LawCover

Terms of Reference 126:
Security for Costs and Associated Costs Orders

Preliminary Submission

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SUMMARY

LawCover submits that:

(a) Uniform Civil Procedure Rules (UCPR), rule 42.3, requires amendment in order to provide powers to the courts of New South Wales to make costs orders against commercial litigation funders who are not parties to proceedings;

(b) further rules of court are required in order to facilitate such powers including the disclosure to the Court and other parties to proceedings of the existence of funding arrangements and the terms of funding agreements;

(c) Rule 42.21(1) of the UCPR should be amended to provide an additional ground on which the Court may order security for costs where there is a non-party funder funding the proceedings for commercial profit;

(d) Amendments should be made to the Civil Procedure Act 2005 (NSW) (*CPA*) and/or the UCPR to give explicit powers to the New South Wales courts to deal with funders as a part of the courts' overall power to make orders with respect to the management and supervision of proceedings. Such powers should co-exist with any regulation of commercial litigation funders by the Australian Securities & Investments Commission (*ASIC*).

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1. LawCover

1.1 The LawCover Group consists of LawCover Pty Limited, LawCover Insurance Pty Limited and LawCover Plus Pty Limited. The LawCover companies are subsidiaries of the Law Society of New South Wales.

1.2 The Law Society in each state and territory operates its own professional indemnity insurance scheme. In practice, firms with offices in more than one state or territory are able to purchase insurance cover with their preferred scheme. LawCover is the only APRA licensed legal profession-owned insurance scheme in Australia.

1.3 In order to practise, solicitors in New South Wales are required to have compulsory professional indemnity insurance. Each solicitor is required to have a minimum of $2 million compulsory professional indemnity cover, which was increased from $1.5 million from 1 July 2009.

1.4 LawCover Insurance Pty Limited provides compulsory professional indemnity insurance to New South Wales solicitors pursuant to the *Legal Profession Act 2004* (NSW), as well as optional top-up professional indemnity insurance in addition to the compulsory layer of insurance.

1.5 For most solicitors in NSW, their professional indemnity insurance is provided by LawCover. LawCover insures approximately 14,000 solicitors. The terms of cover are approved by the NSW Attorney-General, and are made available to the principals or directors of each firm. LawCover's policy wording is also published on its website, which can be accessed by any member of the public.

1.6 The limit of indemnity under LawCover's policy of insurance includes any claim payment (such as payment of a settlement or judgment) and defence costs. Any costs incurred in defending a claim erode the remaining amount which is available to indemnify the insured solicitor for any settlement or judgment sum. Once the limit of indemnity has been exhausted, the solicitor will be required to fund any claim payment or defence costs from his or her own resources. It is therefore in the interests of the firm concerned and the legal profession as a whole to ensure that litigation can be managed efficiently at the minimum possible cost.

1.7 LawCover in most cases has the conduct of litigated claims against solicitors insured by it. This has been the position since the commencement of the LawCover scheme in 1980. As such, LawCover is very experienced in defending litigation in New South Wales, and we offer our comments in response to the Commission's call for preliminary submissions.

1.8 LawCover's objectives include the minimisation of claims costs and claims payments. At the same time, LawCover has obligations to protect its capital base (including to meet APRA requirements), to provide competitive premiums and to ensure the continued viability of the LawCover scheme.

1.9 Although plaintiffs can often regard professional negligence claims as "insurance claims", it remains the case that the defendants are individuals who have a strong interest in defending their professional reputations and who may be exposed to claims in excess of their insurance cover. Protracted litigation can impact upon a solicitor's professional reputation and private life, and can incur hidden costs such as time spent preparing for the defence of a claim.

1.10 LawCover's total claim costs (including defence costs) are in the order of $50 – 60 million annually.

2. Litigation funders

2.1. Recent developments both in the courts and in the business community have had the effect that litigation funders have entered the mainstream of litigation in New South Wales. The High Court's decision in *Campbells Cash and Carry v Fostif Pty Ltd*[1] held that an agreement by a non-party, for reward, to pay or contribute to the cost of a party in instituting and conducting proceedings is not, of itself, an abuse of the Court's processes.

2.2. Earlier, in 1993, the common law offence of champerty which had made it an offence for a non-interested party to finance another person's litigation for profit, was disposed of in the *Maintenance, Champerty and Barratry Abolition Act (NSW)*.

2.3 Legislation such as the *Maintenance, Champerty and Barratry Abolition Act (NSW)* and authorities, including *Fostif*, have endorsed the involvement of litigation funders as being legitimate. As a result of these factors, and the prevailing commercial environment, litigation funding is now a feature of the litigation

1. (2006) 229 CLR 386.

landscape and LawCover submits that it is now appropriate and necessary for this to be acknowledged in the rules of Court.

2.4 There has been a range of judicial views as to whether litigation funding represents a misuse of the courts for private profit or whether it is a useful and desirable means by which litigants can prove their rights[2]. LawCover's submission is that, regardless of individual views as to the merits of litigation funding, funders are becoming a more significant participant in litigation in New South Wales and are increasingly likely to be so in the future. The rules of court should therefore recognise this reality.

2.5 In recent years LawCover has dealt with numerous claims against its insured solicitors which have been supported by commercial litigation funders. Litigation funders can range from highly sophisticated commercial investors to individuals or groups of individuals who can be little different to lenders of last resort. The more sophisticated funders include listed companies with many shareholders. Regardless of the precise nature, size or sophistication of the funder, they comprise or represent private investors who do not have an interest in the subject of the litigation other than as a speculative investment in the outcome of the workings of the justice system. While LawCover recognises that such factors no longer are treated as attracting labels such as "champerty and maintenance" or "abuse of process", nevertheless the nature of litigation funding as a form of private investment for profit needs to borne in mind in considering the extent to which funders should be subject to the same consequences faced by other litigants (including as to costs) who genuinely do have an interest in the underlying subject matter of the dispute.

3. The absence of power of courts in New South Wales to order costs against commercial litigation funders

3.1 The courts currently have a wide discretion to order costs. The general power is found in **section 98 of the CPA**. Section 98(1) relevantly provides:

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[2] Einstein J of the Supreme Court of New South Wales wrote extra-curially an article (with co-author Simone Krauss) entitled *"Liquidators, litigation funding and security for costs: Echoes of maintenance and champerty in the exercise of the court's discretion"*: 31 Australian Bar Review (2008). The article commented on a decision of the New South Wales Court of Appeal in *Green v CGU* [2008] NSWCA 148 which concerned security for costs. Einstein J, who had been the trial judge, commented that the differing views of the members of the appeal court in *Green* was demonstrative of differing judicial views with respect to litigation funding generally. His Honour noted at 208:

> *"For Hodgson and Campbell JJA, litigation funding, whilst perhaps not of itself contrary to public policy, nonetheless represents a misuse of the public forum of the courts for private profit. This is clear from Hodgson JA's assertion that 'the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made'. In contrast, Basten JA appears to have accepted litigation funding as a useful and desirable tool which can allow a party without means (including a corporation in liquidation) to litigate its grievances and prove its rights."*

(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, and

(c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

3.2 This power is subject to the provisions of **rule 42.3 UCPR**, which provides:

"(1) Subject to rule 42.27, the court may not, in the exercise of its powers and discretions under section 98 of the Civil Procedure Act 2005, make any order for costs against a person who is not a party.

(2) This rule does not limit the power of the court:

(a) to make an order for payment, by a relator in proceedings, of the whole or any part of the costs of a party to the proceedings, or

(b) to make an order for payment, by a person who:

(i) is bound by an order made, or judgment given, by the court in proceedings or is bound by an undertaking given to the court in proceedings, and

(ii) fails to comply with the order or the judgment or breaches the undertaking,

of the whole or any part of the costs of a party to the proceedings occasioned by the failure or the breach, or

(c) to make an order for payment, by a person who has committed contempt of court or an abuse of process of the court, of the whole or any part of the costs of a party to proceedings occasioned by the contempt or abuse of process, or

(d) to make an order for costs against a person who purports, without authority, to conduct proceedings in the name of another person, or

> *(e) to make an order for costs against a person who commences or carries on proceedings, or purports to do so, as an authorised director of a corporation, or*
>
> *(e1) in the case of proceedings in the Land and Environment Court, to make an order for costs against a person who carries on proceedings as a party's agent, or*
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> *(f) to make an order of the kind referred to in rule 42.27, or*
>
> *(g) to make an order for costs in exercise of its supervisory jurisdiction over its own officers, including solicitors, barristers and court appointed liquidators."*

3.3 The power granted by section 98(1) CPA extends to making costs orders against non-parties, including litigation funders. In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 the High Court held that a wide discretionary power, similar to that expressed in s98(1) CPA, in the Rules of the Supreme Court of Queensland gave the court the power to order costs against a non-party.

3.4 Following *Knight*, the predecessor to rule 42.3 UCPR (being Pt 52 r 4 of the Supreme Court Rules) was introduced by *Supreme Court Rules (Amendment No 274)* 1993. The explanatory note describes the purpose of the amendment as being *"to restrict the power of the court in making a costs order against a person who is not a party"*.[3]

3.5 It is conceivable that those drafting the amendment did not have in mind the prospect of large scale commercial litigation funding as is now being seen or if they did (remembering that the provisions were drafted well prior to *Fostif*) that they considered that those arrangements would be captured by the abuse of process exception.

4. The decision of the High Court in *Jeffery & Katauskas Pty Ltd*

4.1 On 13 October 2009, the High Court put to rest any argument that non-party litigation funders could be the subject of direct costs orders in New South Wales. In *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd & Ors*[4] the

[3] See *Wentworth v Wentworth & Ors* [2000] NSWCA 350 per Heydon JA at [162].
[4] [2009] HCA 43.

High Court held that a non-party funder of litigation could not be subject to a costs order made in reliance on the abuse of process exception to r42.3(1) found in r42.3(2)(c), even where the funder stood to make a significant profit from the litigation if successful, without providing an indemnity for adverse costs orders.

4.2 In *Jeffrey*, the relevant facts were that a litigation funder provided funding for the action in return for a significant share of the proceeds of any judgment, but did not provide an indemnity for adverse costs orders. It was this feature that was said to distinguish the arrangements from those considered in *Fostif*. *Jeffery & Katauskas* argued that such an arrangement was an abuse of process as the successful defendant would be required to meet the action, funded by the significant resources of a non-party, but be left to pursue an impecunious plaintiff for its costs if successful.

4.3 In rejecting *Jeffery & Katauskas'* argument, the majority of the Court held that:

a. The bare fact that a plaintiff may be unable (even will be unable) to meet an adverse costs order does not mean that further prosecution by proceedings by that plaintiff is an abuse of process, and

b. Absent a finding of abuse of process or contempt of court,[5] the fact that the funder of the litigation would not be liable to meet an adverse costs order is a product of the applicable rules of court, thereby restricting the otherwise general powers given to the courts of New South Wales in section 98(1) of the *Civil Procedure Act*.

4.4 As such, the courts of New South Wales have no power to order costs against litigation funders directly.

4.5 It is LawCover's submission that rule 42.3 is now out of date. The state of the law, and the litigation environment generally, has moved on significantly since the rule was first introduced. As a result, LawCover submits the rules do not adequately deal with the involvement of litigation funders.

4.6 LawCover submits that in order to adapt to the current climate, and to avoid the result seen in *Jeffrey*, rule 42.3(2) should be amended to provide an exception to the operation of sub-rule 1 for litigation funders.

[5] Two of the limited exceptions provided for in sub-rule (2) of rule 42.3.

4.7 In the absence of such amendments, successful defendants in funded actions in the New South Wales Courts have the following options:

(a) pursue recovery against an (almost invariably) impecunious plaintiff;

(b) rely on the plaintiff to enforce an obligation in the funding agreement (should there be one) for the funder to meet the costs order; or

(c) rely on any security for costs that has been obtained, which will almost inevitably result in successful defendants still being left with a very significant shortfall in the recovery of their costs, even on a party/party basis.

4.8 This is a state of affairs which fails to recognise the new reality of the involvement of litigation funders in the litigation landscape. LawCover submits that a successful defendant should not, having been forced to meet an action funded by a non-party for profit, be left without recourse to recover its costs.

5. Security for costs: an inadequate remedy

5.1 The majority in *Jeffrey* noted that the development of the remedy of security for costs went some way to meeting part of the unfairness that was alleged to arise in circumstances in which a plaintiff is impecunious and unable to meet a costs order. Their Honours said that to the extent that there would be a shortfall between what the defendant actually incurred and what was provided as security, that was a product of the security for costs regime and not as a result of any unfairness or abuse of process. Their Honours pointed out that the rules will not permit the ordering of costs against the funder unless the principles of abuse of process are engaged. This result was an incident of rule 42.3, and not as a result of the common law.

5.2 Although an order for security may well be available, it is not an automatic entitlement and is not available in every case.

5.3 While rule 42.21(1) sets out a number of limited grounds for ordering security for costs, the Supreme Court has a wide inherent discretion[6] and can and does take account of a wide number of considerations in the exercise of its

[6] The Supreme Court in New South Wales has an inherent jurisdiction to award security for costs. That jurisdiction is not available in the District Court.

discretion, which in practice means that it is often difficult to predict the outcome of an application for security.

5.4 Furthermore, it is a fundamental principle underlying the grant for security for costs that the amount awarded is never intended to be a full indemnity to the defendant for its costs.[7] Although in determining the amount of security to be ordered, the Court may base its decision on a general estimate provided by the defendant, the Court is not bound to accept such an estimate of the costs likely to be incurred. An application for security should be made promptly at an early stage of the proceedings and there is in practice a general reluctance by the Courts to award a significant sum by way of security, even when litigation funders are involved. It is often necessary for a defendant to make more than one application to "top up" the security that has been ordered.

5.5 When these factors are combined, it is not difficult to see that a successful defendant may face very serious prejudice if there is no recourse against the funder.

5.6 As to the adequacy of reliance on security for costs, LawCover respectfully adopts the views of Mason CJ and Deane J in *Knight* (at [28]) where their Honours said:

> *"No doubt [security for costs] is an appropriate remedy in many cases but there are limitations attaching to the availability of security for costs. These limitations are such that security for costs is not a remedy in all cases in which justice calls for an order for the award of costs against a non-party. Security cannot be ordered against a defendant or a plaintiff who is an individual and who resides in the jurisdiction. The amount awarded as security is no more than an estimate of the future costs and it is not reasonable to expect a defendant to make further applications to the court at every stage when it appears that costs are escalating so as to render the amount of security previously awarded insufficient. And the availability of the remedy is scarcely a reason for denying the existence of jurisdiction to make an order for costs against the 'real party' at the end of the trial of an action."*

5.7 LawCover also respectfully adopts the following views of Hodgson JA in *Green v CGU* [2008][8]:

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[7] See *Brundza v Robbie & Co No. 2* (1952) 88 CLR 171.

[8] See *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 per Hodgson JA at [51] and [61]. In this case the defendant insurer sought security of approximately $2.6 million from the plaintiff, who was a liquidator backed by a litigation funder. The defendant had spent costs in excess of $1.5 million at the time of making the application. The Court at

> *"Although litigation funding is not against public policy (Campbells Cash and Carry Pty Limited v Fostif Pty Limited [2006] HCA 41; 229 CLR 386 at [87]-[95]), the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails."*
>
> *"I think it is right that the court should be concerned to ensure that a litigation funder, involved in the litigation purely for commercial profit, should not be able to avoid responsibility for costs if the litigation fails, or be in a position where there may be obstacles in the way of a successful defendant obtaining costs from such a funder."*

5.8 While these comments were made in the context of an application for security for costs, the principles articulated by Hodgson JA are equally relevant to the wider question of the power of a Court to order a litigation funder to pay the costs of a successful defendant at the conclusion of proceedings where security for costs has not been awarded or where the security provided was inadequate.

5.9 In *Green*, the Court of Appeal relied on its inherent jurisdiction to order security rather than its powers under the UCPR. The Court considered the substantial costs incurred by the defendant and the involvement of a litigation funder to be factors which took the case outside the normal position in which a liquidator suing personally would otherwise be in the position of an ordinary plaintiff and therefore generally liable to an order for security for costs only in the limited circumstances set out in rule 42.21(1) of the UCPR[9].

5.10 **LawCover submits that the UCPR rule 4.21(1) should be amended to provide for an additional ground on which the Court may order security for costs where there is a non-party funder funding the proceedings for commercial profit.**

first instance ordered the plaintiff to provide security of $450,000 and declined to award security for the past costs. A majority of the Court of Appeal (including Hodgson JA) upheld the order for security but on different grounds.

[9] Per Hodgson JA supra at [60] and [61].

6. The potential for injustice occasioned by the current operation of UCPR rule 42.3

6.1 LawCover submits that the result in *Jeffery* is contrary to the interests of justice, although we recognise of course that the judges of the High Court were constrained by the rules of court they were required to apply.

6.2 The majority of the High Court identified the outcome in *Jeffery* to be an incident of UCPR Rule 42.3 and the limitations of the protection provided by security for costs orders. The majority recognised [at 39] that "whether or to what extent the possibility that a defendant will succeed in defending proceedings only at a cost not recoverable from the plaintiff suggests some need to revisit the provisions or the principles governing security for costs is a large question. It was not the subject of argument and is a question about which no view is expressed".

6.3 The operation of the present regime can represent an extremely costly outcome for defendants who succeed in obtaining verdicts in their favour but who nevertheless face the prospect of being significantly out of pocket. In some large cases, the shortfall can be a sum in the order of many millions of dollars. If such occurrences are frequent, it is likely that insurers will need to increase their premiums in order to recoup the costs expended in the successful defence of funded actions.

Case Histories

6.5 The Commission will no doubt be aware that the company liquidators frequently pursue litigation in an attempt to recover money in favour of the company's creditors. Proceedings brought by liquidators following large corporate collapses are extremely expensive to defend, as there is the potential for many witnesses to be examined and for tens of thousands of documents to be discovered. However, there will usually be no assets held by the company which can be used to pay any adverse costs order. Similarly, a costs order cannot be enforced against the individual creditors or, as can be seen above, the litigation funder. The defendant in such a case must defend an action knowing it has little if any prospect of recovering its costs, even if it receives a verdict in its favour.

LawCover offers the following examples of its past experience in defending claims brought by funders:

6.5.1 *Example (1)*

- A company with administrators appointed to it and which was subject to deeds of company arrangement commenced proceedings against 4 law firms.
- The deeds were put in place for the purpose of facilitating the litigation.
- The assets of the company to meet claims by creditors were mainly comprised of the cause of action which was the subject of the litigation, and any proceeds of that litigation.
- The conduct of the proceedings was funded by a litigation funder, which provided an indemnity to (amongst other things) meet adverse costs orders against the plaintiff company.
- The company's litigation against the law firms was unsuccessful.
- Prior to judgment, the litigation funder terminated the indemnity agreement.
- The defendant law firms' costs are collectively in a sum of millions of dollars.
- The company's liabilities exceed its assets by several million dollars even before regard is had to the judgment in favour of the law firms.
- Following the decision in *Jeffery*, it is clear that there is no basis under UCPR Rule 42.3, or pursuant to any inherent jurisdiction of the Court, for seeking a costs order directly against the litigation funder.

6.5.2 *Example (2)*

- A major law firm successfully defended proceedings in which a "lost profits" claim of $1 billion was brought. There were primary and excess layer insurers for the law firm which conducted the defence.
- The funder did not respond to correspondence by the law firm's solicitors seeking recovery of costs for the proceedings at first instance.
- The law firm's party / party costs were subsequently assessed at $4.8 million. The law firm was successful in appeal proceedings commenced by the claimant.
- The law firm filed an application seeking an order that the funder pay the appeal costs as the funder would not confirm liability.

- The law firm made an offer of $5.5 million for the costs at first instance and on appeal.
- The funder alleged that a deed of indemnity it had entered into was not enforceable and that a director of the funder had acted without authority.
- After lengthy negotiations, LawCover was able to recover only $385,000 from the funder with a shortfall in excess of $5 million.

6.6 LawCover is also aware of other examples, the details of which it is not at liberty to disclose. However, the point LawCover wishes to make in this regard is that there are insured solicitors (albeit small in numbers) who face the prospect of the limit of indemnity of the LawCover policy being eroded entirely by defence costs in New South Wales proceedings. Those solicitors have small, suburban practices and do not have the means to meet large defence costs bills. If the solicitors are successful in their defences, they may still become bankrupt or be otherwise financially crippled in the event they cannot recover costs from an impecunious plaintiff who had entered into arrangements with a litigation funder.

7. Consistency with the position in the Federal Courts

7.1 In the Federal Court there is no impediment of the kind found in rule 42.3 against obtaining costs orders against litigation funders. LawCover submits that there should be consistency between the different jurisdictions in relation to whether costs orders may be obtained from litigation funders.

8. Disclosure of funding arrangements

8.1 In conjunction with LawCover's submissions that rule 42.3 be amended to include an exception for commercial litigation funders, LawCover considers that the amended rules could be circumvented in the absence of disclosure of the existence of the funding arrangements. Accordingly, LawCover submits that the Uniform Civil Procedure Rules should be amended with the effect that:

- a litigation funder's involvement in a proceeding should be disclosed to the court and the other parties at the outset of the proceedings by filing a notice stating the fact of funding and identifying the funder; and
- the funded party should file and serve on all parties a copy of the funding agreement either with the originating process or within 14 days of the funding agreement being entered into.

9. Definition of a litigation funder for the purposes of the suggested amendments

9.1 LawCover acknowledges that drafting of an appropriate definition of 'litigation funder' for the purposes of the suggested amendments poses some difficulty. There is a need to ensure that any amendments capture the type of funding arrangements seen in *Fostif* and *Jeffrey* but not so wide as to capture other arrangements which are not of that nature.

9.2 In suggesting the above reforms, LawCover has in mind those funders who provide funding in return for a reward or profit, usually a significant percentage of any judgment obtained. However, LawCover acknowledges that there are some arrangements, which may be strictly considered to be funding arrangements, which should not be caught by any such provisions. In this respect, LawCover has in mind arrangements between family members where funding is provided for an action in return for the money being repaid.

9.3 However, whatever the definition, LawCover submits that the power to order costs against a funder ought to be exercised at the discretion of the Court in each case according to the interests of justice. Whilst LawCover suggests that there ought to be a general presumption in favour of making the order against a funder, that presumption should be able to be displaced so that certain funding arrangements which do not carry with them the characteristics of commercial funding as considered in *Fostif* and *Jeffrey* do not attract the effect of the provisions. This would ensure that in each case, appropriate consideration is given to whether the orders ought be made against the funder, having regard to all of the circumstances of the case, including the conduct of the proceedings generally and the terms of the relevant funding agreement.

9.4 Another feature of litigation funding is that the funding arrangements are often structured such that the 'funder' is a corporate (with no or very limited assets) or not the real beneficiary of the arrangements. This gives rise to the very real risk that any amendments to the rules to permit the courts to order that funders pay costs will be of little practical benefit unless the real funder (or the ultimate beneficiary) is made the subject of those orders. Thus, the drafting of any changes needs to carefully consider the definition of the funder.

10. Increased Regulation of Commercial Litigation Funders

10.1 LawCover notes the Full Federal Court decision in *Brookfield Multiplex v International Litigation Funding Partners* [2009] FC AFC 147 in which the Full Federal Court held that litigation funding arrangements for two representative actions were managed investment schemes for the purposes of the *Corporations Act 2001,* requiring registration or relief by ASIC. ASIC subsequently provided transitional relief to 30 June 2010 for actions commenced prior to 4 November 2009. LawCover understands that the Federal Minister for Financial Services, Superannuation and Corporate Law has commenced an inquiry into the extent to which funders should be regulated by ASIC. However, it may be that not all litigation funding agreements would fall within the managed investment scheme provisions.

10.2 Whilst the overall regulation of commercial litigation funders is beyond the scope of the terms of reference, LawCover suggests that through amendment to the CPA and/or UCPR, explicit powers should be given to the New South Wales courts to deal with funders as a part of the overall power to make orders with respect to the management and supervision of proceedings before then. As litigation funders have become a regular participant in litigation, usually with a significant commercial interest in its conduct and outcome, LawCover submits that New South Wales courts ought to have the express power to exercise a level of supervisory jurisdiction over funders that are involved in proceedings before the courts.

10.3 Whilst any inappropriate conduct on the part of the funder which may interfere with the court's processes and the administration of justice generally would likely be subject to the court's power to punish for contempt, LawCover submits that the courts should be given the power to exercise a level of general supervision over funders involved in litigation before them. Funders play a significant role in litigation and have an interest in the outcome of litigation but they are not subject to professional standards (as are practitioners) or immediate supervision by the courts (as are parties). Given the involvement that litigation funders have in litigation, and their potential to affect its conduct, LawCover submits that funders ought to be subject to the court's processes and supervision to the same extent as parties and legal practitioners. LawCover submits that such a power should, in addition to the suggested amendments to rule 42.3 outlined above, extend to making orders against funders for costs when the funders have caused a waste of costs through the

conduct of the funder, similar to the power to order costs against practitioners found in s99 of the CPA.

10.4 LawCover is aware of one instance of a person who identified himself as "funding" certain proceedings making threats to the solicitor representing a LawCover insured, and also the insured firm, if the funder ultimately did not achieve a satisfactory result in the litigation. LawCover does not suggest that such behaviour is common; however, it is most improper and has the potential to interfere with the administration of justice. It is conceivable that less reputable funders may direct similar actions towards defendants themselves. **In the absence of regulation of the litigation funding industry, LawCover submits that the courts in New South Wales ought to be given supervisory powers to control the conduct of funders in order to prevent such occurrences.**

10.5 LawCover would be pleased to provide clarification of any aspect of these submissions or to provide supplementary submissions if required.

Yours faithfully

P. McGahen.

Paul McGahen
Chief Executive Officer
LawCover Pty Limited