Environmental Defender's Office

Submission to the NSW Law Reform Commission on Consultation Paper 13 (May 2011) - *Security for Costs and Associated Costs Orders*

2 September 2011

The EDO NSW Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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Introduction

The Environmental Defender's Office NSW (**EDO NSW**) welcomes the opportunity to comment on the NSW Law Reform Commission's (**LRC**) *Consultation Paper 13 – Security for costs and associated orders* ('**Consultation Paper**').[1]

EDO NSW is a community legal centre with over 20 years' experience specialising in public interest environmental and planning law. We comment from the perspective of a community legal centre, and public interest litigants undertaking proceedings to protect the environment, or enforce breaches of environment protection laws.

EDO NSW has commented extensively on access to justice issues,[2] including through our association with the Australian Network of Environmental Defenders Offices (**ANEDO**).[3]

Costs barriers can make it difficult for public interest litigants to initiate or continue court proceedings, thereby limiting their access to justice. This submission focuses on the operation of, and impact of, costs orders in relation to environmental public interest litigation in NSW; particularly in the Land and Environment Court (**LEC**), where almost all such litigation is heard.

We have mainly commented on Chapter 4 of the Consultation Paper, on *Public interest and protective costs orders*;[4] as well as some aspects of Chapter 2, *Jurisdiction to order security for costs*. We have adopted the Consultation Paper's terminology, and refer to costs orders made in public interest proceedings as public interest costs orders ('**PICOs**').

This submission complements the EDO's substantial preliminary submission to this inquiry, dated 15 February 2010 ('**EDO's 2010 Submission**'). That submission examines how the threat of adverse costs orders and orders for security of costs deter – and in some cases, prevent – public interest proceedings; and therefore act as a bar to access to justice. We will not revisit those issues in detail here.

However, we refer to the EDO's 2010 Submission frequently here, as its recommendations remain valid in relation to the current Consultation Paper.

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[1] The inquiry's Terms of Reference (Consultation Paper, page viii) state:
"… 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…. 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".

[2] See, eg, EDO NSW, "Submission on NSW Government Discussion Paper: Reform of Judicial Review in NSW", April 2011, available at: http://www.edo.org.au/edonsw/site/policy.php#5.

[3] Previous ANEDO submissions on access to justice issues can be located at the EDO website, see: http://www.edo.org.au/edonsw/site/policy.php#5. For a comparative perspective from some of our interstate colleagues, please see EDO Victoria's paper, *Costing the Earth? The case for public interest costs protection in environmental litigation*.[3]

[4] For an overview, see Consultation Paper paras 1.11 and 4.2, available at www.lawlink.nsw.gov.au/lrc.

Overview

Broadly speaking, the relevant parts of the Consultation Paper appear to focus on:

- ways to give ongoing effect to NSW Courts' discretionary power to make costs orders in favour of public interest litigants (whether those costs orders are related to PICOs or security for costs orders), and
- codifying factors that are relevant to the exercise of the Courts' discretion.

In doing so, the Consultation Paper may not go far enough in overcoming the complexity and obstacles that public interest litigants face regarding security for costs and associated orders. Such an approach may maintain the status quo of infrequent exercise of discretion to make PICOs, or protect public interest litigants from adverse costs orders.[5]

Despite the number of positive factors in favour of community access to the LEC, the threat of an adverse costs order is one of the greatest deterrents to litigants seeking to bring public interest proceedings.[6] As former High Court Justice, Toohey J, noted, 'there is little point in opening the doors to the Courts if litigants cannot afford to come in'.[7]

We believe the final recommendations of the NSW Law Reform Commission (**LRC**) should further emphasise the existing barriers to access to justice created or maintained by costs orders and existing procedural rules in NSW. It should also consider novel approaches to overcome these barriers, drawing comparisons with other states such as Queensland, Victoria and Tasmania.

In our view, public interest litigants need clarification and simplification of the law, and a shift of cost risks, in a way that promotes access to justice irrespective of financial means. This could be achieved by legislating (or requiring through court rules) that public interest litigants are *exempt* from adverse costs orders and orders for security of costs, provided their case meets the relevant 'public interest' threshold.

Such an approach would more effectively:

- displace the common law that limits the exercise of the Courts' discretion to award PICOs to public interest litigants (or refuse respondents' claims for security for costs) to only a handful of cases, based on a complex range of factors;[8]
- give weight to the fact that few public interest cases are commenced by altruistic persons and groups in NSW and elsewhere (and even fewer in which the Courts exercise discretion favourably towards public interest litigants[9]) – meaning 'floodgate' concerns are misplaced; and therefore

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[5] See, eg, NSW LRC Consultation Paper, at para [4.24].

[6] See, eg, L. Ogle, "Community Experience of the Court", Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law 1979-1999, Conference proceedings, p 26. See also K. Ruddock, "The Bowen Basin case" in Bonyhady T & Christoff P (eds), *Climate Law in Australia* (2007), Federation Press, pp 184-185.

[7] Justice Toohey, paper delivered to the National Environmental Law Conference (1989).

[8] Noting the limited effect of r 4.2, *Land and Environment Court Rules* in encouraging such discretion to date.

[9] Eg, in 2010 to 2011, we understand there were only five proceedings in which the LEC made, or would have made (but for other circumstances), a court order in favour of the public interest litigant pursuant to r 4.2 of the LEC Rules. We could only identify four other cases in which the proceedings *may* have been categorised as public interest proceedings but a rule 4.2 costs order was not made for other reasons (such as lack of evidence, the existence of private interests and the lack of 'something more', discussed below).

- meet the need for change that is required to encourage public interest proceedings.

To deal effectively with barriers to access to justice for public interest litigants, the EDO also reiterates the six key recommendations outlined in our 2010 submission, and urges the NSW LRC to consider their adoption in its final recommendations:

1. The *Land and Environment Court Rules 2007* should be amended to stipulate that in all proceedings in the Court's jurisdiction, parties should pay their **own costs unless** there are **exceptional circumstances**;
2. The Uniform Civil Procedure Rules ('**UCPR**') should include provisions to enable courts to make **upfront costs orders** in appropriate circumstances;
3. Rule 42.4 of the UCPR should be amended to make it explicit that there is **no limitation** on circumstances when a **protective costs order** can be made, and that such orders are available in public interest proceedings;
4. The UCPR should be amended to include broad provisions relating to **public interest costs orders**, giving courts a **wide discretion to make a variety of costs orders** if proceedings are declared to be in the public interest;
5. There should be a clearly defined **exemption** in the UCPR **from security for costs orders** for litigants who can demonstrate that they are taking action in the public interest;
6. The *Land and Environment Court Rules 2007* should be amended to **prohibit** the NSW Land and Environment Court from requiring public interest litigants to give an **undertaking as to damages** as a condition of granting an interim injunction.

These issues are explored in more detail below.

Public Interest Costs Orders (PICOs)

Background

Chapter 4 of the Consultation Paper examines and considers:

- the definition of public interest proceedings
- the current law on costs and security for costs
- whether there is a need for a new law giving Courts the power to make orders protecting public interest litigants from adverse costs in appropriate cases (as the Australian Law Reform Commission ('**ALRC**') considered in its 1995 Report)[10]
- maximum costs orders (or protective costs orders) and powers to make them under the UCPR, rule 42.4(1)
- the concept of a public interest litigation fund.[11]

[10] Australian Law Reform Commission, *Costs Shifting*, Report 75 (October 1995), available at http://www.alrc.gov.au/inquiries/costs-shifting.
[11] Consultation Paper, Chapter 4, paras 4.3-4.4.

In the EDO's view, the need to give statutory effect to PICOs should be considered in the context of the following issues:

- the fact that there are very few 'low cost' options in NSW to protect the environment or test environmental laws in the public interest, noting:
    i. the very limited availability of legal aid for civil matters generally; and
    ii. that law firms with pro bono programs may face conflicts with their traditional client base if they take on environmental matters;
- the complexity and potential barriers surrounding PICOs under the current case law, which include:
    i. the Court's concern that public interest is a concept so broad that "much litigation, in public law in particular, may be able to be characterised as being brought in the public interest";[12]
    ii. in some circumstances, distinguishing between public interests that may be represented by any party[13] and "relevant, unrepresented" public interest cases[14] – resulting in the accumulation of further complex criteria;[15]
    iii. the need for special circumstances (or 'something more'[16]) which:
        1. derives from the statutory requirement in the UCPR, rule 42.1 (that costs generally follow the event unless it appears to the Court that another order should be made)
        2. has led the Court to distinguish between thelarge number of public interest proceedings (in its view, broadly defined), and "special matters" which justify departure from the usual costs order;[17]
        3. has resulted in additional complexity in the common law, whereby the Courts consider a growing number of 'relevant' factors;[18]
        4. can potentially result in the removal of access to justice, despite cases being in the public interest.[19]

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[12] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)*[2010] NSWLEC 59 at [16].
[13] *Ibid,* at [22].
[14] *Ibid,* at [38].
[15] In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, factors in determining what these "relevant, unrepresented" public interests were:
- the public interest served by the litigation,
- whether that interest is confined to a relatively small number of members from the group or association or concern with their own private amenity or whether the interest is wider,
- whether the applicant sought to enforce public law obligations,
- whether the prime motivation of the litigation is to uphold the public interest and the rule of law,
- whether the applicant has no pecuniary interest in the outcome of the proceedings.

[16] The Consultation Paper considers the LEC's "three step process" for deciding against an order for costs, at para 4.13.
[17] *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)*[2010] NSWLEC 59 at [16].
[18] See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)*[2010] NSWLEC 59 at [60].
[19] See, eg, *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v NSW Minister for Planning (No 2)* [2008] NSWLEC 272, where two traditional owners who fought for many years to protect their cultural

We generally agree with the case law principles on costs summarised at [4.23-4.26] of the Consultation Paper. However, we emphasise that the categorisation of proceedings as having been brought in the public interest does not *necessarily* displace the usual order as to costs.[20] In some circumstances, characterisation as public interest is sufficient[21] (and the counter view that public interest proceedings will be insufficient has been rejected).[22] At other times, 'something more' is required before public interest proceedings will result in a PICO.[23]

Recommendations for PICOs

Recommendations in the EDO's 2010 Submission that remain relevant to PICOs are:

- that the *Land and Environment Court Rules* 2007 (NSW) should be amended to stipulate that in *all* proceedings in the Court's jurisdiction, parties should pay their *own costs*, unless there are exceptional circumstances (such as where the proceedings are vexatious or frivolous);[24] and
- that the UCPR should be amended to include a new part providing for PICOs. This would include:
    - defining a 'public interest proceeding', and
    - expressly requiring Courts to make PICOs in public interest proceedings.

In particular, the EDO's 2010 Submission suggests a **two-step process** whereby:

1. the proceedings are declared as 'public interest proceedings'; and then
2. the costs order that the Court may make is limited to a (broadly defined) PICO.

The EDO suggested a PICO be defined to *exclude* an order that 'costs follow the event' (should the public interest applicant be unsuccessful), but should include orders such as 'no costs' orders, capped costs orders, a one-way cost shifting order or an indemnity.[25]

These recommendations aim to reform the substantive law by shifting costs away from public interest litigants; reduce the reliance on the 'infrequent' exercise of Court discretion;[26] and provide more certainty to litigants as to likely costs.

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heritage were denied a PICO, and which held that rule 4.2 of the *Land and Environment Court Rules,* which was introduced to improve access to justice, did no displace the usual order as to costs. See case study, p 5 of the EDO's 2010 Submission.

[20] See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)* [2010] NSWLEC 59 at [53]

[21] *Ibid,* at [53] per Preston CJ: "… it does not require that something more than the characterisation as public interest is always required… In some cases, something more may be required but in other cases nothing more may be required."

[22] See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)* [2010] NSWLEC 59 at [50].

[23] *Ibid*, at [59].

[24] Key recommendation 1, pp 2 and 6 of the EDO's 2010 Submission.

[25] Key recommendation 4, pp 2 and 9-10 of the EDO's 2010 Submission.

[26] As the Consultation Paper acknowledges (para 4.24), "There are cases where courts depart from the general rule on costs in public interest proceedings. These cases occur infrequently."

Power to make Public Interest Costs Orders

Consultation Paper – 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?

If question 4.1 is targeted at whether Courts have the jurisdiction to make PICOs, we believe the Courts already have this power due to the broad wording of section 98 of the *Civil Procedure Act 2005* (NSW).[27]

We are concerned that merely reiterating the Courts powers to make PICOs, and codifying some of the numerous factors which inform the Courts' discretion (see q. 4.4), will retain the complexity and uncertainty in this area of law – without providing any encouragement or certainty that the Courts will make more PICOs.

The key issue is the *infrequent exercise* of the Courts' discretion under section 98 and the LEC rules. This is particularly so given the presumption that 'costs follow the event' (rule 42.1 of the UCPR), and the flow on effects for requiring 'something more' to displace that presumption (as discussed above). The EDO's suggested two-step process would remove the application of rule 42.1 to public interest proceedings, in favour of a broad but defined range of PICOs to fit the proceedings at hand.

Defining Public Interest Proceedings

Consultation Paper – 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?

The EDO would supports a definition of 'public interest proceedings' as a threshold for whether or not a PICO is made.

We note the definition in the Consultation Paper which reflects ALRC Recommendation 45 (1995), and offer the following comments:[28]

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[27] Section 98 states: "(1) Subject to rules of court and to this or any other Act: (a) costs are in the discretion of the court, and (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid… (3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings. (4) In particular, at any time before costs are referred for assessment, the court ay make an order to the effect that the party to whom costs are to be paid is to be entitled to: (a) costs up to, or from, a specified stage of the proceedings, or (b) a specified proportion of the assessed costs, or (c) a specified gross sum instead of assessed costs, or (d) such proportion of the assessed costs as does not exceed a specified amount."

[28] *Recommendation 45 – public interest costs order*, is reproduced on p 92 of the Consultation Paper:
A court or tribunal may, upon the application of a party, make a PICO if the court or tribunal is satisfied that:

- *the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community*
- *the proceedings will affect the development of the law generally and may reduce the need for further litigation*
- *the proceedings otherwise have the character of public interest or test case proceedings. (cont'd…)*

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

1. Consistent with a two-step process that would require a PICO if the public interest threshold is met, we believe the definition should direct the Courts to grant PICOs in those circumstances (rather than providing for discretion);
2. The definition does not account for public interest proceedings where the application of environmental or other laws may be well settled, but they are not being adequately enforced (i.e. where the plaintiff is seeking enforcement in the public interest, even if the case may not raise 'novel' legal issues) – a new limb should be added to cater for this important circumstance;
3. It is unclear whether the definition in Recommendation 45, which refers to "the community or a significant sector of the community", could encompass protecting the interests of future generations (relevant to environmental law).
4. The definition does not make clear that (as is presumed) the Court may be satisfied of any one of the criteria in order to make a PICO. The word "or" should be inserted between each criterion to clarify this.
5. The non-exhaustive nature of the definition ('[or] the proceedings otherwise have the character…') allows for the further evolution of the law.
6. The EDO supports the explicit clarification that an applicant's own interests will not affect the public interest nature of the proceedings (i.e., as Recommendation 45 suggests, that PICOs remain available notwithstanding that the applicant has a "personal interest in the matter".[29]

Upfront Costs Orders

Consultation Paper – Question 4.3:

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

In our 2010 Submission, the EDO recommended: "the *Uniform Civil Procedure Rules* ('UCPR') should include provisions to enable courts to make 'upfront costs orders' in appropriate circumstances".[30] As discussed in that submission, the purpose is to provide applicants with certainty about the financial consequences of taking legal action. This is important for two reasons:

- First, preparation for the substantive proceedings, including the engagement of counsel, can proceed with confidence once the public interest litigant's position as to costs becomes known.
- Second, the public interest litigant can only proceed with full confidence once the time limit for appealing the PICO has expired, or once an appeal against a PICO is unsuccessful.

Without such orders, uncertainties about the costs of litigation will continue to restrain the courts' potential to serve the public interest.

[29] Recommendation 45 states: "…A Court or Tribunal may make a PICO notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter." See also Consultation Paper at [4.46].
[30] EDO's 2010 Submission, key recommendation 2, pp 3 and 7.

The ALRC's Recommendation 49 (1995) suggested empowering the Court to make upfront costs orders. That is: "The court or tribunal may make a PICO at any stage of the proceedings including at the start of the proceedings". However, the ALRC's proposal provides no guidelines on *when* the Court should exercise its discretion to make upfront costs orders. As such, Recommendation 49 may not enhance the current state of the law, as s 98 of the Civil Procedure Act (above) already provides for such discretion.

As the Consultation Paper notes – the need for an early determination of costs may have to be counterbalanced with the need to understand the nature of the proceedings, before they can be identified as public interest proceedings; also, the nature of the proceedings may be better ascertained at the end of the proceedings.[31]

To resolve this dilemma, NSWLRC may wish to adopt a provision providing, for example, that the Court should declare that proceedings are in the public interest and make a PICO at the outset, if it is *prima facie* satisfied that the proceedings are in the public interest; and that this finding will not prejudice the findings of the Court in the substantive proceedings.

'Discretionary Factors' when making PICOs

Consultation Paper – Question 4.4(1):

(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 … public interest costs orders?

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

In determining whether to make a PICO, the proliferation of discretionary factors created by the case law add to complexity and uncertainty in proceedings. In the EDO's view, they may be an unnecessarily high barrier to public interest litigants in obtaining PICOs. As noted above, these factors can relate to (among other things):

- what constitutes 'relevant, unrepresented' public interests,
- the requirement for 'something more' than mere public interest, or
- countervailing circumstances.

By contrast, under the EDO's proposed 'two-step process', demonstrating that a case has been brought in public interest would be the threshold for the first step (rather than a range of discretionary factors). If the public interest test is met, a range of costs orders would be available (noted above), apart from the usual order that costs follow the event where the public interest litigant is unsuccessful.

The low number of public interest cases brought in the Land and Environment Court, coupled with solicitors' professional obligations requiring reasonable prospects of success, should allay concerns of a 'flood' of PICOs if these factors are removed.[32]

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[31] See pages 93-94 of the Consultation Paper.

[32] Eg, we understand there were only five proceedings in 2010 to 2011 in which the LEC made, or would have made (but for other circumstances), a court order in favour of the public interest litigant pursuant to rule 4.2 of the LEC Rules. See, eg, *Kennedy v Stockland Development Pty Ltd and Anor (No 2)* [2011]

For example, in Queensland, 's 49 orders' have only been used in a handful of cases because the courts have taken a strict view in interpreting what meets the public interest criteria.[33]

In light of this proposed approach, we will not consider what 'discretionary factors' could be listed in legislation (Question 4.4(2)).

Types of Public Interest Costs Order (PICO)

Consultation Paper – Question 4.5:

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

In respect of question 4.5, we broadly agree that the types of PICOs available to the Court should include those set out in ALRC Recommendation 47 (1995).[34] However, under the EDO's proposed two-step process, if proceedings are found to be conducted in the public interest, Courts should *not* be able to make the usual order that costs follow the event if the applicant loses.[35] The two-step process envisages that favourable costs orders should be made provided the public interest is demonstrated. This mechanism would reduce the risk and deterrence of an adverse costs order and increase access to justice. (However, it is still within the Court's discretion to order a proportion of the costs against the public interest litigant.)

Finally, it should be made clear that PICOs may include not only a specified *proportion* of the other party's costs (as in Recommendation 47) but potentially a specified *quantum*.

NSWLEC 10 (11 February 2011); and *Gray and Anor v Macquarie Generation (No 3)* [2011] NSWLEC 3 (1 February 2011). We could only identify four other cases in which the proceedings *may* have been categorised as public interest proceedings, but a rule 4.2 costs order was not made for other reasons (such as lack of evidence, the existence of private interests and the lack of 'something more').

[33] Section 49 of the *Judicial Review Act 1991* (Qld) allows the court to make an order 'that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.'

[34] See Consultation Paper, pp 96-98. ALRC Recommendation 47 (1995) states: "The orders the court or tribunal may make include an order that:

- Costs follow the event
- Each party bears his or her own costs
- The party applying for the PICO, regardless of the outcome of the proceedings, shall
    - Not be liable for the other party's costs
    - Only be liable to pay a specified proportion of the other party's costs
    - Be able to recover all or part of his or her own costs from the other party
- Another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties."

[35] See page 10 of the EDO's 2010 Submission.

Maximum costs orders (UCPR rule 42.4)

Consultation Paper – 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?

As the Consultation Paper notes, this rule provides that courts may specify the maximum costs that one party may recover from another party (either of the court's own motion or at a party's request). The Consultation Paper initially considers this matter at [4.17-4.19]. It refers to *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150, and states:

> "In this case, Justice Pain emphasised that 'the power in r 42.4 is directed to the need to ensure that costs are proportionate to the issues… It is not a tool in the armoury of well intentioned public litigants.'[36] Her Honour did, however, consider the public interest to be one of a number of relevant considerations."

Similarly, in its summary of rule 42.4 at para [4.22], the Consultation Paper states:

> "It is a broad discretionary power, the purpose of which has been described as the curbing of disproportionate expenditure by the parties.[37] The structure and context of the UCPR "provide no assistance in considering the functions and scope of this provision."[38] As such, public interest considerations will only ever be one of multiple factors to be considered by the court."

However, this interpretation of the *BMCS* case in respect of rule 42.4 is problematic. As the EDO's 2010 submission notes, the objects of rule 42.4 are not limited to keeping costs proportionate. Rather, its aims include facilitating access to justice in particular circumstances, and access to justice was the critical question in the case.[39]

In particular, we note the quote of Justice Pain at para [4.19] of the Consultation Paper is found under the heading '*Defendant's Submissions'* in the judgment. Her Honour's position is better stated at [45]:

> "The rule [42.2] does not in terms refer only to matters arising in light of s 60 of the CP Act [*Civil Procedure Act 2005* (NSW)]. There is no basis in the CP Act and rules to restrict the application of the power to make costs order in r 42.4 in the way the Defendant submits. Public interest cases are another category of cases in which PCOs [protective costs orders] can be made if appropriate under r 42.4."

At the appellate level in the *BMCS* case, Basten JA's position is set out at [185-6, 190]:[40]

> "The relationship between r 42.4 in the UCPR and ss 56-60 of the *Civil Procedure Act* 2005 (NSW), which are partly reflected in r 42.4(3), supports the view that a costs capping order may properly be made to "curb the tendency of one or all parties to engage in disproportionate expenditure on legal costs", and to maintain "[p]roportionality of costs to the value of the result"… <u>However, it does not follow that those are the only circumstances in which an order can be made;</u> rather they reflect the

[36] *Blue Mountains Conservation Society v Delta Electricity* [2009] NSWLEC 150 at [32].
[37] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [134], [138] (Basten JA).
[38] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, [181] (Beazley JA, in dissent).
[39] See p 8 of the EDO's 2010 Submission.
[40] *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263.

> concerns which arose in that case… Where a broad discretionary power is conferred on a court, it is important that the full range or permissible considerations is identified and that limitations which do not find reflection in the language of the rule not be imposed. More recent cases have adopted this approach…
> [190] … As *Caroona* demonstrates, there is no call to limit the "principal objects" of r 42.4 in the way suggested by Drummond J in *Janisch* in relation to the Federal Court rule. Further, as subsequent litigation has demonstrated, public law cases have proved a separate and important area of its operation." (emphasis added)

In respect of question 4.7(2) above,[41] any additional use of rule 42.4 is more desirable if it increases access to justice for public interest litigants.[42] However, the EDO makes a further recommendation to facilitate this, so that maximum costs orders may be granted more frequently in favour of public interest litigants (reflecting the nature of the proceedings). This could be achieved by adopting key recommendation 3 in the EDO's 2010 Submission:

> "Rule 42.2 of the UCPR should be amended to make it explicit that there is no limitation on circumstances when a 'protective costs order' can be made, and that such orders are available in public interest proceedings."[43]

Location of PICOs and Maximum Cost Orders

Consultation Paper – Question 4.6:

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

Consultation Paper – 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 the* Uniform Civil Procedure Rules 2005 *(NSW) r 42.4, be relocated into s 98 of the* Civil Procedure Act 2005 *(NSW)?

In respect of questions 4.6 and 4.8, we note that relocating the power for PICOs and maximum costs orders to the *Civil Procedure Act* may provide more certainty and force, as the Consultation Paper suggests.[44] However, the location of these provisions is of secondary concern to their substantive effect. Furthermore, if the new provisions merely codify the existing rules, it will not assist in evolving the law in the public interest.

As noted in the EDO's recommendations (see p 4), we believe there is merit in clarifying powers and directions under the UCPR and the LEC Rules. It may also be considered whether legislative amendments are needed to avoid inconsistency between rules and legislation.

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[41] Question 4.7(2): "Should this rule [UCPR 42.4] be used more frequently in public interest proceedings?"
[42] We note the recent success of our client in *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137 in obtaining a maximum costs order for $10,000.
[43] Page 3 of the EDO's 2010 Submission.
[44] See [4.67] and

Public Interest Litigation Fund

Consultation Paper – 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?

We believe a public interest fund would be beneficial to public interest litigants. However, we would need further details about the proposal and its potential funding sources before we can be confident in answering question 4.9. We would welcome further exploration of this by the NSW LRC.

Security for Costs (Consultation Paper, Ch 2)

As noted in the EDO's 2010 Submission, the Land and Environment Court (**LEC**) has generally moved away from making security for costs orders in proponents' favour in public interest proceedings.[45] We noted this move was supported by the new discretion in LEC Rule 4.2(2).[46] The EDO believes the LEC does generally seek to ensure that security for costs orders do not stifle public interest litigation.[47]

However, as there remains considerable discretion regarding security for costs orders, uncertainty remains for public interest litigants. Such orders can still be used as a threatening 'tool' by respondents, adding additional time and cost to litigation.

We will not address in detail the questions on security for costs in Chapter 2 (eg, questions 2.6[48] and 2.7[49]). However, rather than adopting a list of discretionary factors in the UCPR for Courts to take into account in deciding on security for costs, we recommend:

> "There should be a clearly defined exemption in the UCPR from security for costs orders for litigants who can demonstrate that they are taking action in the public interest."[50]

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[45] Page 11 of the EDO's 2010 Submission.

[46] Rule 4.2(2) states: "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."

[47] See further discussion at p 11 of the EDO's 2010 Submission.

[48] Question 2.6 states: *"Should* Uniform Civil Procedure Rules 2005 *(NSW) r 54.21 be amended to provide a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs? If so… (c) should the list include public interest? If so, should the provision refer to "public interest" or "public importance"? (d) should the list include the impecuniosity of the plaintiff regardless of whether the plaintiff is a natural person or a corporation? Alternatively, would it be preferable to adopt a provision in the* Uniform Civil Procedure Rules 2005 *(NSW), separate from the list of discretionary factors, stating the general rule that security for costs shall not be ordered merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs that may be awarded against him or her?"*

[49] Question 2.7 states:
(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 the relationship of those factors with the jurisdictional grounds listed in* Uniform Civil Procedure Rules 2005 *(NS)W r 42.21(1) be? (2) Should such a relationship be stated in the* Uniform Civil Procedure Rules 2005 *(NSW) r 42.21 or should it be left for courts to develop?"*

[50] See EDO's 2010 Submission, p3

The characterisation of the proceedings as public interest proceedings should be the paramount and determinative factor when deciding whether to make an order for security of costs.

Matters Not Addressed in the Consultation Paper – Undertakings for Damages

The Consultation Paper invites consideration of issues not dealt with in the Paper itself (para [1.63]).

The Consultation Paper defines 'costs', in the context of its discussion of security for costs, as litigation costs comprised of legal advice and assistance and disbursements.[51] However, as the Paper notes (para [1.12]) the Inquiry's terms of reference are not limited to consideration of those matters alone.[52]

Notably, we understand the Consultation Paper does not consider:

- undertakings for damages in the context of interlocutory injunctions; or
- orders for security for costs associated with such undertakings for damages (for example, to ensure the party providing the undertaking can meet its responsibilities, or to supplement the undertaking where the potential damages exceed those covered by the undertaking).

In relation to these issues, we submit that the requirement of public interest litigants to provide security for damages that may arise from interlocutory injunctions is a significant bar to access to justice. This is particularly so for environmental law, the effectiveness of which is underpinned by the 'precautionary principle' as a means to prevent irreparable harm. In the absence of government resources or willingness to enforce the law, injunctions are one of the few remaining tools to prevent such harm. However, the requirement for 'undertakings for damages' may prevent such public interest litigation.

The EDO's 2010 Submission discuss the need to amend the law as it relates to the grant of an undertaking for damages (pp 12-13). Accordingly, we reiterate recommendation 6 in that submission, which states:

> "The *Land and Environment Court Rules* 2007 should be amended to prohibit the NSW Land and Environment Court from requiring public interest litigants to give an undertaking as to damages as a condition of granting an interim injunction."

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For further information regarding this submission, please contact
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[51] See page 5 of the Consultation Paper.

[52] Page viii of the Consultation Paper sets out the Terms of Reference which state "… 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…. 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".