NEW SOUTH WALES BAR ASSOCIATION

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

PRELIMINARY SUBMISSION

I INTRODUCTION

1. This document is a Submission by the New South Wales Bar Association to the NSW Law Reform Commission's "Inquiry into the Law and Practice relating to Security for Costs and Associated Orders". It has been prepared in response to an invitation made by the Commission in a letter dated 11 December 2009 addressed by the Honourable James Wood AO QC, Chairperson of the Commission, to Mr TF Bathurst QC, President of the Association.

2. In making its invitation to the Association the Commission:

   (a) drew attention to the Commission's Terms of Reference (received from the Attorney General, the Honourable John Hatzistergos, on 8 December 2009) pursuant to section 10 of the *Law Reform Commission Act 1967 (NSW)*;

   (b) invited the Association to make a "preliminary submission" directed to (but not limited by) those Terms of Reference; and

   (c) advised the Association that the Commission would invite further comment from the Association as its inquiry progresses.

3. The purpose of the Association's "Preliminary Submission" is to assist the Commission to engage questions referred to it for report and, with the benefit of contributions from stakeholders such as the Association, to formulate such proposals for reform as might, in the Commission's assessment, warrant closer attention.

4. Pending the formulation of a proposal for reform the Association formally reserves a right to review its attitude to any and all issues that might arise in connection with the Commission's Inquiry.

II THE COMMISSION'S TERMS OF REFERENCE

5. In substance, the Commission's Terms of Reference (communicated to the Association under the heading "Security for costs and associated costs orders") are:

   (a) to enquire into and report on whether the law and practice relating to security for costs and 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.

(b) in undertaking that review, to consider in particular whether or not the law and practice:

(i) is consistent with modern notions of access to justice;

(ii) adequately takes into account the strength of the plaintiff's case and whether the litigation is in the public interest;

(iii) applies satisfactorily in the case of incorporated plaintiffs, impecunious plaintiffs, self-represented litigants, and plaintiffs who are supported by legal aid;

(iv) operates appropriately where solicitors are acting on a speculative fee [basis], where parties are funded by third parties, in representative proceedings, and in cross-border litigation;

(v) contains adequate procedures for making and determining applications for relevant orders – for example, in respect of timing, and in respect to their expeditious and efficient disposition; and

(vi) requires any modifications in respect of appeals.

(c) to consider whether the *Uniform Civil Procedure Rules 2005 (NSW)* ("UCPR")in relation to Security for Costs and associated orders are adequate, and any related issue.

III THE ASSOCIATION'S ASSUMPTIONS ABOUT THE NATURE AND AMBIT OF THE COMMISSION'S INQUIRY

6. In approaching these Terms of Reference, and in preparation of these "Preliminary Submissions", the Association makes the following assumptions about the nature and ambit of the Commission's Inquiry:

(a) an object of the Commission's invitation to the Association to make "preliminary submissions" is to advance the process of identifying issues that might reasonably be thought to arise from the Terms of Reference even if not literally encompassed by them.

(b) although the heading to the Terms of Reference uses the expression "associated costs orders", the "associated orders" to which the Terms of Reference themselves refer are not necessarily limited to "costs orders" as such.

(c) the Terms of Reference are primarily, if not exclusively, directed towards the conduct of "civil", as distinct from "criminal", proceedings. The Association also notes that, so far as civil proceedings are concerned, it is most unusual to have security for costs orders in family law litigation or personal injury litigation. In the area of personal injury, for example, the vast majority of litigation is conducted on a speculative fee basis. The

greater general application of security for costs orders in these kinds of jurisdictions would have serious implications for access to justice.

It may be that security for costs orders may have some role to play in relation to large-scale class action personal injury claims which involve litigation funders. The presence of the litigation funders in these kinds of matters makes them more akin to commercial rather than personal injury litigation.

With regard to the scope of the Commission's inquiry, the Association submits that the focus should be on commercial litigation and its equivalents in civil matters. The application of security for costs orders most frequently and appropriately arises in the commercial context as it is there that parties are most frequently a foreign litigant or a corporate entity. The inquiry need not extend to consider areas of civil law where security for costs orders have little application – family law, small scale disputes in the Small Claims Division of the Local Court and standard personal injury claims.

(d) although directed primarily towards the conduct of "civil proceedings" the Terms of Reference implicitly recognise that:

(i) civil proceedings – no less than "criminal proceedings" – might involve important public interest considerations beyond the interests of the litigants named as parties in the proceedings; and

(ii) all proceedings engage public interest considerations insofar as they involve the deployment of public resources and the public has an interest in the due administration of justice.

(e) the Terms of Reference are directed primarily to the conduct of proceedings in courts in which there is a general power to award costs and are not intended to authorise or direct an inquiry as to the conduct of proceedings in which costs orders cannot be, or generally are not, made.[1]

(f) the Terms of Reference are not intended to call into question the general rule that costs follow the event (embodied in rule 42.1 of the UCPR) in courts in which such a rule presently applies.

(g) the primary focus of the Terms of Reference is upon the operation of the UCPR in the context of:

(i) the reforms to civil procedure effected by the *Civil Procedure Act 2005 (NSW)* ("CPR"); and

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[1] This assumption excludes from consideration, for example, the law and practice of: (a) the Administrative Decision Tribunal, governed by provision such as section 88 of the *Administrative Decisions Tribunal Act 1997 (NSW)* and section 566 of the *Legal Profession Act 2004 (NSW)* ("LPA"); and (b) the Land and Environment Court insofar as, in some classes of jurisdiction, orders for costs are not routinely made.

(ii) the ongoing process of reform associated with implementation of the CPA (incorporating the UCPR) and extension of that legislation to courts and tribunals beyond those to which it applied upon its commencement on 15 August 2005.

7. For the record, at the time of preparation of these "Preliminary Submissions" the UCPR apply (with some qualifications) to proceedings in the Supreme Court of New South Wales, the Land and Environment Court, the District Court, the Dust Diseases Tribunal and the Local Court: UCPR rule 1.5 and Schedule 1.

IV THE EXISTING LEGISLATIVE REGIME

8. The jurisdiction to make orders for, or relating to, the provision of security for costs is generally found in legislation although (as found in *Rajski v Computer Manufacture & Design Pty Limited* [1982] 2 NSWLR 443, affirmed at [1983] 2 NSWLR 122 and confirmed in *Green (as liquidator of Arimco Mining Pty Limited) v CGU Insurance Limited* [2008] NSWCA 148; 67 ACSR 105) the Supreme Court of New South Wales, as a superior court and with the benefit of section 23 of the *Supreme Court Act 1970 (NSW)*, has an "inherent jurisdiction" which extends to the making and enforcement of orders for security.

9. Subject to review the by Uniform Rules Committee (pursuant to powers conferred on the Committee by CPA section 9 incorporating, inter alia, paragraphs 16, 18, 19 and 26 of Schedule 3 to the CPA), the principal legislative provisions relating to security for costs orders in courts governed by the CPA are found in the UCPR, and in particular:

   (a) UCPR rule 42.21, in relation to proceedings generally.

   (b) UCPR rule 50.8, in relation to appeals to the Supreme Court.

   (c) UCPR rule 51.50, in relation to proceedings in the Court of Appeal.

   (d) UCPR rule 5.6, in relation to applications for preliminary discovery.

   (e) UCPR rule 39.17, in relation to costs of the sheriff upon execution of a judgment.

10. Of these provisions, the most significant (because of its general application and its enumeration of circumstances in which an order for security might be made) is UCPR rule 42.21. The rules relating to preliminary discovery (UCPR rule 5.6) and the costs of execution of a judgment (UCPR rule 39.17) are directed to particular steps that are not necessarily taken in all proceedings and in which a party might be required to provide security as a price for obtaining particular assistance. The provisions relating to appeals (UCPR rules 50.8 and 51.50) have a field of operation predicated upon the existence of a judgment under appeal pursuant to which, subject to the grant of a stay, a respondent may have a right to proceed to execution; not uncommonly, the question whether an appellant should be required to provide security for the costs of an appeal will fall to be determined in the context of an application for a stay, which provides an

opportunity to assess the parties' respective rights and obligations pending determining of the appeal.

11. Although UCPR rule 42.21 provides a focal point for consideration of orders for security for costs, it is not the only legislative provision that requires consideration. That is because:

    (a) section 1335 of the *Corporations Act 2001 (Cth)* empowers courts (defined in sections 9 and 58AA of the Act) to make orders for security against corporate plaintiffs.

    (b) the jurisdiction to stay proceedings (eg, under CPA section 67), or otherwise to regulate their conduct (under, eg, CPA sections 61-62 and UCPR rule 2.1), might be sufficient to support imposition of a condition that security be provided as the price of interlocutory relief being granted or withheld in a particular case, as recognised in *Philips Electronics Australia Pty Limited v Matthews* (2002) 54 NSWLR 598.

    (c) particular classes of proceedings might, by their nature, involve a head of jurisdiction not available in proceedings generally. For example:

        (i) proceedings relating to the management or administration of trust property governed by sections 59, 63 and 93 of the *Trustee Act 1925 (NSW)* and equitable jurisdiction generally.

        (ii) section 29 of the *Admiralty Act 1988 (Cth)*.

    (d) by the same token, particular classes of litigant (notably, liquidators governed by the *Corporations Act 2001 (Cth)* and trustees in bankruptcy governed by the *Bankruptcy Act 1966 (Cth)*) might require consideration in the context of their statutory obligations. See, for example, *Green (as liquidator of Arimco Mining Pty Limited v CGU Insurance Limited* [2008] NSWCA 148; 67 ACSR 105.

    (e) although section 47 of the *Legal Aid Commission Act 1979 (NSW)* does not deprive courts of jurisdiction to order that a legally aided person provide security for costs, the fact that a person has a grant of legal aid and that section 47 might accordingly limit the costs entitlements of an adversary can be taken into account upon exercise of the jurisdiction: *Rajski v Computer Manufacture & Design Pty Limited* [1983] 2 NSWLR 122.

12. In a broader sense, any review of "the law and practice relating to security for costs and associated orders" must place that "law and practice" in the context of the dynamics of the conduct of court proceedings, bearing in mind that the necessity for, and availability of, security for costs might in practice be associated with questions such as:

    (a) the identity, character and status of parties (including whether or not a party is a corporation, trustee or the holder of an office).

(b) the character of particular proceedings, including the extent to which they might involve public interest considerations and/or questions about the standing of a party claiming relief (eg, in proceedings instituted in the Land and Environment Court pursuant to s.123 of the *Environmental Planning & Assessment Act* 1979 (NSW)).

(c) the availability or otherwise of legal representation of parties.

(d) the availability or provision of legal aid.

(e) the provision of legal services to a party or parties on a *pro bono* or speculative fee basis.

(f) the possibility that a party might have the benefit of litigation funding, and the terms upon which any such funding is provided.

(g) the ability and preparedness of courts to make orders limiting the recoverability of costs in the proceedings.

(h) the range of costs recoverable in proceedings, particularly in the absence of "scales" designed to govern the quantum of costs recoverable.

13. Without pausing to review each legislative provision which might have a bearing on topics such as these, reference is made to the following provisions as potentially, contextually relevant to a review of "the law and practice relating to security for costs and to associated orders":

(a) CPA sections 60 (proportionality of costs), 67(stay of proceedings), 98 (general power to award costs) and 99 (personal costs orders against lawyers).

(b) UCPR rules 42.3, 42.4, 42.7(2) and 42.32.

(c) LPA section 348 (personal costs orders against lawyers).

V SHOULD THE LAW BE REFORMED?

14. The Commission would be justified in forming an opinion that legislative reform of "the law and practice relating to security for costs and to associated orders" would be timely if only to clarify, and consolidate, the principles applicable.

15. A number of factors point in that direction. They include the following:

(a) The terms in which UCPR rule 42.21 is expressed reflect terminology that predates enactment of the CPA and adoption by the court system in New South Wales of a philosophy of active "case management". The terms of rule 42.21(1), in particular, reflect an era in which court proceedings were viewed more as a contest between individual litigants than they are now. Acknowledging the importance of private rights, case management philosophy gives greater emphasis than was formerly the case to the

interests of the public in the application of public resources to the settlement of disputes.

(b) The terms in which UCPR rule 42.21(1) is expressed might be thought to be inadequate in that:

(i) the rule does not confer a general discretion to make an order for security against a natural person (although the inherent jurisdiction of the Supreme Court, aided by SCA section 23, does extend to the making of such orders).

(ii) the rule is in terms limited to the making of orders for security against plaintiffs (and, by virtue of UCPR rule 9.1(3), cross claimants) even though costs might be unnecessarily incurred in proceedings due to the conduct of a party irrespective of which side of the record is occupied.

(iii) the rule is in terms limited by the necessity of an application by a party.

(iv) even if the circumstances identified in the rule are not taken to be exhaustive of the circumstances in which an order for security can be made, the terms of the rule might be thought to limit the operation of whatever other jurisdiction might be available in support of an order for security.

(v) despite the fact that there appears to be a general consensus about many of the factors able to be taken into account in deciding whether or not an order for security should be made (as to which see, for example, *Green (as liquidator of Arimco Mining Pty Limited) v CGU Insurance Limited* [2008] NSWCA 148; 67 ACSR 105) most of those factors find no reflection in the terms of the rule.

(c) In a court system (such as that governed by the CPA and the UCPR) in which parties can be ordered to engage in compulsory mediation there might be thought to be merit in a proposal that a court should be empowered (upon a report by a court-appointed mediator) to impose an order for security on a party (on any side of the record) who might be thought to have acted unreasonably in conduct of the proceedings.

(d) In a court system (such as that governed by the CPA and the UCPR) that aspires, so far as practicable, to have uniform rules in operation throughout courts, it might be thought desirable to ensure that all courts have similar powers relating to security for costs and that those powers should be coextensive with (if not expressly defined by reference to) the inherent jurisdiction of the Supreme Court.

(e) The growth of commercial litigation funding operations in the years since enactment of the *Maintenance, Champerty and Barratry Abolition Act 1993 (NSW)*, coupled with the possibility that litigation funders might

have effective control of proceedings and stand to obtain substantial benefits from proceedings without exposure to the risks inherent in being a party to proceedings, might be thought to justify an extension of the courts' powers to require security to be provided.

(f) In that context, and generally, there appears to be no justification for the limitation in UCPR rule 42.3 of the courts' power to make costs orders against non-parties.[2]

(g) The growth of national and trans-national proceedings in New South Wales courts might be thought to render desirable conferral of a general power to make orders for the provision of security for costs unaffected by the "gravitational force" of UCPR rule 42.21(1) (to adapt the language of Mason P in *Philips Electronics Australia Pty Limited v Matthews* (2002) 54 NSWLR 598 at [13]).

(h) Bearing in mind that the Australian and State governments have increasingly encouraged the systematic provision of *pro bono* legal services, and at the same time lawyers have been increasingly exposed to the risk of personal costs orders under provisions such as CPA section 99 and LPA section 348, there might be merit in recasting legislative provisions governing orders for the provision of security for costs so as to clarify the rights and obligations of all parties and provide protection for lawyers who provide *pro bono* services on a referral, or approved, by the Legal Aid Commission of New South Wales, the Bar Association or the Law Society of New South Wales (if not more generally). Threats of foreshadowed applications for personal costs orders, in the absence of security for costs, are a not infrequent occurrence which militates against the provision of *pro bono* services (or the provision of services on a speculative fee basis) in all but cases assured of success, thereby limiting access to justice.

(i) Revision of UCPR rule 42.21(1) would permit clarification of the terms upon which "public interest litigation" might be conducted without the provision, or availability, of security for costs.

(j) Since the abolition of "fee scales" formerly used in the taxation of costs, courts and the legal profession have lacked the benefit of an objective standard against which, inter alia, to measure applications for security for costs, and parties are accordingly required in each case to adduce evidence about rates of fees being charged, and fees reasonably chargeable, in a relatively unrestrained "market".

16. If and to the extent that legislative reform might be desirable, allowance should be made for the desirability of any legislative change being harmonized with the law and practice operative in Australian courts other than those of New South Wales.

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[2] Whether or not UCPR rule 42.3 is repealed by the Uniform Rules Committee upon consideration of *Jeffery & Katauskas Pty Limited v SST Consulting Pty Limited* [2009] HCA 43, the availability or otherwise of jurisdiction to make an order for costs against a non-party might reasonably be thought to be relevant to whether or not an order for security should be made against a party.

17. Upon a review of "the law and practice relating to security for costs and associated orders" broader issues about access to justice (including the availability of legal aid, *pro bono* services and speculative actions) inevitably arise for consideration. This is implicitly acknowledged by mention of those topics in the Commission's Terms of Reference. Accordingly, and in that context, the Association invites the Commission to consider whether criticism of (a) budgetary constraints on the availability of legal aid; (b) the reluctance of some lawyers to undertake work at legal aid rates; and (c) the unpreparedness of some private lawyers to provide services on a speculative fee basis in any but cases assured of success, might be muted if the Legal Aid Commission were to be expressly authorized by statute, and encouraged, to make grants of legal aid on terms analogous to a speculative fee retainer or a conditional costs agreement which contemplate that, in the event of success in proceedings, a lawyer could recover a more commercial rate of remuneration (recoverable on a party-party assessment).

IV A PROVISIONAL SUBMISSION

18. The facts that (a) the Commission's Inquiry is presently in its early stages, (b) there is a need to crystallise the issues raised by the Commission's Terms of Reference and (c) the Submissions the Association has been invited to make are intended to bear a "preliminary" character pending further consultation, militate against anything but a provisional expression of views about the Terms of Reference by the Association.

19. Nevertheless, the Association can, and does, submit that (for the reasons and in the respects outlined above) there are substantial grounds upon which the Commission could recommend to the Attorney General that aspects of "the law and practice relating to security for costs and to associated orders" could benefit from reform. In particular, there is a need to provide a clear statement of: (a) the ambit of the jurisdiction of courts generally to make and enforce orders for security for costs; and (b) factors which can, or should, be taken into account in the exercise of that jurisdiction.

20. In that context, the Association submits that:

    (a) the UCPR might usefully be amended to ensure that all courts to which they apply have an express power to make orders for security for costs that is conferred by reference to a single, broadly defined criterion (co-extensive, in substance, with the inherent jurisdiction of the Supreme Court), coupled with a non-exhaustive list of factors that might be taken into account and which, by their enumeration, might be expected to provide guidance as to the due exercise of the power in ordinary cases.

    (b) the list of factors that might be taken into account upon the exercise of such a power might usefully be based upon the discussion of Hodgson JA in *Green (as Liquidator of Arimo Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148; 67 ACSR 105.

(c) conformably with CPA section 5(1), the inherent jurisdiction of the Supreme Court (which provides an important reservoir of power in the administration of justice) should be preserved.

21. Accordingly, the Association invites the Commission to recommend to the Attorney General (and, through the Attorney, to the Uniform Rules Committee as may be appropriate) that:

(a) UCPR rule 42.21 (and any ancillary legislative provisions) should be amended:

(i) to recast rule 42.21(1) so as to confer on all courts 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.

(ii) to incorporate an express statement that access to the courts is not, as a general rule, contingent upon the availability or provision of security for costs but that, in the interests of justice, a court to which the UCPR apply may make orders relating to security.

(iii) to confirm that the power of the courts to make orders relating to security for costs extend to orders for the provision of security relating to costs incurred in the past, as well as costs likely to be incurred in the future, conduct of proceedings.

(b) UCPR rule 42.3 should be repealed and the power of the courts to make orders for costs against non-parties in the interests of justice should be expressly confirmed.

22. On the same, provisional basis the Association invites the Commission to recommend to the Attorney-General that (with all due consultation with the Courts and other stakeholders):

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

(b) Consideration should be given to express legislative authorisation (by such amendments of the *Legal Aid Commission Act 1979 (NSW)* and the LPA as might be necessary) for the Legal Aid Commission to make grants of legal aid by entry into costs agreements with private lawyers on terms analogous to a "conditional costs agreement" such as is contemplated by LPA section 323(1) or a "speculative action" fee arrangement such as contemplated by *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203.

(c) Consideration should be given to the publication by NSW Courts of fee scales similar to the "National Guide to Counsel Fees" published annually by the Federal Court of Australia, most recently on 4 December 2009 (with effect from 4 January 2010).

8 February 2010