SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION WITH RESPECT TO ITS CONSULTATION PAPER 13

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Question 3.1

(1) In my view there is no need to have an express provision in the UCPR that litigation funding is a relevant factor in security for costs applications as NSW judges will no doubt take into account this important fact when considering applications for security for costs orders in "funded" proceedings.
(2) If, contrary to my recommendation, the UCPR is amended I would like to draw the NSWLRC's attention to a useful definition of litigation funder contained in the proposed rules of court (designed to govern class actions in New Zealand) recently drafted by that country's Rules Committee: see note 61 of the attached article "Reining in Litigation Entrepreneurs: A New Zealand Proposal" which will be published in the September 2011 issue of the *New Zealand Law Review* ("NZLR article").

Question 3.2

(1) Given that a disclosure requirement already exists with respect to Federal and Victorian class action proceedings - as a result of paragraphs 3.6 of the Federal and Victorian Practice Notes on class action proceedings (see note 128 of the NZLR article) - I do not see any problems with a similar statutory provision with respect to all NSW proceedings (not just class action proceedings).

Question 3.3

(1) Not necessary. It is clear that, as a result of the repeal of UCPR r 42.3, NSW trial judges have the power to award costs against litigation funders, as is the case with trial judges in other Australian jurisdictions: see note 126 of the NZLR article. I would also like to draw to the NSWLRC's attention the fact that my empirical study of Federal class actions has not revealed any instances of funding agreements not encompassing adverse costs awards or of litigation funders failing to honour these commitments when such orders (including security for costs orders) have been made in favour of a respondent in funded class actions: see pp 15-16 of the NZLR article for the latest empirical data.

Question 3.4

(1) Not necessary. See answer to question 3.3 above.

Question 3.6

(1) In paragraph 3.80 of Consultation Paper 13, the NSWLRC notes that "in *Bray v F Hoffmann-La Roche Ltd* ('*Bray*') the Full Federal Court held that ordering security against representative plaintiffs was inconsistent with the immunity

conferred on represented claimants by s 43(1A)". Unfortunately, that is not correct. On the contrary, a number of comments were made by the Full Federal court justices in their individual judgments which envisaged the award of security for costs orders in favour of class action respondents in a greater number of circumstances than had previously been recognised by single justices of the Federal Court. In my view, the approach adopted by the Full Federal Court in *Bray* is, with respect, inappropriate and likely to deal to undesirable outcomes if applied by trial judges presiding over class action litigation: see pp. 249-257 of the attached *Canterbury Law Review* article. Thus, to ensure that NSW trial judges do not apply *Bray* I would recommend a legislative formulation of the factors that judges should consider when asked to issue security for costs orders against representative plaintiffs in NSW class actions. These factors/criteria should, in my opinion, seek to introduce for NSW class actions the scenario that existed with respect to Federal class actions in the pre-*Bray* era. This scenario is outlined in pp. 249-257 of the Canterbury article.