

**SUBMISSIONS OF LAWCOVER TO NEW SOUTH WALES  
LAW REFORM COMMISSION**

**CONSULTATION PAPER 13**

**SECURITY FOR COSTS AND ASSOCIATED COSTS  
ORDERS**

## SUMMARY

LawCover submits that:

- 1.1 legislation should be amended to give Courts the express power to order costs against litigation funders and provide for the circumstances under which the power may be exercised;
- 1.2 the Uniform Civil Procedure Rules (UCPR) should be amended to include, as part of the 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;
- 1.3 section 47(1) (b) of the *Legal Aid Commission Act* (NSW) 1979 should be amended so that the protection afforded to legally assisted persons from liability for payment of the whole or any part of costs awarded against them applies in more limited circumstances. The "costs follow the event" or the costs indemnity rule should apply to legally assisted persons with NSW courts having the discretion to remove or vary the protection against liability for costs in certain circumstances.

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## 1 Introduction

- 1.1 In its Preliminary Submission to the NSW Law Reform Commission in response to the terms of reference 126, Security for Costs and Associated Costs Orders, LawCover set out in section 1 a description of the nature of its operations and its litigation experience.<sup>1</sup>
- 1.2 Some of the issues identified by LawCover in its Preliminary Submission have, since the date of those submissions (26 February 2010), been the subject of law reform and, in one respect, LawCover submits that there has been sufficient reform. Nonetheless, there are several costs issues which remain unresolved and LawCover believes that overall further reform is warranted.
- 1.3 First, LawCover submitted that rule 42.3 of the Uniform Civil Procedure Rules (UCPR) required amendment in order to provide powers to the courts of New South Wales to make costs orders against commercial litigation funders who are not parties to proceedings. The NSW Uniform Rules Committee repealed rule 42.3 on 7 May 2010, thus removing the obstacle to the courts ordering costs against third parties (including litigation funders).<sup>2</sup>
- 1.4 In December 2010, the NSW Parliament amended the Civil Procedure Act 2005 (NSW) (CPA) by passing the Courts and Crimes Legislation Further Amendment Act 2010 (NSW). New provisions, which took effect from 1 April 2011, were introduced into section 56, Overriding Purpose, under which the Court is to facilitate the just, quick and cheap resolution of the real issues in the dispute. Under sub-section 6, a person has a “*relevant interest*” in civil proceedings if the person:
- (a) provides financial or other assistance to any party to the proceedings; and
  - (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.
- 1.5 There is a note in the legislation which states:

*“Examples of persons who may have a relevant interest are insurers and persons who fund litigation”.*

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<sup>1</sup> LawCover, Preliminary Submissions, 26 February 2010, paragraphs 1.1 - 1.9.

<sup>2</sup> See *Jeffery & Katauskas Pty Limited v SST Consulting Pty Limited & Ors* [2009] HCA 43.

- 1.6 Consequently, as a result of these amendments to the CPA, litigation funders are parties who are now expressly subject to the NSW courts' supervisory powers. By the operation of section 56, litigation funders are persons who must not cause a party to a civil dispute or proceedings to be put in breach of a duty to:
- (a) assist the court to further the overriding purpose of the Act to facilitate the just, quick and cheap resolution of the real issues;
  - (b) participate in the processes of the court and to comply with directions and orders of the court.
- 1.7 Under section 56(5), the court may take into account any failure to comply with these provisions in exercising a discretion with respect to costs.
- 1.8 These new provisions (together with the repeal of rule 42.3) permit the court to make costs orders against a litigation funder found to have exercised control of litigation and to have been in breach of sub-sections (3) or (3A) of section 56 as summarised above. The effect of these laws should be sufficient to ameliorate the circumstances described in the examples set out in paragraphs 6.5.1, 6.5.2 and 6.6 of LawCover's Preliminary Submissions, that is, in which unsuccessful plaintiffs leave LawCover and insured solicitors with very large defence costs bills which cannot ultimately be the subject of a successful costs recovery. With the combined effect of the courts' inherent jurisdiction and the absence of rule 42.3 precluding costs orders against non-parties, it should be possible for costs orders to be made against litigation funders in those circumstances.
- 1.9 Secondly, LawCover nonetheless maintains its preliminary submission that UCPR rule 4.21(1) should be amended to provide for an additional express ground on which the Court may order security for costs where there is a non-party funder funding the proceedings for commercial profit.<sup>3</sup>
- 1.10 Thirdly, LawCover submitted in its Preliminary Submissions that further rules of court are required in order to facilitate such powers as the disclosure to the Court and other parties to the proceedings of the existence of funding arrangements and the terms of the funding agreement. LawCover maintains its submissions in paragraph 8.1 of its Preliminary Submission.
- 1.11 LawCover submitted that amendments should be made to the CPA and/or the UCPR to give explicit powers to the NSW courts to deal with funders as a part

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<sup>3</sup> LawCover, Preliminary Submissions, 26 February 2010, paragraphs 5.1 – 5.10.

of the courts' overall power to make orders with respect to the management and supervision of proceedings. Such powers, LawCover submitted, should co-exist with any regulation of commercial litigation funders by the Australian Securities & Investments Commission (ASIC).<sup>4</sup> Section 56 of the CPA now addresses this issue.

1.12 Fourthly, LawCover submits that amendments should be made to the Legal Aid Commission Act (NSW) 1979 to permit costs orders to be made against legally assisted persons which can be recovered from those persons in excess of the amounts recoverable from the Legal Aid Commission. Detailed submissions in this regard are set out below.

## **2 Litigation Funders: Disclosure and Security for Costs**

2.1 LawCover's Preliminary Submissions considered the prominent role of litigation funders in litigation in New South Wales and addressed the absence of power of courts in New South Wales to order costs against commercial litigation funders.<sup>5</sup>

2.2 LawCover reiterates its preliminary submission that a successful defendant should not, having been forced to meet an action funded by a non-party for profit, be left without recourse to recover its costs.

2.3 While amendments to the CPA by the Courts and *Crimes Legislation Further Amendment Act (NSW) 2010* have:

- (a) brought commercial litigation funders within the supervisory jurisdiction of the NSW Supreme Court (with the new sub-sections to s56); and
- (b) introduced a new Part 10, Representative Proceedings in Supreme Court,<sup>6</sup>

it remains the case that there is no express obligation on the part of a funded party in any proceedings in the Supreme Court to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, to provide any security for costs, or to meet any adverse costs order against a party to proceedings.

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<sup>4</sup> Litigation funders are required to hold an Australian Financial Services Licence pursuant to the requirements of Ch 7 of the *Corporations Act 2001 (Cth)*: See *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138; [2011] NSWCA 50.

<sup>5</sup> LawCover, Preliminary Submissions, 26 February 2010, paragraphs 2.1 – 3.5.

<sup>6</sup> The Supreme Court regime commenced on 4 March 2011.

- 2.4 By contrast, there are such express requirements in representative proceedings commenced in the Federal Court pursuant to Federal Court Practice Note CM17, Representative Proceedings Commenced under Part IVA of the *Federal Court of Australia Act (Cth) 1976*.<sup>7</sup> Under that Federal Court Practice Note, parties are 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. There are also provisions which seek to strike an appropriate balance between the rights of the parties, for instance in providing that any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.<sup>8</sup>
- 2.5 LawCover submits that the absence of such laws in NSW have the effect that a solicitor who is a defendant in an action commenced by a funded party will not be given notice that that party is funded. This may impede an application by the defendant for security for costs. The fact of funding may be a decisive factor in obtaining an order for security for costs. LawCover submits that representative proceedings in both jurisdictions should be consistent in this regard so as not to confer an unfair advantage on funded plaintiffs who commence proceedings in the Supreme Court as opposed to the Federal Court.
- 2.6 The identification of a litigation funder is an important factor going to the question of whether security for costs should be ordered. In its Preliminary Submissions, LawCover referred to the NSW Court of Appeal decision in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148.<sup>9</sup> In that case, the fact that a liquidator who brought proceedings against several of the former directors and officers of Arimco did so on behalf of a litigation funder was a relevant factor in the majority upholding an order for security for costs. Hodgson JA said:

*“a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation”.*<sup>10</sup>

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<sup>7</sup> The Federal Court Part IVA regime commenced on 5 July 2010.

<sup>8</sup> Practice Note CM 17 - Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976, paragraph 3.6.

<sup>9</sup> see paragraphs 5.7 to 5.10.

<sup>10</sup> At [51].

Campbell JA also stated:

*“in so far as the litigation is for the private profit of the funder, it is appropriate for security to be supplied ...”*<sup>11</sup>

- 2.7 LawCover reiterates its preliminary submissions concerning security for costs, including that it is not difficult to see that a successful defendant may face very serious prejudice if there is no recourse against the funder. Rule 42.21(1) sets out only a number of limited grounds for ordering security for costs. While the Supreme Court has inherent discretion to take into account a wide number of considerations in the exercise of its discretion to prevent abuse of process,<sup>12</sup> it is often difficult to predict the outcome of an application for security. Recent amendments to the CPA have not resolved these issues.
- 2.8 LawCover maintains its submission that the UCPR rule 42.21(1) should be amended to provide for an additional express ground on which the court may order security for costs, namely, in circumstances where there is a non-party funder funding the proceedings for commercial profit.

### **3 Plaintiffs supported by Legal Aid**

- 3.1 Section 47 of the Legal Aid Commission Act NSW 1979 governs payment of costs awarded against legally assisted persons. Specifically, section 47(1)(b) provides:

(1) Where a court or tribunal makes an order as to costs against a legally assisted person:

...

(b) except as provided by subsections (3), (3A), (4) and (4A), the legally assisted person shall not be liable for the payment of the whole or any part of those costs.

- 3.2 LawCover acknowledges the policy rationale supporting the provision of legal aid whereby those in need of legal assistance are given access to justice. In introducing the legislation to Parliament, the policy rationale was stated as follows:

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<sup>11</sup> At [86]. (See also Justice Clifford Einstein and Simone Krauss, “Liquidators, litigation funding and security for costs: Echoes of maintenance and champerty in the exercise of the court’s discretion”, (2008) 31 Aus Bar Rev 202.)

<sup>12</sup> See *Rakski v Computer Manufacture and Design Pty Ltd* [1982] 2 NSWLR 443, 447; *Byrnes v John Fairfax Publications Pty Ltd* [2006] NSWSC 251, at [17].



*“The objective of the Government is simply to provide the means by which all citizens might have the same practical access to courts, and to achieve equality before the law.”<sup>13</sup>*

- 3.3 Further, in establishing a Legal Aid Commission, the government intended to *“see that legal aid administration does not stagnate but remains responsive to changing social needs.”<sup>14</sup>*
- 3.4 By virtue of the grant of legal aid, a legally assisted person is protected from the rules which would otherwise ordinarily apply that unsuccessful litigants should be required to recompense the other party for costs. While such protection may overcome the risk of an adverse costs order from operating as a disincentive to legally assisted persons in commencing proceedings, the protection results in significant inequality for defendants rendering successful defendants little or no recourse to recover defence costs.
- 3.5 The costs of defending proceedings brought by legally assisted persons can be of a similar magnitude as the costs incurred in other commercial proceedings, for instance, in proceedings brought by liquidators from corporate failures.<sup>15</sup> The same circumstances identified in paragraph 6.3 of LawCover’s Preliminary Submissions can arise, namely, that there can be extremely costly outcomes for defendants who succeed in obtaining verdicts in their favour but who nevertheless face the prospect of being significantly out of pocket. The frequency and costs magnitude of such occurrences will likely have a direct bearing upon premium amounts set by insurers in order for insurers to recoup the significant costs expended in the successful defence of funded actions.
- 3.6 LawCover’s experience is that litigation is often complicated and/or protracted where the claimant receives a grant of legal aid, for the following reasons:
- (a) When costs orders are made against a legally aided person, in practical terms no steps can be taken to recover most of the costs, because of the combination of the individual’s financial position and section 47(2) of the *Legal Aid Commission Act 1979* which restricts the amount of costs which can be recovered from a legally assisted person when a Court makes an order for costs against that person to \$15,000;<sup>16</sup>

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<sup>13</sup> Attorney General Frank Walker, Second Reading Speech, Hansard Vol CXLVI, 19 April 1979, p.4710.

<sup>14</sup> Ibid, p.4711.

<sup>15</sup> As considered in LawCover’s Preliminary Submissions, Case Histories at paragraphs 6.5 – 6.6.

<sup>16</sup> Those costs are payable by the Legal Aid Commission, not the legally assisted person.

- (b) where legal aid is involved it can be much more difficult to achieve a settlement. There may be no incentive for a legally assisted person to settle, particularly where, for example, the subject of the proceedings relates to a lender's claim for possession of property, where the assisted person's main objective is to simply remain in possession of the home for as long as possible;
- (c) the usual incentives to negotiate may not apply because the legally assisted person knows he or she will face minimal, or no, personal exposure to pay other parties' costs as a result of the statutory maximum liability for costs of \$15,000, which is payable by the Legal Aid Commission;
- (d) many legally aided civil matters outside the family law sphere involve attempts by home owners to set aside mortgages and loans on the basis that the transactions are unjust within the *Contracts Review Act* (NSW) 1980 or are unconscionable in equity. Usually the legally aided person has few, if any, assets other than the equity in their home. By the time the matter comes to litigation often no equity is left if the loan/mortgage is enforced and the bank's legal and other enforcement costs are paid;
- (e) the legally aided person often joins other parties to the proceedings such as solicitors or accountants. While such parties are usually insured, the cases against them involve stress and great disruption to their lives. They may also face a significant uninsured exposure; for example, in situations in which professional persons sued are no longer working or where they are required to defend a complicated action which means the limit of cover is significantly eroded by defence costs.

### 3.7 LawCover further submits that:

- (1) the amount the Legal Aid Commission shall pay for costs under section 47(2) should be reviewed with a view to substantial increases being applied. (LawCover acknowledges that there are funding constraints on the Legal Commission and does not purport to have expertise or any specialist knowledge of Legal Aid funding or its operations);
- (2) there should be regular reviews by the Legal Aid Commission to determine, particularly in cases being handled by private legal practitioners for legally assisted persons, whether those cases are being run efficiently and in accordance with court orders as well as Legal Aid

Commission policies and guidelines, including merit testing of cases as to whether there are reasonable prospects of success;

- (3) the grant of legal aid be terminated or solicitors appointed to act for the legally assisted person be replaced if numerous costs orders are made against that person without proper cause;
- (4) limits be placed upon the amount of legal aid to which a particular claimant may be entitled;
- (5) the Legal Aid Commission should review, at the end of a case, the asset position of the legally assisted person to determine whether any contribution can be made by that person towards the defence costs payable to any successful defendant over and above those costs payable by the Legal Aid Commission pursuant to section 47(2);
- (6) NSW courts should have discretion, in certain cases, to remove or vary the protection provided to legally assisted persons by virtue of section 47 particularly where the conduct of the legally assisted persons in litigation may have caused costs to be incurred unnecessarily. (For example, as occurred in *Khoury & Anor v Hiar & Anor* [2006] NSWCA 47 which is considered below, section 47(4A) came into play because an order for costs on a solicitor and client basis was made as a result of an offer of compromise. There was, however, a discretion in the Legal Aid Commission to decline to pay the costs award. If there were to be law reform which had the effect that a legally assisted plaintiff who has declined to accept a reasonable offer of compromise is thereby exposed to an enforceable costs order because that person has not received a result which is better than the offer of compromise, there would be less likelihood of unnecessary costs being incurred and borne by defendants who are ultimately successful in proceedings. It would also be an added incentive for legally assisted persons to meaningfully engage in settlement negotiations which is consistent with the overriding purpose in section 56 of the Civil Procedure Act 2005 (NSW));
- (7) NSW courts should also have discretion, in other cases, to remove or vary the protection provided to legally assisted persons by virtue of section 47 if assets have been dealt with by a legally assisted person in order to mislead the Legal Aid Commission in granting legal aid and which otherwise may be available to meet a judgment for the defendant's costs. (The grounds for this submission are set out in detail below).

### Further submissions arising from broader principles relevant to legally assisted persons

3.8 In the NSW Court of Appeal decision of *Khoury & Anor v Hiar & Anor* [2006] NSWCA 47, the successful party had incurred considerable costs before receiving a notice of the grant of legal aid to the plaintiff. In that case the successful party prepared and obtained an assessment of the whole of the costs of the proceedings. There was no distinction in the bill of costs between those costs incurred before and after the grant of legal aid. Costs were assessed in the sum of \$48,000. However, in addition to the sum of \$15,000 payable by the Legal Aid Commission, the successful party was only able to recover \$7,000 (relating to the period when there was no grant of legal aid).

3.9 The Court of Appeal in *Khoury & Anor v Hiar & Anor* held that section 47(3) of the *Legal Aid Commission Act* brought a temporal limitation to the definition of a legally assisted person in the *Act* as “a person to whom legal aid is provided”. It was accepted that the legally assisted person was liable for the payment of costs incurred when she was not a legally assisted person. Section 47(4A) came into play because the order for costs on a solicitor and client basis was made as a result of an offer of compromise. There was enlivened a discretion in the Legal Aid Commission to decline to pay the costs pursuant to that sub-section. Accordingly, the legally assisted person was liable to pay the costs the Commission had declined to pay. The legally assisted person, however, could resist any attempt to enforce payment of a gross sum ordered as costs or of assessed costs, or to enforce the judgment. By statute or rules of court, application could be made to stay execution of the judgment, including a costs order on the basis of section 47. The Court of Appeal (per Giles JA) said:

*“It might be seen as unsatisfactory that a judgment entered on the filing of a certificate ... did not carry the liability to pay which one would have expected of such a curial act. A purported judgment can also have effects on credit rating or in public estimation. But an order for costs which does not carry the liability to pay which would normally be expected was inbuilt in the [Legal Aid Commission] Act. Disconformity between a court’s order and liability to pay was accepted in the Act’s approach, by which the liability of a legally assisted person to pay costs was not worked out when the court made its costs order, but was left for the superimposition of section 47.”*

3.10 LawCover submits that the outcome of *Khoury’s* case was that the defendant suffered an unjust costs burden. While there are strict criteria under which

persons may qualify for a grant of legal aid (which usually mean that such persons are unlikely to meet costs orders),<sup>17</sup> the usual effect of a costs order is that there is a 12 year limitation period in which to recover those costs.<sup>18</sup> Circumstances may change. Sometimes people's financial circumstances alter considerably for the better over such a long period of time. A grant of legal aid can have the effect that ill-considered decisions and conduct by legally assisted persons can result in costs orders. Nonetheless, the protection afforded by section 47 is such that there would be no liability to pay costs awarded at any time even if the financial circumstances of the legally assisted person improve so as to be able to meet any costs order made against them.

- 3.11 LawCover submits that NSW courts should have discretion to be able to override the temporal limitation given to legally assisted persons under section 47 for liability to pay a defendant's costs and defendants should be allowed to apply to the court for enforcement of costs payable to it, within a 12 year period following judgment in the event the financial circumstances of the legally assisted person sufficiently improve.

### **Legal Aid and Security for Costs**

- 3.12 Question 3.7 of the Consultation Paper asks the question: Does the law and practice on security for costs apply satisfactorily in the case of plaintiffs who are supported by Legal Aid? LawCover submits above that the protection afforded to legally assisted persons by the *Legal Aid Commission Act* from adverse costs orders should be removed. While section 47(1) (b) of the *Legal Aid Commission Act* does not prevent the court making an order against a legally assisted person for security to pay costs, for the reasons set out below, LawCover submits that such persons should not be permitted to utilise the protections in section 47 to avoid liability for costs.
- 3.13 There may be other circumstances (albeit unusual) in which a person has qualified for a grant of legal aid but has access to assets which would be available to meet a costs order or an order for security for costs.<sup>19</sup>
- 3.14 In a number of cases, as outlined below, the courts have ordered security for costs against plaintiffs who have divested themselves of their assets in order to avoid the consequences of an adverse costs order, and sometimes in circumstances where the plaintiff has been legally aided.

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<sup>17</sup> For instance when a person is at a 'special disadvantage' or qualifies for legal aid on the basis of means testing.

<sup>18</sup> Limitation Act 1969 No.31 (NSW), s. 17(1).

<sup>19</sup> For instance if such assets were held by the legally assisted person's spouse or another family member.

- 3.15 In *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443, proceedings had been brought by Dr Rajski (who was legally aided) and Raybos Pty Ltd, a company controlled by him, against the defendant. The defendant sought security for its costs. That application was contested on the basis that the court had no power to order security against Dr Rajski, or against Raybos in circumstances where its co-plaintiff was a natural person. Further, Dr Rajski submitted that the inescapable effect of s47(1)(b) of the Legal Aid Commission Act was that whatever the amount of costs that might be ordered against a legally assisted person, that person had no personal liability to pay the costs except in the circumstances referred to in the section and that the liability of the Commission to pay such costs was limited to \$5,000 (the cap prevailing at that time). It was further contended that, as a result, the court's power to order security for costs was, by implication, taken away.
- 3.16 Holland J rejected these submissions. There was evidence that Dr Rajski had "denuded" Raybos of approximately \$275,000 before the proceedings were commenced and that most of that money had gone to Dr Rajski's mother, with whom Dr Rajski resided. In those circumstances, his Honour held that it was appropriate to order security against both Raybos and Dr Rajski.
- 3.17 The decision of Holland J was affirmed on appeal (see *Rajski v Computer Manufacture & Design Pty Ltd* [1983] 2 NSWLR 122). It has been applied in a number of subsequent cases as discussed below.
- 3.18 In *Bhagat v Murphy* [2000] NSWSC 892, the defendant had made an application for security for costs. (Mr Bhagat was not legally aided). Mr Bhagat originally refused to give any evidence concerning his personal assets in opposition to that application. When Mr Bhagat was informed by Young J (as his Honour then was) that, in those circumstances, his Honour would award security against him, Mr Bhagat gave evidence that he had no assets. However, under cross-examination he conceded that he lived with his wife in an apartment in "The Connaught", ("*a building which is considered to be very up market*" Young J said<sup>20</sup>) although Mr Bhagat gave evidence that he had not the faintest idea who owned the apartment or how his occupation of it was funded. Young J noted that "*he said that his wife looks after such matters and that the unit is her affair*". Mr Bhagat also conceded that he had been the beneficial owner of 760,000 units in Estate Mortgage Depositors Trust No 4, although he had disposed of most of those units to his wife, and that he owned some property in India. Young J, referring to *Rajski v Computer Manufacture & Design Pty Limited*, said that where

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<sup>20</sup> at [11].

the plaintiff has so organised his affairs as to put his assets out of the reach of the defendants, he cannot shelter behind the general poverty rule<sup>21</sup>. Taking a list of 7 factors into account, Young J ordered that Mr Bhagat provide security in the sum of \$300,000.

- 3.19 In *Byrnes v John Fairfax Publications Pty Ltd* [2006] NSWSC 251, Simpson J<sup>22</sup> observed that the adoption of the Uniform Civil Procedure Rules did not affect the conclusions reached by Holland J in *Rajski* in relation to the existence of the court's inherent power to order a plaintiff to provide security or the principles that should be applied by the court in determining whether to exercise that power. Clearly, his Honour went on to say, one type of case where it may be appropriate for the court to order security for costs in exercise of its inherent power is where the plaintiff has taken steps to divest assets to avoid the consequences of an adverse costs order.
- 3.20 A recent NSW Supreme Court decision of 30 May 2011, *Welzel v Francis* NSWSC 477, also applied these authorities in ordering security for costs against a plaintiff who had divested himself of assets with the intention to avoid paying costs awarded against him.
- 3.21 The case law referred to above provides examples of situations in which plaintiffs have divested themselves of assets in order to avoid meeting adverse costs orders. In *Rajski*, the plaintiff qualified for a grant of Legal Aid.<sup>23</sup> Where a plaintiff in fact has access to assets, that person should not be able to avail themselves of the protection afforded by s47 of the Legal Aid Commission Act to defeat the ultimate recovery of a costs award.
- 3.22 LawCover submits that the principles applied in the above cases in relation to security for costs would provide useful guidance as to the circumstances in which there ought to be grounds for removing the protection afforded by s47 of the Legal Aid Commission Act or otherwise providing an exception to it. LawCover further submits there is currently a potential anomaly in the law whereby it may be possible for a defendant to obtain security for costs against a legally aided plaintiff and yet it is not possible for a defendant to obtain a costs order against a legally aided plaintiff at the conclusion of the proceedings. If similar principles were to guide the circumstances in which both security for costs and an order for costs at the conclusion of the proceedings could be ordered, it would bring about greater harmony in the law and, it is submitted,

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<sup>21</sup> [at 23].

<sup>22</sup> [at 17].

<sup>23</sup> *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443, 454.

reduce the incidence of unfair results for defendants in cases brought by legally aided plaintiffs.

3.23 Legal Aid NSW, in certain matters, has discretion as to whether it will pay costs ordered against the legally assisted person.<sup>24</sup> LawCover sets out below some case examples of its own experience in which arguably there has been an unjust result because a defendant has been left with very substantial defence costs liabilities (borne by LawCover) or because a defendant has received costs orders in its favour which could not be enforced, including one instance where Legal Aid NSW has declined to exercise its discretion to pay costs awards above the \$15,000 maximum.

### **Some examples of LawCover's experiences of defending claims brought by persons with grants of legal aid**

3.24 *Example 1:* The claimants, who had received a grant of legal aid, were unsuccessful in their claim which proceeded through the Supreme Court, then to the Court of Appeal. LawCover's defence costs were in excess of \$600,000 yet Legal Aid NSW was only obliged to pay the statutory maximum of \$15,000 for each of the two proceedings. Given the amount of defence costs, LawCover made a submission to Legal Aid NSW for the maximum payment allowed in excess of \$15,000 for each of the proceedings. The submission was unsuccessful. Legal Aid NSW refused to exercise its discretion to meet the costs awards. Without detailed explanation or reply, Legal Aid NSW simply sent a cheque to LawCover for \$30,000. However, the unsuccessful claimants could, and did, make an application to the Suitors Fund<sup>25</sup> for the payment of their costs of the hearing which then reverted to Legal Aid NSW. In other words, the unsuccessful legally assisted party had its costs paid whereas LawCover recovered only the statutory minimum payable by Legal Aid NSW of \$30,000; a bare fraction of the total defence costs incurred.

*Example 2:* The legally assisted party sought advice from the defendant solicitor concerning possession proceedings and refinancing. In this case solicitor/client defence costs were in the order of \$500,000 while the claimant's solicitor alleged his client's party/party costs were in the order of \$650,000, notwithstanding that the defendant solicitor had obtained at least 12 adverse costs orders against his former client on interlocutory matters and that many of the matters in dispute were common to other proceedings in which the

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<sup>24</sup> Legal Aid NSW Policy Online, Chapter 16, Costs and Fees at 16.11.

<sup>25</sup> Pursuant to the *Suitors' Fund Act 1951*, the Suitors Fund provides funds to mitigate costs incurred in court proceedings through no fault of the parties, in certain circumstances.



claimant's solicitor was claiming additional costs. It appeared to LawCover that the real decision maker in the legally assisted person's camp was her son, who was at no risk of any adverse costs orders because his mother was legally aided.

- 3.25 The last example is also an illustration of the fact that legally aided persons in some cases may have multiple costs orders made against them at interlocutory stages yet there is no recourse for the opposing party to recover those costs. In that particular proceeding, at least 12 interlocutory costs orders were made in the NSW Supreme Court against the legally assisted plaintiff. It is submitted that the possibility of an adverse costs order is no incentive for the legally assisted person to properly manage litigation because, by the operation of section 47(2), those costs orders cannot ever be enforced.
- 3.26 LawCover would be pleased to provide clarification of any aspect of these submissions or to provide further supplementary submissions if required.