Submission to the New South Wales Law Reform Commission in response to Consultation Paper 13: Security for costs and associated costs orders

Justice Nigel Rein

1. I refer to the New South Wales Law Reform Commission's Consultation Paper 13: Security for costs and associated costs orders (**"the Paper"**). In expressing the views below I do so in my own right and not on behalf of the Supreme Court or as a member of the Uniform Civil Procedure Rules Committee.

2. I note that Justice Brereton has provided a detailed and thoughtful submission, now published on the Commission's website. I agree with all that Justice Brereton has said and the answers his Honour has proposed to questions 2.4(1), 2.5, 2.8, 2.11, 2.12, 3.6, 3.9 and 5 (other than 5.8). The focus of this submission, therefore, is on the balance of issues.

3. I note that in his Honour's submission to the Commission, Justice Brereton made reference to four principles in relation to security for costs in the following terms:

> "The submission is founded on the view that the law and practice in respect of security for costs should reflect and balance the following principles:
>
> • a party brought to court as a defendant, if successful, should not be exposed to the injustice of being unable to enforce a costs order in its favour;
> • a plaintiff with a meritorious claim should not be denied access to justice by reason of impecuniosity;

- the arrangements by which a party finances its litigation is primarily a private matter for that party; and
- interlocutory applications to courts should be kept to the minimum in terms of frequency and complexity, by their outcomes being reasonably predictable, while justly accommodating the special characteristics of unusual cases, by preserving sufficient flexibility."

By the reference to "balance" I think his Honour was recognising that there is, or may be, a degree of tension between the four principles.

4. In the present context I would extend the first principle to include the principle that a person who seeks to benefit from the outcome of litigation commenced by him or by a person with whom he has a connection ought (in the absence of precisely defined exceptions) bear the burden of the costs of the litigation if unsuccessful ("**the benefit/burden principle**").

5. I agree that attention needs to be paid to all of the four principles as extended (and reference to a form of each of them can be found in the Paper) and I accept that the divergence of viewpoint between the answers proposed by Justice Brereton and myself may relate to a difference of emphasis on the importance of the benefit/burden principle and the effect that has on how the second, third and fourth principles are to be dealt with. There may be an overlap in relation to each of the three other points; for example, how is meritoriousness of the plaintiff's claim to be determined in the context of the issue of access to justice and, if the plaintiff is funded, who will benefit from a successful outcome to the litigation?

6. In this context it ought be recognised, I suggest, that a defendant who successfully defends a claim may have incurred, by reason of the litigation, a significant costs burden, which, in the absence of recovery from the plaintiff, might produce very serious consequences. The high cost of litigation is not simply an impediment to plaintiffs but is a prospective burden to defendants who, after all, have no choice but to defend or settle.

7. For costs purposes, plaintiffs can be categorised into four groups:
   (a) those able to fund litigation themselves (that is, their own costs and the defendant's costs if unsuccessful);
   (b) those able to obtain litigation funding from an outside private source;
   (c) those able to obtain litigation funding from a public source such as Legal Aid; and
   (d) those unable to fund the litigation themselves, either their own costs or to meet the defendant's costs if unsuccessful and unable to obtain funding.

8. We are not concerned with 7(a) here. Each of 7(b), (c) and (d) need to be considered separately, but I contend that the underlying benefit/burden principle is applicable to each group for reasons which I shall develop below.

Category 7(b): Plaintiffs able to obtain privately sourced litigation funding

9. I can see no rationale for permitting a litigation funder to avoid paying the defendant's costs when the plaintiff, whose case the funder supports, fails.

Either the case is one which the funder believes has a sufficient prospect of success, and hence has the potential to produce a profit, or it is not. In calculating the risk the funder is prepared to run and the rate of return it demands consequent upon that risk, there is no reason why the risk of the plaintiff having to meet the defendant's costs and the litigation funder having to indemnify him cannot be factored in. The risk that the plaintiff will fail and be ordered to pay costs is an attendant risk of the enterprise and the funder should be required to shoulder that burden as a price of being permitted to join in the economic venture, namely, bringing a claim against a defendant, since that requires the expenditure of money by the defendant.

10. Another type of private funding is that provided by legal practitioners. Leaving entirely to one side cases in which a legal practitioner assists a client to bring a case without any proper basis or acts in some inappropriate way in the course of the proceedings or is grossly negligent, costs orders are not made against practitioners. There have been significant changes to the legal landscape in recent times. First, the torts of champerty and maintenance have effectively been abolished. Secondly, "no win no fee" costs agreements are widespread. Third, some firms effectively specialise in "no win no fee" litigation and one of these firms, Slater & Gordon, is now a publicly listed company.

11. In *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980**,** the defendant was required to pay costs in excess of $15 million in addition to a settlement fund of $97 million. That is a very

significant amount of costs (no doubt at the upper limit) and indicates what might be achievable in a class action which is successful. If the action had resulted in failure for the plaintiffs, who would pay the defendant's costs, no doubt of a similar order?

12. Firms that practise on a "no win no fee" basis can be viewed as litigation funders. They do not receive a share of the recovery but they do receive a significant benefit if the proceedings are successful, namely the earning of significant fees for legal work, which fees would not otherwise be generated. I do not think that solicitors who run litigation on a "no win no fee" basis should be required to pay costs before their client's financial resources have been depleted to meet an order made in favour of the defendant but, subject to some narrow exclusions, practitioners who conduct their business on the basis that they will conduct litigation that does not need to be paid for by their clients, and whose clients would not be able to meet an order for costs if made against, them ought be required to meet the successful defendant's costs.

13. The consequence of such an approach may be that the number of cases brought is reduced. Solicitors may, however, decide to establish contingency funds or utilise some other economic model which will protect them (for example, by arranging bonds to meet any costs orders obtained by the successful defendant, the cost of which will be paid out of a fund created by charges paid out of successful claims).

14. This links in to the need for security to be provided by plaintiffs in a class action. If the solicitor has to provide security to enable the case to proceed, the cost of security ought be added to the cost of the litigation recoverable if the plaintiff succeeds.

15. It might be asked: why should barristers not also be required to contribute to the costs of the successful defendant? I think that the difference is that barristers generally do not conduct a practice based solely on a “no win no fee” basis, but more importantly, they do not have the resources to establish funds or bonds that would protect or partially protect them from adverse personal costs orders. I accept that the line is somewhat indistinct but I do not advocate requiring barristers to pay costs of the successful defendant (unless their conduct falls within the already accepted classes of cases in which that is appropriate).

16. I have included a suggested definition of “litigation funder” in answer to question 3.1(2) reflecting the views expressed in this section and I accept it may need closer attention.

Notification of third party involvement

17. I support the proposal for notification of third party involvement in proceedings brought by a plaintiff or cross claimant. I think that a defendant ought be informed of the fact that a plaintiff is funded by a third party litigation funder or otherwise. I would include in the “otherwise” an insurer

who brings a claim in the name of an insured by way of subrogation since the insured may, apart from the claimed right against the defendant, have no assets out of which a successful costs order can be met.

Category 7(c): Plaintiffs able to obtain publicly sourced litigation funding

18. When Legal Aid supports a plaintiff by funding a claim, it places a burden of costs on the defendant and not just itself. If the plaintiff is successful, the burden will properly be borne by the defendant. If the plaintiff is unsuccessful, the defendant will have a liability for costs in a potentially significant sum of money which will to a significant degree not be met on the usual basis and I think Legal Aid should be required to meet all of the defendant's costs on the usual basis if the defendant succeeds in defending the case, subject to a possible exception mentioned below. If Legal Aid was able to recover costs on a commercial basis when the legally aided party is successful, this could create a fund out of which the costs of successful defendants can be met in other cases.

19. So far as public interest groups are concerned, if a matter is sufficiently important from a public interest point of view for the plaintiff to receive assistance, it ought be sufficiently important for the defendant to be compensated if the plaintiff is unsuccessful. The public interest groups should not be able to burden defendants with "important" legal points the costs for which the defendant (with no opportunity to choose) is required to shoulder even if successful. There may be room for an exception where the

defendant is a public authority, an arm of a government or possibly a publicly listed corporation.

Category 7(d): Impecunious plaintiffs

20. This group includes persons who can afford to pay for representation but could not meet a costs order in addition to their own costs if unsuccessful, and those who are completely unable to fund the litigation and who cannot obtain support and hence have no legal representation. The fact that a plaintiff is unable to obtain representation on a “no win no fee” basis in the current legal scene is not without significance.

21. A self-represented litigant very often involves the Court and the defendant in a more extensive hearing, interlocutory and final, than would otherwise pertain. This is not surprising but it is nonetheless capable of producing considerable hardship to a defendant. There are clearly, once again, competing considerations. On the one hand a person should be able to bring his case before the Court and to block that access by requiring security is inimical to freedom of access to justice. On the other side of the equation, however, is the right of a defendant, if he is successful in defending the case, to recover his costs from the unsuccessful plaintiff, a right which will be meaningless in many instances. A costs bill of $100,000 is by no means extraordinary and there are many in the community who could not comfortably bear the burden of such a debt themselves. A balance is obviously required but I suggest that to date far more prominence has been

given to the notion of access than to the right of the successful defendant to be granted protection. That an order that security for costs be provided in a case in which the claim is decidedly tenuous or weak will very likely bring the proceedings to an end is not, I suggest, an outcome which is incompatible with the interests of justice which require consideration of both parties' rights, not just those of the plaintiff.

22. I appreciate that it is generally undesirable for security for costs applications to involve extensive scrutiny of the case to be advanced but a security for costs application in which more detailed consideration can be given to the strength or weakness of the case advanced by self represented litigants would provide a useful filter on claims by litigants in person who are impecunious. Additional attention to such a case at an early stage is likely to be productive of a significant reduction in court time being spent on weak or even hopeless cases.

23. My view is that a defendant ought to be able to obtain security against any party, individual or corporate, whose ability to meet an adverse costs order is in doubt (whether living within or outside the jurisdiction). There ought to be an amendment to the Uniform Civil Procedure Rules 2005 and, if need be, legislative amendment to make it clear that the entitlement to an order for security is not limited to corporations.

Fact that plaintiff is resident in another state and change of residence

24. In my view, a defendant ought be able to obtain security when the plaintiff is not resident and does not hold property within the jurisdiction in which the defendant is sued. I do not support a change from "plaintiff is ordinarily resident outside New South Wales" to "plaintiff is ordinarily resident outside Australia". The costs and difficulty of enforcement in another state are, I think, likely to exceed the costs of enforcement within New South Wales. It is important for plaintiffs to ensure that a defendant is made aware of a change of address, especially if the plaintiff has moved interstate or overseas. The ability of a defendant to rely on a failure to notify will encourage compliance. Nor do I think defendants should be required to investigate enforceability of costs orders in other jurisdictions or that ease of enforcement overseas should be a reason not to order security.

Question 2.6: Discretionary factors

25. I think that relevant factors can be specified but with the indication that the list is not exhaustive. Such enumeration is helpful to practitioners in considering whether or not to bring (or resist) an application for security. The comments of Justice Brereton indicate how difficult it will be to agree on a specified list – for example, his Honour would not regard impecuniosity of a natural plaintiff as relevant; I, on the other hand, would regard it as a factor. Which of these two approaches ought be adopted depends on how far, as a

matter of policy, one wishes to promote access to justice over reducing the exposure of successful defendants to bearing their own costs.

26. I would accept that the matters identified in r 672 of the Uniform Civil Procedure Rules 2009 (Qld) are worthy of inclusion in the list of discretionary factors, except for r 672(i).

Question 3.5: Conditional costs agreement

27. That a plaintiff has a conditional costs agreement points to the plaintiff being unable to meet a costs order if not successful. In my view, that ought be a relevant factor in deciding whether to order security.

Disclosure of overall financial status

28. I note that Justice Brereton is concerned about shifting the focus from whether or not the plaintiff is insolvent to whether or not disclosure has been adequate and the reliance by defendants on incomplete financial disclosure to support a claim that the plaintiff could not meet an order. On the other hand, much time is spent by defendants in subpoenaing material from the plaintiff and third parties in an endeavour to establish the financial position of the plaintiff when it is the plaintiff that knows best whether it can meet a costs order. A requirement for disclosure will, I think, bring matters to a head more swiftly and the plaintiff will have the knowledge of what resources it will have to meet a costs order, particularly in cases where its accounts and tax

returns are not up to date. The availability of a presumption will reduce the need for examination of the financial wherewithal of the plaintiff but there may be some circumstances where the failure to provide information might be justified and hence the presumption ought be capable of being rebuffed as envisaged by question 2.10(b).

Timing of applications

29. It has long been accepted that security for costs applications should be made at an early stage of the proceedings. I think that rather too much has been made of this. A defendant, properly advised, should make enquiries of the plaintiff's financial position but I do not see why the plaintiff should be able to resist an application for security when the defendant does not bring an application for security at an early stage. If the plaintiff is unable to provide security the case will come to an end and the dilatory defendant will not be protected for his costs to date, but why the fact that the plaintiff has expended money on the case up to that point in time should be a reason to preclude the making of a security for costs order for the future is unclear. The plaintiff has far better knowledge of his inability to meet a security for costs order if unsuccessful than the defendant.

Amount of security

30. Once again I think that the courts have been inclined to favour the plaintiffs in their approach. All that is being provided is an amount as security to which

the defendant has no access unless he obtains a costs order against the plaintiff. I do not think the courts should strive to cut back the amount of security to a bare minimum but rather the security should be as close to the likely recoverable costs as is possible. If the defendant's recoverable costs are less then the amount of security, the security to that extent will not be called upon. I accept that an unrealistically high amount could be unfair to a plaintiff and the provision of exaggerated costs estimates should be discouraged, but in general terms the difference between a realistic figure for security and a more limited figure is unlikely to preclude the plaintiff from being able to provide security in the higher sum if he could fund security for the lower amount. I do not accept that it is fair that it is the defendant who should be left at risk of a shortfall, particularly in large cases where the shortfall could be a very significant amount of money, given that the security will only be called on if the plaintiff is unsuccessful and the defendant's costs have been assessed or agreed.

Public interest costs orders

31. I repeat, in this context, what I have said at paragraph 19 above.

Questions in the Paper

32. I now turn to deal with each of the questions posed in the Paper.

2.1 (1) No.

(2) Not applicable.

2.2 No.

2.3 (1) No.

(2) No.

(3) Yes.

2.4 (1) Yes.

(2) Yes, I think it should be available as a factor.

2.5 No.

2.6 Yes.

(a) Yes.

(b) Yes.

(c) No.

(d) Yes, it should include the impecuniosity of the plaintiff, regardless of whether the plaintiff is a natural person or a corporation.

2.7 The current approach is appropriate for the reasons stated by Justice Brereton.

2.8 No.

2.9 No (but by making natural persons liable to provide security).

2.10 (a) Yes.

(b) Rebuttable presumption.

2.11 No.

2.12 No.

3.1 (1) Yes.

(2) *"Litigation funder" means:*

a. *a person, corporation or other legal entity who agrees to provide financial support to a party claiming against another party in court proceedings ("the recipient") either in the form of a loan or by the payment of legal fees and costs incurred or to be incurred by the recipient in connection with those court proceedings and pursuant to which agreement the recipient is required:*

   i. *to repay monies lent to or paid on behalf of the recipient; and*

   ii. *interest on those monies and or some other amount additional to the amount lent to or paid on behalf of the recipient;*

   out of monies recovered from the other party to the proceedings;

b. *a law firm which, acting for a client, agrees to require payment of its fees from the client only if the client is successful against another party to the proceedings; or*

c. *an insurer which, pursuant to its rights of subrogation, brings a claim in the name of its insured against another party.*

3.2 (1) Yes.

(2) Yes.

3.3 (1) Yes.

(2) It is probably desirable to spell out the general grounds but I do not have a firm view about this.

3.4 Yes.

3.5 Yes.

3.6 (1) Yes.

(2) Yes, such power should be stated in legislation.

3.7 No.

3.8 (1) Yes.

(2) Costs awarded should be given to a pro bono litigation fund.

(3) Yes.

3.9 No.

4.1 No, current law is adequate.

4.2 (1) Yes.

(2) It should, if possible, not include as part of the definition “the character of public interest” and, so far as the alternative discussed in 4.47 is concerned, it ought not refer to “novel questions of law”.

4.3 Yes.

4.4 (1) No.

(2) Not applicable.

4.5 Not applicable.

4.6 Uniform Civil Procedure Rules 2005 (NSW).

4.7 Not applicable.

4.8 No.

4.9 Yes.

5.1 (1) None.

(2) No.

(3) Yes.

(4) No.

5.2 (1) No.

(2) No.

(3) Yes, as to payment into court.

5.3 No. This will be the usual order but the Court may make other orders, including an order that the proceedings are to be dismissed if the security is not paid by a certain date.

5.4 No.

5.5 (1) No.

(2) No.

5.6 (1) No.

(2) No.

(3) No.

(4) No.

5.7 (1) No.

(2) Not applicable.

5.8 (1) Yes.

(2) Not applicable.

5.9 The provision should be in the Uniform Civil Procedure Rules 2005 (NSW).

5.10 (1) Yes.

(2) The provision should be located in the *Civil Procedure Act* 2005 (NSW).

5.11 Yes.