Maurice Blackburn
Lawyers
Since 1919

NEW SOUTH WALES LAW REFORM COMMISSION

SUBMISSION OF MAURICE BLACKBURN PTY LIMITED ON SECURITY FOR COSTS AND ASSOCIATED COSTS ORDERS

17 AUGUST 2011

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17 August 2011

New South Wales Law Reform Commission
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Dear Sir/Madam,

Re: Consultation Paper 13 on security for costs and associated costs orders

We make these submissions in response to the New South Wales Law Reform Commission's Consultation Paper 13 of May 2011 in relation to security for costs and associated costs orders ("the **Consultation Paper**"). We have previously made a submission in respect of the New South Wales Law Reform Commission's inquiry into security for costs and associated costs orders by way of our preliminary submission dated 26 February 2010 ("our **Preliminary Submission**"), a further copy of which is **enclosed**.

(1). Introduction

1.1 These submissions will address selected questions, as contained in the various chapters comprising the Consultation Paper. Specifically, we will address the following:

- Chapter 2 – Jurisdiction to order security for costs;
- Chapter 3 – Plaintiffs assisted by particular forms of costs agreements;
- Chapter 4 – Public interest and protective costs orders; and
- Chapter 5 – Procedures and appeals.

We also repeat the contents of our Preliminary Submission in relation to the questions identified below, where applicable.

1.2 Maurice Blackburn Pty Ltd is a national plaintiff law firm with offices in New South Wales, Victoria, Queensland and Western Australia. It is one of the leading plaintiff law firms in Australia and conducts a number of claims on a speculative basis whereby it funds the proceeding on behalf of plaintiffs who may be unable to finance their own legal claims and who would otherwise be precluded from bringing meritorious actions. The NSW practice provides plaintiff legal services in the areas of personal injury, medical negligence, superannuation (total and permanent disability), industrial and employment, class actions and commercial claims.

1.3 Maurice Blackburn is a leader in the field of class actions in which we assist natural persons and business victims of mass wrongs. This includes claims arising from misleading or deceptive conduct, price fixing and market rigging, the manufacture and sale of defective products, breaches of continuous disclosure obligations under the *Corporations Act 2001* (Cth) and provisions of the *Corporations Act*, the former *Trade Practices Act, ASIC Act*, the state Fair Trading Acts and other consumer protection provisions.

1.4 Maurice Blackburn has acted in a number of significant class actions including: *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd; King v AG Australia Holdings Limited* (formerly GIO Australia Holdings Limited); *Courtney v Medtel Pty Ltd*; *Dorajay Pty Ltd v Aristocrat Leisure Limited*; *P Dawson Nominees Pty Ltd v Multiplex Limited*; *Bray v F. Hoffman – La Roche Limited*; *Jarra Creek Central Packaging Shed v Amcor Limited and Ors*; *Watson v AWB Limited;* and *Hobbs Anderson Investments Pty Limited v Oz Minerals Limited*.

1.5 In the NSW Supreme Court Maurice Blackburn acted for the plaintiff in *Barbara O'Sullivan v Challenger Managed Investments Limited* (2007) 214 FLR 1, a decision that prompted an amendment to the former representative procedure rule (r7.4 *Uniform Civil Procedure Rules* ("**UCPR**")).

1.6 The class action regime was introduced in some Australian jurisdictions from 1992. There is a scarcity of decided case law in respect of class actions due, in part, to: the tendency for actions to be settled prior to trial or judgment; the high cost of running class actions and the models for funding them; and the number of applications brought by defendants to strike out actions and otherwise frustrate their timely prosecution. Maurice Blackburn has been involved in a number of significant judgments in the class action field, both final determinations and interlocutory decisions. A number of class actions run by Maurice Blackburn have been, and continue to be, funded by third party litigation funders. It also runs a number of large class proceedings without external funding.

1.7 Maurice Blackburn's clients have been exposed to applications for security for costs in both representative proceedings and in individual proceedings although the applications have tended to be in our class actions and commercial litigation matters and not in plaintiff injury or professional negligence claims.

Chapter 2 – Jurisdiction to order security for costs

2.6 *Should **Uniform Civil Procedure Rules 2005** (NSW) r42.21 be amended to provide a list of discretionary factors that courts may take into account whether or not to order security for costs? If so,*

(a) *Should r 672 of the **Uniform Civil Procedure Rules 2009** (Qld) be used as the basis for such a list? If so, do you agree or disagree with any of the factors listed in r 672? Are there factors that are not listed in r 672 which should be included in **Uniform Civil Procedure Rules 2005** (NSW) r 42.21?*

(b) *Should the list include the proportionality principle, that is, whether the security for costs applied for is proportionate to the importance and complexity of the subject-matter in dispute?*

(c) *Should the list include public interest? If so, should the provision referred to "public interest" or "public importance"?*

(d) *Should the list include the impecuniosity of the plaintiff regardless of whether the plaintiff is a natural person or a corporation? Alternatively, would it be preferable to adopt a provision in the **Uniform Civil Procedure Rules 2005** (NSW), separate from the list of discretionary factors, stating the general rule that security for costs shall not be ordered merely on account of the poverty of the plaintiff or the likely inability of the plaintiff to pay any costs that may be awarded against him or her?*

(a) In our submission it would be beneficial for the UCPR to be amended to provide a list of discretionary factors that the court may take into account in determining whether or not security for costs should be ordered. This would assist in promoting consistency of rulings and therefore enable parties to better assess whether an application for security for costs may succeed. It may also discourage unmeritorious applications for security of costs being made by defendants whose strategic motives in bringing the application may be, in part, to delay the timely conduct of the proceeding, to distract the plaintiff from focussing on the real issues in dispute and to escalate the costs incurred by the plaintiff.

Whilst we agree with the provision of a list of discretionary factors, we submit that the discretion of the court to determine security for costs applications should be unfettered. It should therefore be made clear in any proposed amendments to the UCPR that the list of discretionary factors is not an exhaustive list and that the discretion remains with the judge determining the application as to whether to order that security for costs be paid, taking into consideration all of the relevant circumstances of the case, on a case by case basis.

Consideration of the proposed discretionary list, as set out in rule 672 of the *Uniform Civil Procedure Rules 2009* (Qld), suggests to us that different weightings should apply to the listed factors, depending on the circumstances of each application. The courts have provided some useful guidance on factors which may be taken into account when determining whether to award security for costs: see for example the judgment of Beazley J in *KP Cable Investments Pty Ltd v Meltglow Pty Ltd.* [1]

[1] *KP Cable Investments Pty Ltd v Meltglow Pty Ltd.* [1] (1995) 56 FCR 189

In respect of some of the rule 672 factors, we make the following comments:

(e) *The means of those standing behind the proceeding*. We submit that this should be limited to those who are likely to commercially benefit from success in the proceeding and not to those who are merely "standing behind" in a non-commercial sense, for example, family members. It should also not include lawyers who are acting for the plaintiff on a speculative basis. The reasons why such lawyers should not be included are developed in our Preliminary Submissions at paragraphs 3.2 to 3.7 and in response to question 3.5 below. It should include third party litigation funders who stand to benefit in a commercial sense from the successful prosecution of the claim.

(c) *The genuineness of the proceeding.* This factor may otherwise be described as the *bona fides* of the claim. It has been well established in common law that this is a discretionary factor to be taken into consideration in determining security for costs applications. In our submission, a consideration of the merits of the claim is central to assessing the genuineness of the proceeding. We therefore submit that the merits of the claim is a critical factor which the court should have regard to in determining whether to award security for costs.

In addition to the factors set out in rule 672, in our submission the following additional discretionary factors should be added:

(i) *Unreasonable delay in bringing an application for security for costs*. In circumstances where defendants have been in a position to assess whether any circumstances exist warranting an application for security for costs for an extensive period of time, particularly following the introduction of the *Civil Dispute Resolution Act 2011* which requires the plaintiff to take “genuine steps” to endeavour to resolve their dispute with the defendant prior to the commencement of proceedings, and where discovery is usually ordered to be given by the plaintiff at an early stage in the proceedings, the making of security for costs applications when proceedings are at an advanced stage should be avoided as it is prejudicial to plaintiffs. This is because it diverts resources away from trial preparation at a critical time and diverts the parties’ attentions from focusing on the real issues to be determined at trial.

(ii) *The severity of the wrong alleged in the proceeding*. In our submission, in determining an application for security for costs, the court should have regard to the severity of the wrong alleged in the proceeding. Where the alleged wrong is very serious, the court should avoid making an award for security for costs which gives rise to a risk that the proceeding may not continue. This may stray into the area of behaviour modification by the court. In our submission however this is a legitimate role of the court when seen in the context of promoting access to justice, as can arguably be seen in the decision of O'Loughlin J in *Australian Competition & Consumer Commission v Golden Sphere International Inc & Ors.*[2]

(b) We agree that the proportionality principle should be included in the discretionary list as this will assist to avoid unnecessary costs being incurred in defending security for costs applications where the amount of security for costs being sought is disproportionate to the value of the claim. We note that s.60 of the *Civil Procedure Act 2005* (NSW)

[2] *Australian Competition & Consumer Commission v Golden Sphere International Inc & Ors* [1998] FCA 598 (1 June 1998)

embodies the principle that proportionality should be maintained in respect of interlocutory applications in providing that "*in any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute*."[3] In our submission, it is prudent to amend the UCPR to make it clear that the proportionality principle applies in security for costs applications to clarify this for parties and to reduce the likelihood of applications being made where the amount of the security for costs being sought is disproportionate to the value of the claim.

(c) We prefer the terminology of "public importance" to be included in the discretionary factors, which we do not interpret as exactly equivalent to "public interest" although there is some overlap. We recognise that there may be some difficulties in defining "public importance" while "public interest" is a term which has been the subject of a considerable body of case law and may more readily be defined. We submit however that the broader definition of "public importance" may be more appropriate. This is because it should capture meritorious actions being brought which will benefit a significant sector of the public while not satisfying the higher benchmark required to be a matter of "public interest". In our submission, where a proceeding is of "public importance", it is not in the community's interests for the matter to be stultified due to the failure to provide security for costs.

(d) We submit that the impecuniosity of the plaintiff, where the plaintiff is a corporation, should be included in the list however not where the plaintiff is a natural person. There are good reasons why corporate plaintiffs should be treated differently from plaintiffs who are natural persons, as developed in response to question 2.9 below. The key consideration is that of access to justice. As noted in our Preliminary Submissions at paragraph 2.7, it is a cornerstone of the Australian legal system that everyone should have access to the courts regardless of their financial position. The reality however is that potential litigants without adequate means are often precluded from bringing claims, notwithstanding the merits of those claims, if they have insufficient funds to pay for legal services. Case law on security for costs reveals that the general rule that a plaintiff who is a natural person will not be required to provide security for costs is well established. It is important that this is preserved.

[3] Consultation Paper 13 [2.73]

2.9 Should corporate plaintiffs continue to be treated differently from Plaintiffs who are natural persons in relation to security for costs?

In our submission, as stated in response to question 2.6(d) above, there is no justification for departing from the general rule that natural persons should not be prevented from bringing proceedings due to their failure to pay for security for costs. This would amount to a denial of the fundamental rights of access to justice for natural persons. As noted at paragraph 2.104 of the Consultation Paper, a corporate plaintiff is subject to a statutory obligation to give security for the defendant's costs if there is credible evidence that it will be unable to pay an adverse costs order in exchange for the privilege of limited liability[4]. This limited liability, together with the fact that a corporate plaintiff has a separate legal personality to an individual, provide the rationale for separate treatment of companies as against individuals as noted in paragraph 2.106 of the Consultation Paper.[5]

In awarding security for costs against a corporate plaintiff, we consider that insufficient attention is paid by the courts to the merits of the claim. Where a meritorious action has been brought, often by a representative plaintiff representing a number of other group members, it should not be a foregone conclusion that security for costs will be granted to the defendant where there is a corporate plaintiff. In our experience, natural persons are not selected over corporate plaintiffs as a representative party so as to avoid the making of a security for costs order against the party. There are a number of factors which are taken into account in selecting a representative party.

We also point out the imbalance between an impecunious defendant who will not be met with a security for costs application, even where the merits of their defence are questionable, and the plaintiff who is exposed to a security for costs application if they fall within the criteria set out in the UCPR.

Any departure from the general rule which allows security for costs to be awarded against plaintiffs who are natural persons would, in our submission, unfairly inhibit the access to justice of a significant portion of the community and the rights of individuals to bring meritorious actions regardless of their financial position.

[4] Consultation Paper 2.104
[5] Consultation Paper 2.106

*2.10 Should **Uniform Civil Procedure Rules 2005** (NSW) r 42.21 be amended to include:*

(a) a procedure allowing defendants to request a corporate plaintiff to disclose its overall financial status; and

(b) a presumption that the corporate plaintiff is impecunious, if the plaintiff refuses the request for disclosure?

(a) In our experience, in most actions where there is a corporate plaintiff defendants will, at some stage throughout the proceeding, make enquiries regarding the financial status of the plaintiff with a view making an application for security for costs if there exists grounds on which to suspect that the plaintiff may be impecunious. This is an existing right which has been readily utilised by defendants to date.

The new *Civil Dispute Resolution Act 2011* requiring the parties to engage in correspondence prior to the commencement of claims, the provision of documents on discovery and Practice Notes issued by the Supreme Court of New South Wales which require the plaintiff to provide details of its claim in the initial stages of the proceeding[6], all assist to put the defendant in a position where it has sufficient information at an early stage in the proceeding to assess whether an application for security for costs may be warranted and can make the necessary enquiries by correspondence.

In our submission, there is no necessity to incorporate into the UCPR a procedure to allow defendants to request corporate plaintiffs to disclose their overall financial status as this is a right which they already possess and have readily utilised in the past.

(b) Similarly, in our submission there is no need for a rule to be incorporated in the UCPR for a presumption that the corporate plaintiff is impecunious if the plaintiff refuses the request for disclosure. It is clearly in the plaintiff's interest to respond adequately and appropriately to a request from a defendant for information in relation to its financial status in order to avoid the costs and diversion of a security for costs application, if it is in a position to provide this information. Its failure to do so could prejudice the plaintiff as it may lead to an application being made for security for costs and to the plaintiff incurring the costs of meeting the application, where it could have been avoided if the plaintiff provided the material requested. There may well be costs implications for the plaintiff if it does not respond adequately to a defendant's legitimate enquiries.

[6] See paragraph 28 of Practice Note SC CL 5 in the Supreme Court Common Law Division – General Case Management List, requiring the plaintiff to serve an evidentiary statement at the first directions hearing

Chapter 3 – Plaintiffs assisted by particular forms of costs agreements

3.1	*(1)*	*Should the **Uniform Civil Procedure Rules 2005 (NSW)** be amended to include, as part of a list of discretionary factors relevant to the court's exercise of the power to order security, the consideration that the plaintiff is receiving funding from a litigation funder?*
	(2)	*If so, how should litigation funding be defined?*

(1) We agree that whether the plaintiff is receiving funding from a litigation funder is a factor relevant to the court's exercise of the power to order security. We do not believe however that it is necessary to amend the UCPR to include this as a discretionary factor as the court already has the power to take this into account. Further, we submit that this should also apply to the funding of defendants by an insurer, for example, where an insured defendant commences an appeal and an application for security for costs is made in that context.

(2) If an amendment is made to the UCPR which necessitates a definition of litigation funding, then we submit that it should be defined to include a third party who provides financial assistance to a party to a proceeding and exercises any direct or indirect control, or any influence over the conduct of a party in respect of the proceeding, including an insurer. The definition should specifically exclude lawyers representing a party, whether on a conditional fee basis or otherwise. Lawyers should not be regarded as litigation funders as their relationship to the party on whose behalf proceedings are brought is a solicitor/client relationship in which legal services are provided by the lawyer for the conduct of the matter in accordance with the terms of their costs agreement. This relationship is heavily regulated under the *Legal Professsion Act 2004 (NSW)* and the lawyer has numerous duties to the client under legislation, the solicitors' rules and its fiduciary obligations to the client. Unlike litigation funders, lawyers' relationships with clients are not purely a commercial relationship entered into for a commercial benefit.

3.2	*(1)*	*Should legislation be adopted to provide that, at the initial stage of a case management process, each party should disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order?*
	(2)	*If so, should the client legal privilege be expressly abrogated in relation to the disclosure requirement?*

(1) We support the Supreme Court imposing by way of a practice note, a provision that, at the initial stage of a case management process, each party should disclose any agreement by which a litigation funder or insurer is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. The Federal Court Practice Note CM17 provides in paragraph 3.6 as follows:

> *"At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party."*[7]

A similar provision to Practice Note CM17 in the Supreme Court of NSW would better enable the court to consider and assess whether provisions in respect of adverse costs contained in a funding agreement are adequate to protect the parties from exposure to the risk of an adverse costs order being made in their favour and the other party not being in a position to meet it. The court and parties could also turn their minds to whether the funding agreement is binding and any limitations on the funding agreement which might operate to prevent the parties from obtaining full redress in respect of adverse costs orders made in their favour.

In our submission, this provision should equally apply to insurers, in particular of defendants, to avoid the situation where the plaintiff receives an adverse costs order in its favour on success and there are insufficient funds to meet the adverse costs order due to the inadequacy of the insurance cover, for example, as a result of a cap on liability or an exclusion clause. Insurers funding the defence of a proceeding are in a similar situation to a litigation funder in that they are doing so on a contractual and commercial basis. The terms of their provision of funding and any indemnity in respect of adverse costs should therefore be a matter disclosed to the court and the parties.

As the law currently stands there very limited avenues available to plaintiffs to obtain information in relation to the insurance status of defendants, or proposed defendants, prior to the commencement of proceedings or throughout its conduct. This significantly hampers the ability of plaintiffs' lawyers to advise their clients on such aspects as recoverability and to properly assess the defendant's ability to meet an adverse costs order. Often it is not until considerable funds have been spent in pursuing an action that it is revealed that there is no responding insurance policy or there is a limit on the liability in a responding insurance policy.

[7] Federal Court of Australia Practice Note CM17 [3.6]

There is no clear obligation on a defendant, or potential defendant, to disclose details of its insurance policy or policies to a plaintiff at any stage of proceedings. In order to make a proper assessment of the prospects of ultimate recovery and whether the plaintiff is exposed in respect of an order for adverse costs in its favour, ideally the plaintiff would be assisted by knowledge of the following:

(a) The identity of the insurer;

(b) The terms and conditions of the insurance contract including any exclusion clauses;

(c) The details of notification of claims or circumstances by the insured;

(d) Whether there has been any denial of liability; and

(e) Whether there are any limits on liability in respect of the insurance policy.

Courts are reluctant to permit discovery of a defendant's insurance documents on the basis that it is not normally relevant to the issues between the plaintiff and the defendant notwithstanding that it is relevant to recoverability and adverse costs. This gives rise to practical problems for the conduct of the litigation on behalf of plaintiffs, particularly in large shareholder matters and representative proceedings.

The introduction of the proportionate liability regime in each Australian jurisdiction has caused additional prejudice to plaintiffs in this regard as, under this regime, if a plaintiff succeeds against multiple defendants, they will no longer be jointly and severally liable for its loss. The plaintiff therefore bears the risk of proceeding against impecunious defendants where a limit on liability or exclusion clause restricts the amount that can be recovered under insurance policies maintained by defendants when the plaintiff receives an adverse costs order in its favour or an award of damages. The plaintiff's ability to make a security for costs application is not a complete answer to this problem. Disclosure of any insurance policy under which a defendant is being funded at the initial stage of litigation would however go some way towards minimising this risk.

In our submission, there would be additional benefits arising from information obtained from compulsory disclosure of funding arrangements, including insurance policies, at the outset of proceedings for the authorities and regulators.

(2) The disclosure of funding agreements and insurance policies may give rise to problems of waiver of client legal privilege: see *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited* (2008)[8]. In our submission this problem could be minimised by the use of masking to avoid disclosure of any confidential information which may prejudice the party to the funding agreement or insurance policy. We note that this is consistent with the practice espoused in Federal Court Practice Note CM17.

[8] *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited* [2008] NSWCA 148 [11]

3.3	*(1)*	*Should legislation be adopted to give courts power to order costs against litigation funders?*
	(2)	*If so, should the legislation provide the circumstances under which the power may be exercised, or should the case law be allowed to identify such circumstances?*

(1). In our experience, most funding agreements contain terms that the funder will pay any adverse costs orders made against the funded party, indemnifying them against those costs. Where such an indemnity operates, in the event of an adverse costs order being made against the funded party, the funder will be liable to pay the adverse costs under the terms of its contract with the funded party.

Furthermore, there is already a limited pool of organisations who provide litigation funding which adversely impacts on the access to justice for claimants who cannot afford to run their own meritorious matters.

Following the ruling in the High Court *Jeffery and Katauskas Pty Limited v SST Consulting Pty Limited*[9], rule 42.3 of the UCPR was repealed. The effect of this was that it is no longer necessary to establish an abuse of process or contempt of court as grounds for the making of an order for costs against a person who is not a party to the proceedings. In our submission, it should now be left to the judiciary to identify the circumstances in which costs orders can be made against litigation funders with due regard to precedent and the applicable legal principles. We do not consider it necessary for legislation to be enacted to provide for this power. To do so would, in our submission, be unfairly singling out litigation funders as against other funders of litigation such as insurers and may form a disincentive which further diminishes the already limited market in litigation funding. It also may result in litigation funders looking offshore to fund proceedings where adverse costs regimes do not operate in the same terms as in NSW.

[9] *Jeffery and Katauskas Pty Limited v SST Consulting Pty Limited* (2009) 239 CLR 75

3.4 Should legislation be adopted giving courts the power to make security for costs against litigation funders?

In our submission, where a third party is funding a litigation, it should be liable to pay any security for costs ordered to be paid by the litigation the basis that it stands to derive a commercial benefit from the proceedings and it is in the funder's interest for the action to be able to proceed. This does not apply however to a lawyer conducting an action on a conditional fee basis for the reasons set out in section 3.1 and 3.5 of this submission.

As noted in paragraph 4.4 of our Preliminary Submissions, under standard funding agreements, the funder is obliged to provide security for costs. We also set out in paragraph 4.4 of our Preliminary Submissions further provisions commonly included in proforma funding agreements which further mitigate the risk of an opposing party's exposure in respect of adverse costs.[10]

The provision of an undertaking by a party to pursue the indemnity provided in the funding agreement may in some circumstances satisfy the concerns regarding a defendant's risk of adverse costs not being met. We refer to the NSW Supreme Court decision of *The Australian Derivatives Exchange Limited v Doubell*[11] in which Barrett, J refers to the guidelines laid down by Hodgson, JA in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited*[12] (2008).

Generally a funding agreement will provide for a direct undertaking, sometimes by way of a deed poll annexed to the funding agreement. In our submission, provision of such a direct undertaking by the funder will impact on whether there is a need for security for costs to be awarded and is a factor which should be taken into account in determining applications for security for costs. Absent any evidence that the funder's financial position is precarious, the existence of such an undertaking suggests that there is no valid basis on which to believe that the funder would be able to avoid liability for an adverse costs order made against the funded party.

In the New Zealand High Court decision of *Houghton v Saunders*, the High Court found that it did have jurisdiction to order that security for costs be paid by the claimant and by the litigation funder. In his reserved judgment, French, J stated at [36]:

> *"Where there is doubt about the bona fides of the funder or bad behaviour on the funder's part, the case for declining approval or ordering such security, perhaps on an indemnity basis, is strengthened. Where an application for approval of a funder is met by an application for security for costs the enquiry may include not only the funder's means but also whether it is of such standing that its decision to fund provides a worthwhile pointer to the merits of the case."*[13] *[36]*

His Honour went on to emphasise the importance of considering the merits of the case and not only the funders means[14] [37]. French J also noted that security for costs can be a matter for continuous review and proposed a staged process for reappraisal which might increase or reduce security as more is learned about the case. This approach may be one way of dealing with the problem where applications for security for costs are made very early

[10] Preliminary Submissions [4.4]
[11] *The Australian Derivatives Exchange Limited v Doubell* [2008] 1174
[12] *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Limited* (2008) NSW CA 148
[13] *Houghton v Saunders HC Christchurch CIV-2008-409-000348* [2011] NZHC 542 [36]
[14] *Ibid* [37]

in the proceeding before a great deal is known about the merits of the proceeding and when it is difficult to make realistic estimates of costs.

We cannot see that it is necessary for legislation to be enacted to give the courts' power to make a security for costs order against a funder directly as:

(a) The courts have the power to make such an order as it is; and

(b) If a security for costs order is made against the funded party then the funder is most likely to be the person putting up such security in any event.

3.5 Should the court, in determining applications for security for costs, be able to take into account the fact that the plaintiff's lawyer is acting pursuant to a conditional costs agreement?

We submit that, if the plaintiff's lawyer is acting pursuant to a conditional costs agreement, this should be a factor weighing against security for costs being imposed. Lawyers act on a speculative basis for claimants for a variety of reasons, as referred to in paragraph 3.1 of our Preliminary Submissions[15]. The key distinction between a litigation funder and lawyers acting for claimants on a speculative basis is that the lawyers are not attracting super profits as a result of their conduct of the matter. Further, lawyers are governed by strict regulation under our *Legal Profession Act* 2004 (NSW) and fiduciary obligations arising from the solicitor/client relationship which do not apply to a litigation funder whose relationship with the claimant is governed by contract. Lawyers are also prohibited from imposing an uplift on their fees under the *Legal Profession Act 2004* (NSW) such that they cannot charge a percentage of the claimant's winnings, as litigation funders generally do.

Plaintiffs' lawyers, in agreeing to act on a speculative basis, take on a substantial risk of loss. This is particularly the case with large representative actions in which the costs incurred are substantial. There are very few law firms who engage in the conduct of large representative matters on a speculative basis due to the need to bear such a significant risk. Any additional burdens placed on plaintiffs' lawyers acting under conditional costs agreements in respect of security for costs would only serve to diminish the number of firms conducting this important work. It would be a disincentive for lawyers to take speculative matters on and reduce the pool of available lawyers who act for claimants with meritorious cases to bring. This would also have a negative impact on the access to justice for the public.

[15] Preliminary Submissions [3.1]

3.6	*(1)*	*Should courts have power to order security for costs against representative plaintiffs?*
	(2)	*If so, should power be expressed in legislation or should it be left for the case law to develop?*

The courts currently have the power to order security for costs against representative plaintiffs where they are corporations or if they fit within the criteria set out in the legislation.

We repeat the submissions made in our Preliminary Submission as summarised below:

> Representative Proceedings should be treated differently in respect of applications for security for costs than individual actions for a variety of reasons, including:
>
> (a) They are notoriously more expensive to run than individual proceedings;
>
> (b) There is often a public interest element in respect of representative actions;
>
> (c) The rationale behind representative procedures is to facilitate access to justice which would otherwise be denied due to the lack of resources of those plaintiffs;
>
> (d) The disincentive to commence class actions on an economic basis due to the existing costs regime;
>
> (e) The tendency of evidence from respondents to present unsustainable amounts as estimates for their costs;
>
> (f) The impact of interminable interlocutory applications brought by respondents in an effort to strike out class actions which results in an escalation in costs.[16]

We repeat the submissions made at paragraphs 5.1 to 5.15 of our Preliminary Submissions in support of our view that it is inappropriate for representative proceedings to be subject to applications for security for costs, unless the claims are lacking in merit or funded by a third party litigation funder.

[16] Preliminary Submissions [5.14]

Chapter 4 – Public Interest and protective costs orders

4.9	*Should NSW establish a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interest?*

We support the introduction of a public interest fund that will provide financial assistance to cover the legal costs of, and any adverse costs orders against, persons or organisations whose litigation raises issues that are in the public interest.

Any steps which provide an incentive to run matters in the public interest, which are notoriously expensive to run and hard fought by defendants, is a positive development. This measure would provide a valuable supplement to the work of law firms who operate on a speculative basis and organisations such as the Public Interest Advocacy Centre and other community legal centres who act for claimants who otherwise would not be able to fund meritorious cases which are in the public interest where legal aid is otherwise not available.

It is disincentive for lawyers to run public interest litigation that they, or their clients, may be exposed to adverse costs if unsuccessful. Any concerns regarding the removal of controls to ensure that only meritorious actions are brought, which adverse costs may be seen as contributing to, can be allayed by the fact that public interest litigation is generally expensive and difficult to run. It is highly unlikely that those who run public interest litigation would do so unless they were confident of the merits of the matter, even if adverse costs did not apply or if there was public interest fund available from which funds could be drawn.

Chapter 5 – Procedures and Appeals

5.1	*(1)*	*What problems arise in the assessment of the appropriate amount of security? Do Courts have difficulties in determining the amount, particularly in complex cases? Do legal representatives know what arguments or evidence they are allowed to provide to the court?*
	(2)	*Should guidance be provided in statute or regulations, or is the matter one most appropriately left to judicial discretion?*
	(3)	*Should there be non-binding lawyers' fee scales that may be used in determining the amount of security of costs?*
	(4)	*Should costs assessors be permitted to sit alongside a Judge in hearings on the amount of security?*

(1) One of the key problems that arise in the assessment of the appropriate amount of security is that the applicant for security for costs often makes unrealistic estimates as to the likely costs to be incurred in defending a claim. This is partially because applications for security for costs are often made early in a proceeding when it is difficult to know with any certainty:

(a) When the matter will proceed to trial;

(b) How long the trial is likely to run for;

(c) How many interlocutory applications will be made;

(d) The volume of discovery that each party will be required to produce; and

(e) How many subpoenas will be issued in the proceeding.

By way of illustration, as referred to in the Consultation Paper, in the case of *Fiduciary Ltd v Morningstar Research Pty Ltd*[17] the defendant's solicitor estimated an amount in excess of $6million would be incurred in defending the proceeding while the plaintiff's argued that it should only be required to pay $800,000 in security. Ultimately the court ordered the plaintiff to pay the amount of $924,536 in security for costs.[18] This case highlights the difficulties courts have in determining the amount of security to be awarded, particularly where the estimates provided by the parties are vastly disparate.

Courts have difficulties in determining the amount to award for security for costs primarily because they are reliant on the evidence put forward by the parties which is often limited by their failure to know some of the factors referred to above. There is a wide variation in the nature of evidence put forward in support of applications for security for costs. Some costs estimates are extremely detailed and in the nature of a "skeleton bill of costs" as suggested in paragraph 5.7 of the Consultation Paper.[19] However, it is also common for parties to provide only general estimates which are unreliable in their level of detail.

[17] *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 664
[18] Consultation Paper [5.15]
[19] Consultation Paper 13 [5.7]

Another factor which makes it difficult to determine the amount of security is the difficulty of assessing the prospects of settlement of the case prior to trial. Parties are often reluctant to disclose a great deal of information about this for strategic reasons and it is very difficult for the court to determine whether there is a realistic possibility of settlement when provided with incomplete information.

It is important to note that the amount being awarded for security for costs is not intended to provide a full indemnity to the applicant: *Brundza v Robbie & Co*[20]*. [2]* (1952) 88 CLR 171, 175; *Bryan E Fencott & Associates Pty Limited v Eretta Pty Limited* [21], as noted at paragraph 5.21 of the Consultation Paper[22].

It would assist the parties in preparing evidence in respect of security for costs applications to have clearer guidelines of the evidence that the court needs to assess the amount of security to be awarded. This may avoid some of the difficulties referred to above in determining the amount of security and avoid applicants for security making wildly unrealistic estimates of the costs of proceeding and awards being made which do not reflect the likely adverse costs order that may be made in the event that the claim does not succeed. It would be important however to avoid a "checklist" style approach which may prove counter productive.

(2) We support the introduction of statute or regulations providing such guidance which will still need to be applied by the judiciary at its discretion.

(3) In our submission the introduction of non-binding lawyers' fee scales to be used in determining the amount of security for costs may give the parties some clarity with respect to the amount of security for costs which is likely to be ordered and assist to limit unrealistic estimates of fees which are sometimes made in applications for security for costs. If fee scales were to be introduced however, they should be limited in their application to security for costs.

(4) We do not consider that it is necessary for costs assessors to be permitted to sit alongside a judge in hearings on the amount of security. In our submission, it is more appropriate for a judge to properly consider the various discretionary factors which need to be taken into account in determining the amount of security, including the prospects of settlement of the case and the merits of the case. The judge will have a better "feel" for the case than a costs assessor. Should the judge require assistance with regard to the quantum of security then referral could be made to a costs assessor on a discreet point.

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[20] *Brundza v Robbie & Co. [No. 2]* (1952) 88 CLR 171, 175;
[21] *Bryan E Fencott & Associates Pty Limited v Eretta Pty Limited* [21](1987) 16 FCR 497
[22] Consultation Paper [5.21]

5.6	*(1)*	*Should the **Uniform Civil Procedure Rules 2005** (NSW) be amended to provide courts power to set aside or vary security for costs orders?*
	(2)	*If so, should the power be in broad terms or should it provide a "standard" for assessing when the court may exercise this power? If so, should it be:*
		(a) "material change of circumstances" as developed in common law;
		(b) "special circumstances" as specified in the Australian Capital Territory and Queensland court rules; or
		(c) some other standard?
	(3)	*Should there be a list of factors for determining whether the standard has been met?*
	(4)	*Should leave be required to seek an order varying or setting aside security for costs?*

(1) We do not support a proposed amendment to the UCPR to provide courts the power to set aside or vary security for costs orders. We do not believe this is necessary as, as noted in the Consultation Paper[23], the court has this power as part of its inherent jurisdiction: see *National Bank of New Zealand Limited v Donald Export Trading Limited*[24]; *Republic of Kazakhstan v Istil Group Inc.*[25]

Any expansion of the rights of applicants in respect of security for costs would:

(a) enable defendants to more readily bring multiple interlocutory applications, in the nature of attrition litigation, particularly where the plaintiff has limited resources available; and

(b) make it more difficult for a plaintiff to plan for trial as it would lack any certainty as to whether further applications may be made to set aside or vary security for costs orders already made.

(4) We support the introduction of a requirement for leave to be sought to seek an order varying or setting aside security for costs so that the court can exercise its discretion in determining whether an application to set aside or vary a security for costs order is made on bona fide grounds or for an ulterior purpose. If such a requirement was introduced then we agree that appropriate criteria would be, as referred to in the Consultation Paper[26]:

(a) a material change of circumstances; or

(b) Special circumstances.

In our submission, it should be left to case law to develop the definitions of material change of circumstances and special circumstances.

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[23] Consultation Paper [5.47]
[24] *National Bank of New Zealand Limited v Donald Export Trading Limited* [1980] 1 NZLR 97, 103
[25] *Republic of Kazakhstan v Istil Group Inc.* [2006] 1 WLR 596, [32]
[26] Consultation Paper [5.52]

5.11 Should courts have express legislative power to dismiss an appeal for failure to provide security for costs under an order to do so?

In our submission the court should have express legislative power to dismiss an appeal for failure to provide security for costs under an order to do so. This would make the NSW jurisdiction consistent with the Federal Court where that power to dismiss an appeal for failure to pay security for costs is contained in s.56(4) of *the Federal Court of Australia Act 1976* (Cth) and with Queensland under rule 774 of the *Uniform Civil Procedure Rules 1999.*

The introduction of such legislation would help to avoid unnecessary costs being incurred which may not be recoverable where proceedings remain on foot, notwithstanding that security for costs have not been paid. It would also have procedural advantages and be consistent with the overriding purpose of facilitating the just, quick and cheap resolution of the issues in dispute: s. 56 *Civil Procedure Act 2005* (NSW).

In our view, the court is likely to have the inherent jurisdiction to dismiss an appeal for failure to pay security of costs, but for avoidance of doubt we agree that it should be made a statutory power.

We agree with the wording used in the Queensland court rule 774, as set out at paragraph 5.89 of Consultation Paper[27] as follows:

"If the appellant has been ordered to give security for costs of an appeal and the security has not been given as required by the order -

(a) The appeal is stayed insofar as it concerns steps to be taken by the appellant, unless the Court of Appeal otherwise orders; and

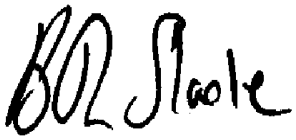
(b) The Court of Appeal, may on the respondent's application, dismiss the appeal."

[27] Consultation Paper [5.89]

6. Conclusion

We are grateful for an opportunity to make these submissions in response to the Consultation Paper. We congratulate the New South Wales Law Reform Commission on its thorough and expansive approach to the important issues of security for costs and associated costs orders and for consulting interested parties within the public in relation to the initiatives discussed in the Consultation Paper. We look forward to the implementation of considered reforms and amendments arising from this process.

Yours faithfully,
MAURICE BLACKBURN



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ANNEXURE 1

UNIFORM CIVIL PROCEDURES RULES (QLD) 1999
RULE 672 DISCRETIONARY FACTORS FOR SECURITY FOR COSTS

In deciding whether to make an order, the court may have regard to any of the following matters:

(a) The means of those standing behind the proceedings;

(b) The prospects of success or merits of the proceedings;

(c) The genuineness of the proceeding;

(d) For Rule 671(a) - the impecuniousity of a corporation;

(e) Whether the plaintiff's impecuniousity is attributable to the defendant's conduct;

(f) Whether the plaintiff is effectively in the position of a defendant;

(g) Whether an order for security for costs would be oppressive;

(h) Whether an order for security for costs would stifle the proceeding;

(i) Whether the proceeding involves a matter of public importance;

(j) Whether there has been an admission or payment into court;

(k) Whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) Whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) The costs of the proceeding.