SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION

CONSULTATION PAPER 13 – SECURITY FOR COSTS AND ASSOCIATED COSTS ORDERS

The New South Wales Law Reform Commission has produced Consultation Paper 13 on security for costs and associated costs orders. These comments address the following parts of the Paper.

1. Chapter 2 – gaps in the New South Wales statutory provisions, particularly r42.21 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), insofar as they apply to natural persons. Other stakeholders seem better placed to comment on gaps in Commonwealth statutory provisions, particularly s1335(1) of the *Corporations Act 2001* (Cth) and the issue of how corporate plaintiffs should be treated.
2. Chapter 3 insofar as it deals with issues in relation to commercial litigation funders and lawyers acting on a conditional basis. Legal aid is a specialised area and the Legal Aid Commission of New South Wales would seem best placed to comment on the law and practice on security for costs in this area. Similarly, issues relating to representative proceedings and matters in which lawyers are acting pro bono may be better addressed by lawyers who regularly conduct such actions.
3. Chapter 5.

CHAPTER 2 JURISDICTION TO ORDER SECURITY FOR COSTS

Security for costs has the potential to be a powerful weapon in a defendant's litigation armoury. The making of an order may effectively stop a plaintiff in their tracks, and there is a potential for wealthy defendants to use their superior resources to attempt to put a stop to litigation at an early stage by applying for security for costs. Any amendment that might encourage lengthy satellite litigation around security for costs should be discouraged.

Chapter 2 raises questions as to whether the existing case law should be codified, both as to the jurisdictional grounds for ordering security (Questions 2.1 and 2.3), the discretionary factors that may be taken into account (Questions 2.6 and 2.7) and the availability of security for costs against defendants (Question 2.12).

The argument that codification would make it easier for the courts, litigants and their legal representatives to identify the basis for a claim for security and relevant factors to be taken into account is a persuasive one. In this connection, it is noted sections 363 and 364 of the *Legal Profession Act 2004* list the matters that may be taken into account in assessing costs and provide useful guidance for practitioners, clients and costs assessors.

However, there may be a temptation to "shoehorn" a claim into one of the existing, listed factors rather than attempting to formulate new factors based on the facts of the case at hand. This may in turn tend to arrest the evolution of existing factors, and the development of new factors, in the case law.

On balance, provided the legislation makes it clear the list of factors is not exhaustive, a readily accessible legislative list of discretionary factors would seem desirable. The list in r672 of the *Uniform civil Procedure Rules 2009* (Qld) seems a suitable basis for such a list.

Chapter 2 also raises questions as to whether the New South Wales legislation should be amended so as to be consistent with other jurisdictions (Question 2.2). With the advent of a national legal profession imminent, it would seem desirable to provide consistency as far as possible.

CHAPTER 3 PLAINTIFFS ASSISTED BY PARTICULAR FORMS OF COSTS AGREEMENTS

Litigation Funding

A litigant who is indemnified by a third party for their costs may nevertheless be entitled to a costs order in their favour – *Dyktynski v BHP Titanium Minerals Pty Ltd* 60 NSWLR 203. McColl JA commented (at 220) that, in considering the indemnity principle, "*regard should be had to substance rather than form and to the real, as distinct from the nominal, plaintiff*".

Likewise, in considering the making of adverse costs orders and ordering security for costs, regard should be had to the substance of litigation funding arrangements, and the control such arrangements typically give to the litigation funder. Litigation funding is somewhat distinct and unique category of assistance and as such may warrant singling out for special treatment in terms of the costs orders that may be made, and the information to be provided to the courts to assist them in the making of such orders.

Against this background, the following responses are given to the specific Questions posted in the Paper.

Question 3.1 – it seems desirable to include the consideration that a plaintiff is receiving litigation funding in any legislative list of discretionary factors relevant to the court's exercise of the power to order security for costs. The definition proposed by NSW Young Lawyers seems suitable.

Question 3.2 – it seems desirable that there should be a legislative requirement to disclose at least the litigation funding arrangements in relation to costs, particularly those pertaining to adverse costs orders and security for costs.

Questions 3.3 and 3.4 – it seems desirable to give an express power to order costs, and security for costs, against litigation funders.

On the other hand, it is noted that the relevant case law in relation to litigation funding is recent and still developing. There may be an argument that the case law should be allowed to develop further before the power to order costs or security for costs against litigation funders, and the circumstances in which this may be done, are codified.

Conditional Costs Agreements

The decision in *Del Bosco* assumes a plaintiff's lawyer offering a conditional costs agreement is "*standing behind*" the plaintiff. However, typically such agreements provide for the lawyer to be paid only upon the successful outcome of the matter, and then form settlement money and/or party/party costs recovered. Disbursements may be paid by the lawyer as they arise or remain unpaid, and professional costs remain unpaid throughout.

In these circumstances, it would indeed seem "*perverse*" (as suggested by Slater and Gordon) to regard the existence of a conditional costs agreement to be a factor in favour of security for costs being awarded against a plaintiff. In answer to Question 3.5, this should not be a factor that can be taken into account.

CHAPTER 5 – PROCEDURES AND APPEALS

Determining the amount of security – Question 5.1

Costs consultants are often called upon to provide expert evidence in security for costs applications, and may be best placed to identify problems that arise in assessing an appropriate amount of security. Ultimately, they can only provide an assessment based upon a prediction of the work that is likely to be required to be done, and the likely length, nature and complexity of the proceedings. In doing so, they must rely heavily upon information provided by the defendant's lawyer, and there may be a temptation for the defendant's lawyer to overstate the work likely to be required.

The assistance a costs assessor may be able to provide on the hearing of a security for costs application is likewise likely to be limited unless the costs assessor is also an accredited specialist or experienced lawyer practising in the same area of law as the matter forming the subject of the security for costs application.

The use of a non-binding lawyers' fee scale is not supported as it may fetter the Court's discretion and may not take into account alternative methods of charging that may be used by a defendant's lawyer.

Form of security – Question 5.2
Whilst it may be desirable to list possible forms of security identified in the case law to date, codification has the potential to arrest the development of new and innovative forms of security unless any amendment makes clear that the list is not exhaustive.

Stay of proceedings until security is given – Question 5.3
The imposition of an automatic stay of proceedings seems logical and consistent with the purpose of a security for costs order, and might have the consequences suggested by Fairfax Media. However, retention of the Court's discretion provides a final safeguard against abuse of the security for costs provisions.

Dismissal of proceedings for non-compliance with order – Question 5.3
No comment

Appeals against order – Question 5.5
Varying or setting aside the order – Question 5.6
If case law recognises the possibility of an appeal, or the power to vary or set aside a security for costs order, then in the interests of transparency and access to justice, it would seem desirable to capture that in the legislation, using the statements of principle and tests contained in case law. It may be desirable to impose a requirement to obtain leave so as to limit the potential for costly and time consuming satellite litigation over security for costs.

Finalising the security – Question 5.7
It seems desirable to provide a default procedure for dealing with costs ordered as security, as happens with reserved costs (see UCPR r42.7).

Security for costs in appeal proceedings – special circumstances – Question 5.8
If case law interpreting the existing provisions gives little effect to the "special provisions" requirement, then in the interests of transparency and access to justice, it seems desirable to either remove the requirement and/or list examples of the factors a court may have regard to, as gleaned from the case law.

Security for costs in appeal proceedings – placing the power to order security in statute – Question 5.9
No comment

Security in applications for leave to appeal – Question 5.10
Statutory power to dismiss an appeal for failure to provide security – Question 5.11
In the interests of consistency and access to justice, it would seem desirable for all courts to be on the same footing as regards the power to order security for costs in applications for leave to appeal, and the power to dismiss an appeal for failure to provide security, particularly given nature and value of claims now being dealt with by, for example, the District Court.

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Commissioner

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