

## **CGU Submission to the NSW Law Reform Commission – Security for Costs and Associated Orders**

CGU Insurance welcomes the opportunity to make the following submissions to the NSW Law Reform Commission inquiry into law and practice relating to security for costs and associated orders.

CGU is part of the IAG Group. It provides a wide variety of insurance products which provide coverage for various claims including personal injury, motor vehicle, property damage, and professional negligence.

Many of these insurance products cover legal defence costs where a plaintiff pursues issues legal proceedings on an insured to recover damages (for example in a personal injury claim or claim for professional negligence).

CGU, like all insurers, frequently face the situation where, after successfully defending a litigated claim against its insured at trial, find that costs order awarded in favour of its insured is of no benefit as the unsuccessful plaintiff does not have the financial means to pay the costs orders imposed by the court.

CGU agrees and supports the principle that impecuniosity should not bar a claimant from bringing legal proceedings to enforce their legal rights. However, it is of the view that the current rules and practice in regard to orders for security for costs are too narrow and need to be reformed to strike a better balance between protecting a plaintiff's right to litigate a claim regardless of their financial means and ensuring a successful defendant is not unduly exposed to the cost of defending a litigated claim.

Therefore CGU makes the following submissions:

1. The Uniform Civil Procedure Rules (NSW) r 42.21 be expanded to provide a broad based ground for courts to order security for costs where an order is necessary in the “interests of justice”.

This would reflect and incorporate the Supreme Court's inherent jurisdiction to make security for costs orders<sup>1</sup> and the implied power of the District Court to make orders for security for costs<sup>2</sup> beyond the five current grounds outlined in UCPR r 42.21.

2. In expanding these grounds the UCPR (NSW) r 42.21 should be amended to provide a list of discretionary factors the courts should consider in deciding whether to make an order for security for costs.

These discretionary factors should include:

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<sup>1</sup> Bahr v Nicolay (No 1) (1987) 163 CLR 490, 494 (Toohey J).

<sup>2</sup> Phillips Electronics Pty Ltd v Matthews (2002) NSWCA 157 [51].

- i. whether the plaintiff's claim is vexatious or the plaintiff is a vexatious litigant;
- ii. the bona-fides of the claim;
- iii. the prospects of the claim succeeding or merits of the proceeding;
- iv. whether there has been delay by the plaintiff in issuing proceedings that has prejudiced the defendant;
- v. the costs of the proceedings;
- vi. whether the claimant has failed, without reasonable excuse, to comply with court timeframes (thereby increasing costs);
- vii. whether the plaintiff has dissipated assets or not paid previous costs orders in favour of the defendant.

### **Security for Costs Orders against Litigation Funders**

CGU also submits that legislation should be adopted that gives courts express statutory power to order security for costs orders against litigation funders.

As outlined in NSW Law Reform Commission Consultation Paper 13, litigation funders are not bound by the same rules of ethics in terms of their duties to the plaintiff or the court<sup>3</sup>. Furthermore, their express purpose of funding the litigation is to profit from the outcome of a success in the proceedings. In these circumstances it is reasonable that litigation funders also bear the risk of exposure to costs should the claim they are funding fail.

Similarly, provision for security for costs orders to be made on litigation funders also provides some safeguard for funded plaintiff's who may otherwise be fully exposed to an adverse costs order in the event that their claim fails at trial.

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<sup>3</sup> NSWLRC Consultation Paper 1, *Security for costs and associated orders*, NSW Law Reform Commission, Sydney 2011, p 69.