff.

The courts have always ruled that an impecunious litigant, being a natural person, should not be denied the right to litigate. The Committee supports the proposal to adopt a provision in the UCPR separate from this list, to the effect that security for costs shall not be ordered merely on account of the poverty of the plaintiff, where the plaintiff is a natural person.

The Committee also supports the proposal in Question 2.8 that r. 42.21(1)(d) be amended to reflect s. 1335(1) of the *Corporations Act 2001* which requires 'credible testimony' for the belief that the corporation will be unable to pay the costs of the defendant if ordered to do so.

Litigation funding

It is important to bear in mind, firstly, that for commercial reasons, funders are extremely unlikely to fund claims that are not meritorious and, secondly, funders generally indemnify the funded party for any adverse costs orders.

As a general rule, funders carry out a stringent merits test before they agree to a funding proposal. They work with the law practice retained to carry out the work, to ensure that the proceedings advance smoothly towards a successful outcome. A plaintiff funded by a litigation funder is, accordingly, less likely than an unfunded plaintiff to be the subject of an adverse costs order.

It is now widely accepted that funders serve an important function in allowing impecunious plaintiffs to bring their claims before the courts. It is not considered an abuse of process nor is it contrary to public policy for funders to control the litigation and make a profit from it.

Since the abolition of maintenance and champerty as a crime and as a tort,[11] funders have been able to operate as businesses bargaining for a share of the proceeds of litigation. Their share is substantial: it has been estimated to be between one third and two thirds of the proceeds of the litigation.[12]

[11] This change took place in NSW in 1995.

Indeed, his Honour Mason P said that the policy of the law had changed: 'The law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled.'[13] Mason P concluded that 'the present litigation should be regarded as falling within the principle that public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.'[14]

For commercial reasons, funders objectively assess the merits of a claim before agreeing to fund litigation. Once they have agreed to extend the loan, most funders simply stand in the shoes of the plaintiff and take total control with respect to retaining a legal team, providing instructions and making decisions. Funders are only paid when there is a successful outcome to the litigation. The quantum is calculated by reference to the amount recovered in the proceedings, usually as a percentage.

The Law Council of Australia ('Law Council') made submissions on the subject of litigation funding to the Standing Committee of Attorneys-General on 14 September 2006. In its submission, the Law Council argued that the potential effect of over-regulation is to stifle the industry's growth and inhibit the development of competitive forces required to lower the cost of litigation funding services.

The Paper suggests that mandatory disclosure of any funding agreement between the plaintiff and a litigation funder would allow the court and the defendant to assess whether the funder has provided an indemnity for any adverse costs order.

On 29 September 2006 the NSW Young Lawyers Civil Litigation Committee and NSW Young Lawyers Pro Bono Taskforce ('Young Lawyers' Committees') made a joint submission to the New South Wales Attorney General on litigation funding.

As a general principle, it was the Young Lawyers' Committees' opinion that disclosure and other requirements should only be imposed if a failure to disclose would amount to either an abuse of process or would harm the integrity of the court system in some way. In commenting, the Young Lawyers' Committees acknowledged that funders were already subject to legislative and prudential regulation by reason of the fact that they are usually corporations.

Disclosure of the funding agreement can be seen as one mechanism by which the court can protect itself against such risks. For instance, disclosure of the level and degree of control that any funder would be capable of exercising may be one way to protect against the potential risk of an abuse of process. However, any court conducting such assessments should balance this factor against the

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[12] Michael Legg, Louisa Travers, Edmond Park and Nicholas Turner, 'Litigation Funding in Australia' [2010] UNSWLRS 12.

[13] (1992) 174 CLR 178 at 192-193.

[14] [2004] 1 WLR 2807 at 2817, citing *Doe Dem Masters v Gray* [1830] EngR 58.

public interest in what can be characterised as an improvement to access to the justice system, for many parties previously unable to afford it.

If, however, plaintiffs were to be required to disclose in all proceedings that they were being funded, then any disclosure should be subject to protection in the form of maintenance of confidentiality and privilege.

The Committee supports the recommendations submitted by the Young Lawyers' Committees. In particular it supports the Young Lawyers' Committees' recommendation that any legislative provision should be carefully considered to ensure that an approach based on minimal intervention is maintained to allow the market to establish accepted norms. An overly restrictive regime would likely stifle the development of a mature litigation funding market in Australia. The Young Lawyers' Committees did not consider that any mandatory criteria should be set. If guidelines or legal criteria are to be set, they should be framed with a view to preventing any potential abuse of process of the court rather than, for example, solely for the purposes of consumer protection.

The recommendation was made that parties should only be required to disclose the litigation funding agreement to the court and not to the defendants, unless matters are raised by the defendants that give rise to concerns that the agreement may offend certain public policy considerations. The funding agreement should otherwise be protected from disclosure to the other party, as knowledge of the terms of the agreement may distort the litigation process.

The funders would normally take on the burden of the costs risk for the claimants.[15] They will also do what is required to comply with an order for security for costs if it is made. They do this out of necessity, as properly advised claimants will typically seek an indemnity against an adverse costs order.

The Commission has asked whether the fact that the plaintiff is funded by a litigation funder should be a relevant consideration for the court to take into account in the exercise of its discretion to make an order for security for costs. Rather than incur the time and expense involved in making an application for security for costs, the defendant would be better served if funders were to provide indemnity to the funded party for any adverse costs order because if the plaintiff is a natural person the order for security is not likely to be made and further, the eventual costs order may exceed the value of the security for costs proffered.

In *Jeffery & Katauskas Pty Limited v SST Consulting Pty Limited & Ors*[16] the defendant did obtain orders for security for costs of the trial: for $47,750 by order of Rolfe J on 15 December 2000, and for $140,000 by order of the trial judge, McDougall J. The order was made on 6 October 2004, the day after commencement of what became a 19-day trial, and the shortfall between the costs of the trial and the security provided was in excess of $450,000.

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[15] For an example, see *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* [2006] HCA 41

[16] (2009) 239 CLR 75

That case arose for determination not because it was impossible to obtain an order for security for costs against the funder, but because the funder did not have in place an indemnity for the plaintiff in the event of an adverse costs order.

If the funding issue has to be disclosed as a relevant consideration, then it may merely point to the plaintiff's impecuniosity and hence the plaintiff's inability to comply with an adverse costs order. It may also point to the availability of funds, being those which may be provided by the funder. The funder may very well provide security for costs should the plaintiff be ordered to do so, and it would not be in the funder's interest to have the matter stayed or dismissed.

Ipp JA said in *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr; Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Tim Barr Pty Ltd & Ors*[17] that

> ...due weight must be given to the prospect that even if the defendant is given an order for security for costs from the plaintiff, the normal checks and balances that the system would impose on the funder (to limit costs) were it to be potentially liable for defendant's costs, would still not be present.

Ultimately, in that case, his Honour came to the view that without an appropriate indemnity by the funder to the plaintiff for the defendant's costs, there is a material tendency that the processes and procedures of the court could be converted into instruments of injustice or unfairness. In the circumstances, his Honour considered that the arguments of the defendant should be upheld and a stay of proceedings should be granted but only on a conditional basis, namely, until the funder provided the plaintiffs with an indemnity against any costs that they might be ordered to pay the defendant.

In *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*[18] Basten JA said at 75:

> With respect to individual plaintiffs generally (including liquidators), neither impecuniosity, the nature of the resources relied upon to bring the proceedings nor the possibility of indemnity in the case of failure, will usually be considerations warranting an order for security for costs. Given that impecuniosity is not relevant in such cases, the existence of an indemnity may well provide a greater degree of comfort to a defendant than would otherwise be the case.

It can therefore be seen that there is strong judicial support for the proposition that an agreement by the funder to indemnify any adverse costs orders may be more important to the defendant than obtaining any order for security for costs against the plaintiff.

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[17] [2005] NSWCA 240
[18] [2008] NSWCA 148

Legg et al[19] have suggested that, ideally, the percentage of the recovery going to the funder will reflect the risk inherent in the proceedings. With an increasing level of risk, the funder will require a greater share of the proceeds to make the investment attractive.

A case could therefore be made that, if the funder is not prepared to indemnify the whole of any adverse costs orders, it should at least be required to give a partial indemnity. If the riskier the proceedings, the greater the amount the funder could potentially receive, then the indemnity by the funder for any adverse costs order should be proportionate to the risk.

It is not envisaged that this would apply to financial assistance from other third parties, such as friends, relatives, insurers, legal aid, co-operative ventures such as trade unions, creditors and shareholders of a corporate litigant, nor lawyers retained pursuant to a conditional costs agreement. These do not bargain for a share of the proceeds and therefore should not be required to bear the risk of paying costs pursuant to a costs order.

Once the intention to apply for security for costs is conveyed to the plaintiff and the plaintiff produces evidence that the funder has provided indemnity for any adverse costs order, that should be the end of the matter. The defendant should be comforted and would be unlikely to commit to the expense of an actual application for an order for security of costs.

The Committee recommends that efforts be made to ensure funders provide indemnity in whole or in part for the defendant's costs should there be a costs order made against the plaintiff. Most funders already provide such indemnity.

There is already legislative requirement to comply with directions and orders of the court under s. 56 (3) of the *Civil Procedure Act 2005.* Under s. 56(4) of *the Civil Procedure Act 2005*, any person with a 'relevant interest' in the proceedings commenced by the party must not, by their conduct, cause a party to a civil dispute or civil proceedings to be put in breach of a duty identified in subsection (3) or (3A).[20] This essentially proscribes funding without providing for an indemnity for any adverse costs order.

If legislation is adopted giving courts the power to make orders for security for costs against litigation funders, then this power should be restricted to cases involving corporate plaintiffs.

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[19] Michael Legg, Louisa Travers, Edmond Park and Nicholas Turner, 'Litigation Funding in Australia' [2010] UNSWLRS 12.

[20] s.56(4) *Civil Procedure Act 2005*

Conditional costs agreements and aided plaintiffs

Question 3.5 of the Paper asks whether a court, 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.

This might only signify to the court that the client is impecunious. As stated above, the courts have always followed the basic rule that a natural person who sues will not be ordered to give security for costs, on the basis of the person's impecuniosity. This is an interests of justice principle that must not be casually traversed. Those practitioners would act for such impecunious clients even when it means there is a risk of them not being paid at all or there being a long delay before they receive payment. In most cases these practitioners cannot charge a premium to compensate them for so acting.[21] In any event, such practitioners normally do not act unless there is substantial merit in the claim. The Committee does not believe that it would be necessary or helpful to include this as a discretionary factor.

A further question is whether the indemnity principle would operate to deprive a pro bono client from applying for a costs order.

Pro bono work means work for free. The agreement with the client should state unconditionally that the practitioner would not charge the client and hence the client would not be entitled to a costs order. If, however, the practitioner is to charge the client upon a costs order being obtained in favour of the client, then this arrangement will need to be reflected in the costs agreement.

Practitioners were advised in an article in the *Law Society Journal*[22] that in order to preserve entitlement to party-party costs, it would be prudent for the practitioner to include a particular provision in a costs agreement with the client for recovery of costs. The suggested provision was to the effect that upon a successful outcome, the law practice would be entitled to full payment of its fees.

In the 2006 appeal in the matter *of Wentworth v Rogers; Wentworth & Russo v Rogers,* [23] payment to the lawyer was dependent upon successful *recovery* of costs which means there was no current liability by the aided party to pay fees. As Santow JA observed, '[w]hether the overall costs arrangements fall foul of the indemnity principle depends ultimately on the content and construction of the costs arrangements.'[24]

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[21] s.324 *Legal Profession Act 2004*

[22] Marina Wilson, 'Professional Standards: Preserving Party-Party Costs in Pro Bono Cases' *Law Society Journal* October 2004, Vol 42, page 34

[23] *Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145*

[24] *Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145* at 66.

Further, Basten J said at 132:

> Whether the term 'pro bono' now extends to situations where the lawyer, satisfied that the client has a meritorious claim, nevertheless enters a speculative fee arrangement to charge a usual fee, taking some risk of non-payment, is a question of fact to be determined in the context of the particular case.

The Committee supports the submissions of the National Pro Bono Resource Centre and the Public Interest Law Clearing House NSW that costs orders should be available for successful litigants.

Question 3.8(1) asks whether it is desirable to permit costs orders to be made in favour of pro bono litigants on an indemnity basis. Currently most practitioners acting on a pro bono basis would agree with the client that they would accept the party-party costs as full payment of their costs. They would be prepared to forego the amount payable over and above reimbursement on this basis. This represents a great sacrifice on the part of the practitioner because not only do they have to accept the delay in obtaining payment, but they face the prospect of not being paid at all.

The Committee supports legislative amendment to permit costs orders to be made in favour of pro bono litigants on an indemnity basis. The costs awarded should be payable to the practitioner acting for the pro bono client.

The Committee does not support the establishment of a pro bono litigation fund to receive costs orders and for those funds to then be distributed to national pro bono organisations and strategic projects. The stated aim is to deter frivolous litigation. This is unnecessary as pro bono schemes conduct rigorous merit tests before agreeing to act. Practitioners are well aware of the penalties which can be imposed should they act for a client in a matter which is frivolous, or does not have a reasonable prospect of success.

Allowing for costs orders to be made in favour of pro bono litigants on an indemnity basis would enhance the provision of pro bono legal services and, at the same time, promote the ideal of the just, quick and cheap resolution of disputes.

With respect to Question 3.9 of the Paper, the Law Society opposes neglect, incompetence and misconduct in all its forms. If a practitioner improperly incurs additional costs by such conduct, then the practitioner should be subject to the penalties imposed under s. 99 of the *Civil Procedure Act 2005* regardless whether the practitioner was providing his or her services on a pro bono basis.

As to the amendment of s. 348 of the *Legal Profession Act 2004* to exclude practitioners acting on a pro bono basis, the Committee does not support this proposal. Under s. 347 the provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct.

Practitioners acting for pro bono clients, as for any client, must discharge their duties with honesty, fairness, competence and diligence.

Public interest proceedings

It seems that courts do treat matters involving a wider sector of the community differently as far as costs orders are concerned.

The matter of *Australians for Sustainable Development Inc v Minister for Planning*[25] was decided by the NSW Land and Environment Court on 10 March 2011. In that case, the respondents were ordered to pay the applicant's costs and the first respondent was to pay those costs on an indemnity basis.

Awarding indemnity costs *against* the successful defendant was thought to be appropriate.

The authorities, including that of the High Court,[26] show that courts are conscious of the risks plaintiffs take in raising issues that may be of importance to the wider community. There will be matters which require the court to protect public interest litigants from adverse costs orders.

While unsuccessful applicants in public interest proceedings do enjoy a degree of legislative protection,[27] the courts would be assisted by legislative provisions that would promote greater certainty on this issue.

Rule 4.2 of the *Land and Environment Court Rules 2007* provides that the court may decide not to make an order for the payment of costs against an unsuccessful applicant nor order security for costs against an applicant, if it is satisfied that the proceedings have been brought in the public interest.

The Committee supports the recommendation of the Australian Law Reform Commission to adopt legislation giving the courts power to make a variety of public interest costs orders at any stage of the proceedings, with respect to cases that raise issues affecting a significant sector of the community and novel cases that settle important points of law. The Committee supports the definition of 'public interest litigation' recommended by the Australian Law Reform Commission.

The Paper questions why the use of the r. 42.4 power to cap costs has been so limited. The power under that provision is said to be directed to the need to ensure that costs are proportionate to the issues.[28] Clearly the provision does not apply except where a proceeding is brought in the public interest. The purpose of the power to make orders under r. 42.4 is to achieve a just, quick and cheap resolution whether at a pre-trial stage or during the hearing. If courts do not of their own motion make orders under r. 42.4, and nor are parties relying on this provision, then it may be because the general

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[25] [2011] NSWLEC 33
[26] *Oshlack v Richmond River Council* (1998) 193 CLR 72
[27] Rule 4.2 *Land and Environment Court Rules 2007*
[28] *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150 at 32

law has already addressed the need for proportionality[29] and, or alternatively, because ultimately proportionality is also a matter for the costs assessor appointed by the Chief Justice or a Taxing Officer in the Federal jurisdiction.

The Court of Appeal in *Skalkos v T & S Recoveries Pty Ltd*[30] ('*Skalkos*') dealt with the question of whether the proportionality of costs to award is a relevant consideration for a costs assessor when assessing a bill of costs. In that case, Ipp JA made it clear that it was relevant to consider whether the costs bear a reasonable relationship to the value and importance of the subject matter of the litigation.

The Committee supports the judicial statements[31] that the discretion to make protective costs orders is sufficiently broad and may already take into account any public interest issues in the matter.

The Committee would support the establishment of a public interest fund administered by the New South Wales Government, subject to further consultation with the Law Society. It takes community-minded litigants more than funding to attempt to claim rights in the public interest. It also takes much time and effort. The benefit is extended to the wider community even if the claim is also motivated to some degree by private gain. If funding is available and widely publicised, such spending is to be commended. The Committee would also support the indemnity for any adverse costs orders.

Question 4.1 poses the question of whether there is a need for new legislation to give courts the power to make public interest costs orders. Rule 42.1 of the UCPR confers a power to make costs orders to follow the event, and to make other orders, including public interest costs orders.

However, the provision that has been recommended by the Australian Law Reform Commission[32] could help to clarify the power to make public interest costs orders notwithstanding any personal interest in the proceedings. However, if the power to make this type of costs order were to be introduced, then it is submitted that 'public interest proceedings' should be defined.

The Committee agrees that any legislation establishing the jurisdiction to make public interest costs orders should allow the court to make the order at any stage of the proceedings, including at the start of the proceedings. However, s. 98(3) of the *Civil Procedure Act 2005* already provides that: 'An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings'. This may already be sufficient.

The Committee does not agree that the legislation giving the courts power to make public interest costs orders needs to contain a list of discretionary factors that courts may take into account when determining whether to make such an order. There is ample case law to provide guidance and the courts should not be fettered in making their determinations.

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[29] *Moore v Moore {2004} NSWSC 587; Gallagher v CSR Ltd* unreported WASC 31 March 1994
[30] [2004] NSWCA 281
[31] See paragraph 4.75 of the Paper.
[32] See recommendation 45 on page 92 of the Paper.

With respect to Question 4.5 of the Paper, the types of orders that the court is able to make is a matter for the court. The broad power to make costs orders resides in s. 98(1) of the *Civil Procedure Act 2005* which 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. Further, s. 98(1) provides that the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

If legislation is enacted giving powers to make public interest costs orders, then the provision should be included in the UCPR.

Question 4.8 asks whether the power of the court to specify maximum costs should be relocated to s. 98 of the *Civil Procedure Act 2005.* The Committee is of the view that this is not necessary.

Determining the amount of security

The Honourable Justice John Lehane observed in an article published in the *Law Society Journal*[33] that there is a principle, frequently stated, that an application for security should be made promptly. He said that the court may consider it appropriate to order no security, or limited security, for costs already incurred.

His Honour went on to say that while an order for security will not ordinarily provide a complete indemnity there is no general rule that, in determining the amount of security to be provided, estimated party and party costs will be 'discounted'. The decision is discretionary, and particular factors may result in some reductions being made.

As Lindgren J[34] explained, these factors may include:

> ... the possibilities that the case might collapse and not come to trial, the prospects of success in so far as they might be discernible, the adequacy of the evidence of the costs likely to be incurred, the fact that some of the costs might relate to aspects of a respondent's case which are not truly 'defensive', and the likelihood that a taxing officer would, in any event, reduce to some extent the amount sought.

His Honour Lehane J has suggested that from the point of view of the applicant for security, it may be convenient to make successive applications so as to go some way towards eliminating the uncertainties to which Lindgren J referred in the passage just quoted. For example, it may be convenient to make an order covering the period up to the close of discovery; an order for the period from the close of discovery to the commencement of the trial; and an order covering the duration of the trial itself.

[33] John Lehane, 'Security for Costs' *Law Society Journal*, May 1999, Volume 34, page 54

[34] *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No. 19)* (1995) 134 ALR 187 at 198

Approaching the issue of security in stages permits an applicant for security to adduce evidence of likely costs, which in turn are likely to be far more accurate than they would be if an attempt were made to estimate, close to the commencement of proceedings, the costs of the entire proceedings.

Jagot AJ in *Western Export Services Inc v Jireh International Pty Limited*[35] enumerated the matters that are relevant in determining quantum. Her Honour set out in detail what may be allowed and what may be disallowed in calculating the final amount. Ultimately, the estimate is only expected to be 'reasonable'.

Quantifying security for costs

Chapter 5 of the Paper addresses, inter alia, the question of how courts determine the amount of security to be ordered, in the light of the many uncertainties of litigation.

The examples cited in paragraphs 5.8 to 5.15 illustrate the difficulty faced by the court where the estimates propounded by the defendant and the plaintiff respectively are manifestly different.

In the experience of the Committee, for most litigants, sums ordered for security for costs are substantially less than the amount of costs ultimately incurred or recoverable by the defendant. The question must be asked whether, notwithstanding the rationale that security is not meant to give a 'complete and certain indemnity', it would seem antithetical to the purpose of awarding security to allow a figure which is no indemnity, or a largely insufficient indemnity, leaving the successful defendant at the end of the matter greatly out of pocket for its costs.

While it is necessary to ensure that security does not stifle the litigation, it is also necessary to make the award meaningful and not illusory.

Question 5.1 asks what problems arise in the assessment of the amount of security.

The first problem before the court is how to weigh up the evidence before the court in respect of the likely costs of a matter. It is usual for both parties to adduce evidence from the solicitor with conduct of the matter in respect of the likely work to be done by the defendant, and an opinion by a cost expert on the 'reasonable' costs of that work. The defendant's evidence will, generally, put the claim at its highest and the plaintiff's evidence will seek to show the claim at its lowest.

Unfortunately, in a jurisdiction where there are no objective tests in relation to the type of work allowed, inter partes, or the rates at which that work will be allowed, it is not easy, even for an expert, to provide 'scientific' opinion on the reasonableness of costs claims.

The evidence required can also be expensive to prepare, a fact which mitigates against the purpose of security, that is, to protect the defendant against incurring 'unsecured' costs.

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[35] [2008] NSW SC 601

Paragraph 5 of the Paper refers to the provision of a 'skeleton bill of costs' as a method 'preferred' by the court. It is not clear what type of document is referred to here; however, in practical terms the preparation of any form of itemisation of costs is an expensive task which may lead to an unwarranted distraction in the conduct of the substantive matter, including having to provide the file to a cost consultant.

Furthermore, a detailed itemisation may invite a 'de facto' taxation of particular items which is time consuming and premature in the security context where the reasonableness of work undertaken and costs incurred might only be fairly determined in the light of the final outcome. Additionally the delivery of such a document might expose the defendant to explanations of work which would reveal its tactics in the litigation.

If possible, the best solution would be to provide a method to assist the court to make an award appropriate in the circumstances, without putting the parties to great expense to quantify it.

One way of doing this would be to standardise the form in which the evidence should be presented which streamlines the amount of material which the court has to consider.

Question 5.2 asks whether guidance should be given by statute or regulations. The advantage of providing a guideline, for example, by way of a Practice Note, such as the Federal Court's *National Guide to Counsel's Fees*, would be to provide a cheap and easy way for the court to quantify the security to be ordered.

A guideline should not be in the form of rates, which would not avoid the cost and time taken preparing evidence of how those rates should be applied, but could have a range of gross amounts to be allowed in different types of cases and could be structured to take into account the length of hearing, number of parties and similar considerations.

Another reason for avoiding the setting of rates for such a guideline for example, by way of a range of hourly rates, is to avoid the danger that a range might come to have the status of a de facto scale. Instead, a lump sum or a range of lump sums, should be provided. The chief disadvantage of introducing a guideline would be the infrastructure required to keep the guideline up-to-date. The Federal Court Practice Note is updated every year.

Notwithstanding any difficulties, a guideline would have the advantage of objectivity, so that a defendant who is conducting the defence in a 'no-holds barred' manner would not be protected for its profligate conduct, and a plaintiff would have some certainty and predictability of the amount he or she might have to stake. For example, a one-day hearing, with junior counsel only, where there has been discovery and up to five witness statements/affidavits for each party might, hypothetically, be fixed at $100,000.

If a party were to consider that its case fell outside the guideline, it could be permitted to make submissions to the court on why the guideline should not apply.

Question 5.3 posed the question whether there should be non-binding scales used for determining security for costs.

For the reasons set out above in answer to the preceding question, the setting of 'scales' by way of rates even if they were not strictly binding presents problems where the nature of proceedings and the legal representation of the parties can be widely different. Any judicial approval of a rate of charge, even in the context of an application for security for costs, creates a dangerous precedent in the circumstances of the deregulation of costs in New South Wales.

Also, as noted above, the setting of a range of rates would not avoid the costs of presenting the additional evidence of how those rates should be applied in any particular matter to the work projected. If the object is to assist the court to fix amounts for security for costs to avoid the expense and time in interlocutory hearings, it is submitted that this would not be achieved by setting a range of rates.

The additional problem arises, as noted in the answer to Question 5.2 above that any indicative rates would have to be fixed in consultation, and a system for updating developed.

The Paper asks whether costs assessors should sit with judges for the purposes of fixing the amount of security.

The role of a costs assessor, appointed by the Manager, Cost Assessment, is to determine reasonable costs at the end of a matter, when all of the factors affecting costs have been determined. Indicia such as the length of the hearing, the amount of evidence, the issues which have been determined and the amount of expert evidence all relate to vicissitudes of a trial which will already have taken place by the time that a costs assessor is asked to make a determination.

Assessors have no better ability to predict what may happen in a case and how much it will cost than the solicitors or cost consultants, or the judge presiding. To include yet another viewpoint in addition to those of each of the parties and their experts and the judge is to introduce a further complexity and, probably, uncertainty into the exercise. Rather than add another opinion with respect to the matters that the court has to take into consideration, it is submitted that the adoption of a streamlined basis of presenting evidence as to costs, or a guideline range of gross amounts, would be of far greater assistance to the court.

APPENDIX

CONSULTATION PAPER QUESTIONS

Question 2.1

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

Question 2.2

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

Question 2.3

1. Where the plaintiff is ordinarily resident outside Australia, should the enforceability of an Australian costs order in the plaintiff's country of residence be a relevant factor that courts may consider in assessing an application for security for costs?
2. If so, should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to reflect such a principle?
3. If not, should *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 be amended to reflect such a principle?

Question 2.4

1. Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to require the plaintiff to ensure his or her address as specified in the originating process is kept accurate, and to notify the defendant within a reasonable period of time of any change of address?
2. If so, should failure to comply with such requirement be specified in *Uniform Civil Procedure Rules 2005* (NSW) r 42.21 as a ground for an application for security for costs?

Question 2.5

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

Question 2.6

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

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

Question 2.7

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

Question 2.8

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

Question 2.9

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

Question 2.10

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

1. a procedure allowing defendants to request a corporate plaintiff to disclose its overall financial status; and
2. a presumption that the corporate plaintiff is impecunious, if the plaintiff refuses the request for disclosure?

Question 2.11

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

Question 2.12

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

Question 3.1

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

Question 3.2

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

Question 3.3

1. Should legislation be adopted to give courts power to order costs against litigation funders?
2. If so, should the legislation provide the circumstances under which the power may be exercised, or should the case law be allowed to identify such circumstances?

Question 3.4

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

Question 3.5

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

Question 3.6

1. Should courts have power to order security for costs against representative plaintiffs?
2. If so, should such power be expressed in legislation or should it be left for the case law to develop?

Question 3.7

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

Question 3.8

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

4. Should s 99 of the *Civil Procedure Act 2005* (NSW) and s 348 of the *Legal Profession Act 2004* (NSW) be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis?

Question 3.9

Should s 99 of the *Civil Procedure Act 2005* (NSW) and s 348 of the *Legal Profession Act 2004* (NSW) be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis?

Question 4.1

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

Question 4.2

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

Question 4.3

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

Question 4.4

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

Question 4.5

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

Question 4.6

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

Question 4.7

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

Question 4.8

Should the provisions on courts' power to specify the maximum costs that may be recovered by one party from another, which are currently located in Uniform Civil Procedure Rules 2005 (NSW) r 42.4, re relocated into s 98 of the *Civil Procedure Act 2005* (NSW)

Question 4.9

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

Question 5.1

1. What problems arise in the assessment of the appropriate amount of security? Do courts have difficulties in determining the amount, particularly in complex cases? Do legal representatives know what arguments or evidence they are allowed to provide to the court?
2. Should guidance be provided in statute or regulations, or is the matter one most appropriately left to judicial discretion?
3. Should there be non-binding lawyers' fee scales that may be used in determining the amount of security for costs?
4. Should costs assessors be permitted to sit alongside a judge in hearings on the amount of security?

Question 5.2

1. Are there any problems relating to the forms of security for costs that courts may currently order?
2. Is it desirable to amend the *Uniform Civil Procedure Rules 2005* (NSW) by adding a list of the possible forms of security for costs that courts may order?
3. Is it desirable to amend the *Uniform Civil Procedure Rules 2005* (NSW) to provide requirements similar to the provisions set out in r 829, 830, and 833 of the Supreme Court Rules 2000 (Tas)?

Question 5.3

Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended so that, if the court orders the plaintiff to give security for costs, there is an automatic stay of proceeding s until the plaintiff provides security?

Question 5.4

Are there any problems relating to the power of courts to dismiss proceedings if the plaintiff fails to comply with a security for costs order?

Question 5.5

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

Question 5.6

1. Should the *Uniform Civil Procedure Rules 2005* (NSW) be amended to provide courts power to set aside or vary security for costs orders?
2. If so, should the power be in broad terms or should it provide a 'standard' for assessing when the court may exercise this power? If so, should it be:
    a. 'material change of circumstances' as developed in common law;
    b. 'special circumstances' as specified in the Australian Capital Territory and Queensland court rules; or
    c. some other standard?
3. Should there be a list of factors for determining whether the standard has been met?
4. Should leave be required to seek an order varying or setting aside security for costs?

Question 5.7

1. Should the Uniform Civil Procedure Rules 2005 (NSW) be amended to incorporate the procedures for dealing with security for costs when the main proceedings are finalised?
2. If so, how should such provision be framed?

Question 5.8

1. Should the 'special circumstances' requirement in appeals be removed?
2. If not, should 'special circumstances' be defined, and how should they be defined?

Question 5.9

Should the provision relating to the courts' discretion to make security for costs orders in appeals be located in the *Uniform Civil Procedure Rules 2005* (NSW) or in the *Civil Procedure Act 2005* (NSW)?

Question 5.10

1. Should the legislation provide courts with power to order security for costs for leave to appeal proceedings?
2. If so, should the provision be located in the Uniform Civil Procedure Rules 2005 (NSW) or in the *Civil Procedure Act 2005* (NSW)?

Question 5.11

Should courts have express legislative power to dismiss an appeal for failure to provide for security for costs under an order to do so?