NEW SOUTH WALES BAR ASSOCIATION

NSW Law Reform Commission – Inquiry into the Law and Practice relating to Security for Costs and Associated Orders

SUBMISSION

I. INTRODUCTION

1. This document is a submission made by the New South Wales Bar Association to the New South Wales Law Reform Commission in response to the Commission's "Consultation Paper 13" dated May 2011 and entitled "Security for Costs and Associated Costs Orders", a copy of which was provided to the Association by the Commission under cover of a letter dated 19 May 2011.

II. THE BAR ASSOCIATION ADHERES TO ITS PRELIMINARY SUBMISSION

2. The Association adheres to the submissions made to the Commission in its Preliminary Submission dated 8 February 2011 including, in particular, paragraphs 14-16 and 19-22.

III. THE SCOPE OF THE CURRENT SUBMISSION

3. The Consultation Paper contains a multitude of detailed questions to which the Association does not expressly respond in light of its submission (in paragraph 21(a) of its Preliminary Submission) that UCPR Rule 42.21 should be recast so as to confer on all courts a broad statutory power to make security for costs orders.

4. Were such a broad power to be conferred on courts governed by the *Civil Procedure Act* 2005 (NSW) (CPA) and the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) some of the Commission's questions would fall away. See, for example, the questions noted in the Consultation Paper as Questions 2.2, 2.3, 2.4, 2.5 and 2.7. The courts would also be able, by the exercise of a broad discretionary power, to avoid substantial debates about proof of "jurisdictional grounds".

5. The object of the Association's current submission is to respond to particular issues of concern, with particular reference to the seven "key issues" expressly identified in the Commission's letter dated 19 May 2011. Each of the Commission's numbered Questions has, however, been addressed.

IV. THE FIRST KEY ISSUE: SHOULD COURTS BE GIVEN A BROAD STATUTORY POWER TO MAKE SECURITY FOR COSTS ORDERS? (Consultation Paper, Questions 2.1, 2.6, 2.8, 2.9 and 2.12)

6. The Association submits that courts governed by the Civil Procedure legislation should be granted an express power to make orders for security for costs, on their own motion or on the application of any party, against any party, whenever it appears to them that such an order is required in the interests of justice, taking into account a non-exhaustive list of factors.

7. That power should be granted by an amendment of UCPR Rule 42.21.

8. The question of "security for costs" should be dealt with separately from the general "costs" power found in CPA s 98 so as to maintain its distinct conceptual identity.

9. Provided it is expressed to be a non-exhaustive list of factors to which a court "may" have regard, the list of factors for consideration identified in Rule 672 (incorporating, by reference, Rule 671(a)) of the Uniform Civil Procedure Rules 1999 (Qld) would be appropriate for adoption in New South Wales.

V. THE SECOND KEY ISSUE: SHOULD COURTS HAVE THE POWER TO ORDER COSTS AND SECURITY FOR COSTS AGAINST LITIGATION FUNDERS? (Consultation Paper, Questions 3.1, 3.3 and 3.4)

10. The courts should have a power to make orders for costs, and orders for security for costs, against non-parties if it appears to them that such an order is required in the interests of justice.

11. Insofar as concerns an order for security for costs against a non-party such as a "litigation funder", Rule 25.14 of the Civil Procedure Rules 1998 (UK) provides a template which might usefully be adopted.

VI. THE THIRD KEY ISSUE: SHOULD COURTS HAVE EXPRESS LEGISLATIVE POWER TO ORDER SECURITY FOR COSTS AGAINST REPRESENTATIVE PLAINTIFFS? (Consultation Paper, Question 3.6)

12. CPA s 181 should be amended to confirm that the courts do have legislative power to order security for costs against representative plaintiffs, taking into account the plaintiffs' representative status as a factor relevant to whether any (and, if so, what) order for security should be made.

VII. THE FOURTH KEY ISSUE: 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? (Consultation Paper, Question 3.9)

13. Legislative protection against exposure to personal costs orders (under provisions such as CPA s. 99 and s. 348 of the *Legal Profession Act* 2004 (NSW)) should be given to lawyers who provide legal services as part of a legal aid or pro bono scheme approved by Legal Aid New South Wales or referred by the New South Wales Bar Association or the Law Society of New South Wales.

14. An exemption to exposure to personal costs orders should not be expressed so generally as to apply simply to lawyers who are acting "pro bono". The expression "pro bono" is too imprecise a term in its usage by sections of the legal community. Confinement of any exemption to a scheme approved by Legal Aid New South Wales or referred through legal assistance schemes operated by the relevant professional bodies would ensure that its operation could be monitored. Legal Aid New South Wales administers legal aid funding. The Bar Association and the Law Society administer the practising certificates issued to lawyers.

VIII. THE FIFTH KEY ISSUE: DOES THE LAW AND PRACTICE ON SECURITY FOR COSTS APPLY SATISFACTORILY IN THE CASE OF PLAINTIFFS WHO ARE SUPPORTED BY LEGAL AID? (Consultation Paper, Question 3.7)

15. The Association adheres to the submission made in paragraph 22(b) of its Preliminary Submission to the effect that consideration should be given to express legislative authorisation for Legal Aid New South Wales to make grants of legal aid by entry into costs agreements with private lawyers on terms analogous to a "conditional costs agreement" or a "speculative action" fee arrangement.

16. The Association acknowledges the statement made in paragraph 3.93 of the Consultation Paper that the Commission's terms of reference do not extend to an examination of the ways of providing more funding for Legal Aid New South Wales or the issue of funding civil matters where litigants do not have the resources to fund litigation in general.

17. The Association's invitation to the Commission to address the Legal Aid Commission's legislative authority to enter into costs agreements was not intended to broach upon either of the topics identified by the Commission as outside its terms of reference.

IX. THE SIXTH KEY ISSUE: IS THERE A NEED FOR NEW LEGISLATION TO GIVE COURTS THE POWER TO MAKE PUBLIC INTEREST COSTS ORDERS? (Consultation Paper, Question 4)

18. The Association cautions the Commission against adoption of any proposal for a general departure from the general rule (embodied in UCPR *rule* 42.1) that "costs follow the event".

19. The availability of "public interest costs orders" should be confined to particular jurisdictions, such as the Land and Environment Court, in which "public interest" litigation is routinely encountered. It should not be extended to courts generally.

20. Although the general rule that "costs follow the event" can operate harshly in particular cases, it is an important cornerstone of the system of civil litigation. It should not be the subject of substantial modification without careful consideration and public debate directed specifically at it.

X. THE SEVENTH KEY ISSUE: 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)? (Consultation Paper, Questions 4.7 and 4.8)

21. The Association submits that no amendment of CPA s 95(4)(c) or UCPR Rule 42.4 is necessary, and the application of those provisions should be left to courts dealing with particular cases.

XI. SUNDRY ISSUES

22. Subject to any request from the Commission for elaboration, or reconsideration, of particular issues, the Association responds as follows to the following Questions set out in the Consultation Paper (which do not appear to have been identified in the Commission's list of "key issues"):

    (a) Question 2.10: The Association submits that the proposed changes to procedural and evidentiary rules are unnecessary to enable justice to be done in particular cases and might, despite their beneficial intention, expose corporate plaintiffs to oppressive burdens.

    (b) Question 2.11: The Association submits that the better course is to confer upon the courts a broad statutory discretion (consistent with s. 1335(1) of the *Corporations Act* 2001 (Cth)) and leave to them the application of that discretionary power in particular cases.

    (c) Question 3.2: The Association submits that (although the question of automatic, compulsory disclosure of litigation funding agreements might be reviewed in light of experience) the better course would be to refrain from imposing mandatory disclosure requirements at this stage.

(d) Question 3.5: The Association accepts that, on exercise of a broad statutory discretion, a court could, in an appropriate case, take into account the fact that a plaintiff's lawyer is acting pursuant to a conditional costs agreement. However, it is disinclined to embrace the idea that the terms of a plaintiff's lawyer's retainer should be expressly nominated as a factor to be taken into account, lest that nomination be taken as a suggestion that an examination of the terms of a retainer is necessary on all applications for security. The fact that a plaintiff's lawyer is acting pursuant to a conditional costs agreement does not, of itself, require or justify an order for security for costs. As the Association made clear in its earlier Preliminary Submission, in the area of personal injury litigation, for example, where the vast majority of plaintiff litigation is conducted on a speculative fee basis, the general application of security for costs orders would have serious implications for access to justice.

(e) Questions 3.7 and 3.8 (and paragraph 3.100): The Association accepts that there may be utility in conferral upon courts of a discretionary power similar to that found in s 194 of the *Legal Services Act* 2007 (UK). It might focus the minds of a plaintiff's lawyers upon consideration of whether they should act on a speculative retainer (in which they have a prospect of costs recovery themselves) or a truly pro bono retainer (in which they have no prospect of costs recovery for themselves). It might also deprive unsuccessful defendants of a windfall arising from the fact that party-party costs (based upon the traditional indemnity principle) cannot be recovered against them if the successful plaintiff has been represented without any exposure to a liability for solicitor-client costs. It might help funding of pro bono activities generally.

(f) Question 4.9: The Association submits that, unless an examination is undertaken of the resource implications of the proposal that a "public interest fund" be established, it would be best for the Commission to refrain from entertaining that proposal.

(g) Question 5 (other than Question 5.1(3), which is addressed in paragraph 22(c) of the Association's Preliminary Submission): The Association submits that no substantial modification of procedural rules governing questions of security for costs is required (and, if required, it is better left to the Uniform Rules Committee to address in light of experience from time to time).

XII. CONCLUSION

23. If there are particular issues upon which the Commission seeks the assistance or views of the Association, the Association invites the Commission to nominate them.

22 August 2011