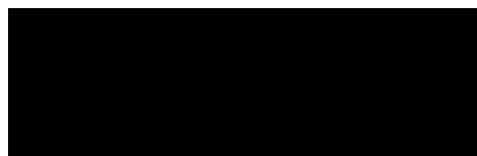


NEW SOUTH WALES LAW REFORM COMMISSION

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



26 February 2010

New South Wales Law Reform Commission
GPO BOX 5199
SYDNEY NSW 2001

By email: nsw_lrc@agd.nsw.gov.au

Dear Sir/Madam,

Re: Inquiry into security for costs and associated costs orders

We make these submissions in response to the terms of reference issued by the Attorney-General pursuant to s 10 of *The Law Reform Commission Act 1967* (NSW) in relation to its inquiry into security for costs and associated costs orders.

1. Introduction

1.1 These submissions will focus on sub paragraph (d) of the terms of reference issued by the Attorney-General:

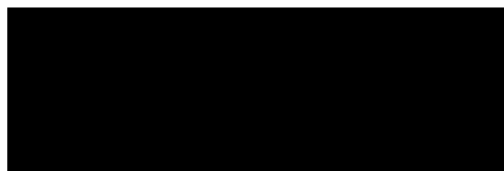
"...whether the law and practice relating to security for costs and to associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim regardless of their means against ensuring that a defendant is not unduly exposed to the costs of defending that litigation. In undertaking this review, the Commission is to consider in particular whether or not the law and practice:

...(d) operates appropriately where solicitors are acting on a speculative fee; where parties are funded by third parties; in representative proceedings; and in cross-border litigation."

1.2 Maurice Blackburn Pty Ltd is a national plaintiff law firm with offices in New South Wales, Victoria and Queensland. 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 would otherwise be precluded from bringing meritorious actions. The NSW practice provides plaintiff legal services in the areas 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 person and business victims of mass wrongs. The 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, Trade Practices

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Act, ASIC Act and the state Fair Trading Act 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*; and *Watson v AWB 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 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 funds 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.

2. Security for Costs Generally

- 2.1 The general rationale behind the costs regime in Australian courts is to compensate the successful party in litigation but not to punish the unsuccessful party. Accordingly, the Court has discretion at common law to make costs orders against the unsuccessful party in favour of the successful party. It also has the discretion to order that security for costs be provided by litigants. The main purpose of this power is to ensure that the defendant is not prejudiced by having to defend an unsuccessful claim against it without some assurance that there will be a means of it recovering any costs awarded to it.
- 2.2 In New South Wales, security for costs applications are dealt with by rule 42.21 of the *Uniform Civil Procedure Rules 2005* ("UCPR") as follows:

“(1) if, in any proceedings, it appears to the court on the application on a defendant:

- (a) that a plaintiff is ordinarily resident outside New South Wales, or
- (b) that the address of a plaintiff is not stated or is mis-stated in his or her originating process, and there is reason to believe that the failure to state an address or the mis-statement of the address was made with intention to deceive, or

- (c) *that, after the commencement of the proceedings, a plaintiff has changed his or her address, and there is reason to believe that the change was made by the plaintiff with a view to avoiding the consequences of the proceedings, or*
- (d) *that there is reasons to believe that a plaintiff, being a corporation will be unable to pay the costs of the defendant if ordered to do so, or*
- (e) *that a plaintiff is suing , not for his own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so,*

the court may order the plaintiff to give such security as the Court thinks fit, in such manner as the court directs, for the defendant's costs of the proceedings and the proceeding be stayed until the security is given..."

2.3 The Federal Court also has a broad discretion to grant security for costs under various provisions of statute and common law as discussed below:

- (a) Section 56 of *Federal Court of Australia Act 1976* (Cth) ("FCAA") empowers the Court to order an applicant to provide security for costs, to vary the security to be provided from time to time, and to dismiss a proceeding on the basis that the security has not been provided. The power under s 56 is broad and unfettered, the only limitation on it being that it be exercised judicially; *Bell Wholesale Co. Limited v Gates Export Corporation* (1984) 2 FCR 1 at 3. The broad discretion of the Court is to be exercised by reference to the particular circumstances of each case.
- (b) Order 28 of the *Federal Court Rules* ("FCR") makes more detailed provision for applications for security for costs as follows:

Order 28 rule 3 - Cases for security:

"(1) When considering an application by a respondent for an order for security for costs under section 56 of the Act, the Court may take into account the following matters:

- (a) *that an applicant is ordinarily resident outside Australia;*
- (b) *that an applicant is suing, not for the applicant's own benefit, but for the benefit of some other person and the Court has reason to believe that the applicant will be unable to pay the costs of the respondent if ordered to do so;*
- (c) *subject to subrule (2), that the address of the applicant is not stated or is incorrectly stated in the originating process;*
- (d) *that an applicant has changed address after the commencement of the proceeding in an attempt to avoid the consequences of the proceeding."*

2.4 Section 1335(1) of the *Corporations Act* also makes provision for security for costs to be ordered against a *corporate* plaintiff:

“Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs in stay/or proceedings until the security is given.”

2.5 Some of the factors which may be taken into account were considered by Justice Beazley in *K P Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, comprising:

- (a) whether the application for security has been brought promptly;
- (b) the strength and bone fides of the applicant's case;
- (c) whether the applicant's impecuniosity was caused by the respondent's conduct, the subject of the claim;
- (d) whether the respondent's application for security is oppressive in the sense that it is being used merely to deny an impecunious applicant a right to litigate;
- (e) whether there are persons standing behind the applicant who are likely to benefit from the litigation, and who are willing to provide the necessary security;
- (f) whether the persons standing behind the applicant have offered any personal undertaking to be liable for the costs and, if so, the form of any such undertaking; and
- (g) whether the applicant is, in substance, a plaintiff, or the proceedings are defensive in the sense of directly resisting proceedings already brought, or seeking to halt the respondent's self-help procedures.

2.6 The operation of the costs regime, including the indemnity costs awards and the discretion to order security for costs, is a way of restraining unmeritorious claims from being commenced, however, one needs to consider whether an order for the payment of security for costs may deprive the impecunious plaintiff from an opportunity of bringing a meritorious claim. As a general rule the poverty of a litigant is not a sufficient ground for the granting of security for costs and neither should it be.

2.7 It is a cornerstone of the Australian legal system that everyone should have access to the courts regardless of their financial position. As put forward by the Access to Justice Advisory Committee:

“All Australians, regardless of means should have access to high quality legal services of affective dispute resolution mechanisms necessary to protect their rights and interests”¹

The reality however is that potential litigants without adequate means are often precluded from bringing claims, notwithstanding the merits of those claims, if they

¹ Access to Justice Advisory Committee, *Access to Justice – an Action Plan* (1994) para 1.9 ('Action Plan') cited by V Morabito *“Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs”*, Monash University Law Review [Vol 21, no 2 1995]

have insufficient funds to pay for legal services. This denial of fundamental rights has, in some part, been redressed by the provision of speculative fee arrangements by some solicitors and by the availability of litigation funding by third parties.

- 2.8 The requirement for plaintiffs to provide security for costs can amount to a formidable obstacle to plaintiffs wishing to bring an action which is legitimately in the public interest.

Justice Toohey noted in an address to the NELA conference on environmental law:

“...There is little point in opening doors to the courts if litigants cannot afford to come in. The general rule that ‘costs follow the event’ is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or a wealthy corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.”²

3. Solicitors acting on a speculative basis

- 3.1 Conditional or speculative fee arrangements with solicitors provide access to the courts for those who do not possess sufficient resources to finance legal actions themselves and for whom legal aid is not available. These persons may be those who have individual meritorious civil claims but who cannot afford to pay or they may be those for whom the cost of an individual proceeding would outweigh the potential benefit but when considered with other similar claims the cost benefit equation changes in favour of proceeding. In the latter event, solicitors may enter into speculative fee agreements with a number of persons or just a representative of the class as asking each of a number of claimants to pay monthly is fraught with difficulties and inviting default.
- 3.2 A speculative fee deal does not carry with it the prospect of super profits for the law firm and firms doing this work are limited, in NSW, to recovering their usual rates on success.³ The risk associated with conducting a matter on a conditional fee basis for a legal practice is high and militates against acting on this basis unless the claim has very good prospects of success.
- 3.3 It is contrary to the interests of justice if a meritorious claim being conducted on speculative basis can be permanently stayed by the inability of a plaintiff or class to meet a security for costs order. Of course, if the claim is not meritorious and it fails then the inability of the plaintiff to pay costs awarded against it is clearly unfair to the defendant. A balance is required.
- 3.4 It is submitted that it is altogether too easy for a defendant to get a security for costs order against a corporate plaintiff as the courts give insufficient attention to the merits of a claim when such an application is made.
- 3.5 Moreover, it is arguable that a plaintiff bringing a meritorious action is prejudiced in that, while the plaintiff may be subject to an order for security for costs, an impecunious defendant will not be. Hence, the successful plaintiff may be unable to recover its costs from the impecunious defendant.

² Toohey J in address to NELA conference on environmental law (1989) cited by Stein J “*The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law*” (1996) 13 *EPLJ* 179 at 180 and in *Oshlack v Richmond River Council* (1994) 82 *LGERA* 236 at 238

³ Section 324 *Legal Profession Act* (NSW) 2004

- 3.6 Solicitors offering speculative fee arrangements do not tend to indemnify plaintiffs against costs orders. The work is done to enable the meritorious claimant to access the courts and seek justice, not to fill the pockets of practitioners. There has been a suggestion that firms that conduct matters on a speculative basis should themselves be exposed to security for costs orders but, as noted in [3.2], there are no super profits to be made speculating claims and if a firm was to face a risk of costs then it would be most unlikely to act in the first place because the cost of taking that risk would far outweigh the potential benefit from so doing.
- 3.7 It is in the public interest for plaintiffs with meritorious actions to be able to proceed with those actions and to not be denied access to justice due to their inability to provide security for costs particularly when there are lawyers willing to fund the claim on a speculative fee basis.

4. Proceedings funded by third parties

- 4.1 It is within the discretion of the court to order security for costs where proceedings are funded by a third party who stands to benefit from the proceedings, such as a litigation funder. Under rule 42.21(1)(e) UCPR, where it appears that a plaintiff is suing not for his own benefit but for some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, security for costs may be ordered.
- 4.2 The case of *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd & Ors*; [2008] NSWCA 283 which ultimately went to the High Court: *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 260 ALR 34; [2009] HCA 43; BC200909275, considered whether the security for costs regime provides a sufficient answer to abuse of process claims in circumstances where an unsuccessful claim brought by the plaintiff was funded by a third party who stood to benefit from the proceedings but without bearing the risk of adverse costs. Ultimately an application was made to the High Court that the funding arrangement, which did not include an indemnity for adverse costs, constituted an abuse of power for the purposes of Rule 42.3(2)(c) of the UCPR. The High Court found that the funding arrangement did not constitute an abuse of power.
- 4.3 This case highlights the issue of whether, when a litigation funder or third party funder is involved and stands to benefit from litigation in a commercial sense, they should be liable for adverse costs. 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 litigant on the basis that it stands to derive a commercial benefit from the proceedings and it is in the funder's interests for the action to be able to proceed.
- 4.4 Under standard funding agreements the funder is obliged to provide such security for costs as is ordered by the court from time to time, and to meet any adverse costs order, or it would be in breach of its contractual obligations. In practice the risk that a funder will not meet adverse costs is met by courts ordering the provision of security for costs. This risk is further mitigated by terms in the pro forma funding arrangements that provide that throughout the case any monies that would be due for adverse costs should the case be lost should either be:
- (h) held in a joint bank account with the lawyers for that express purpose;
 - (i) secured by a bank guarantee in favour of the litigant; or
 - (j) secured by adverse costs insurance.

- 4.5 In the High Court case of *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 80 ALJR 1441, the High Court rejected the argument that third party litigation funding was contrary to public policy or led to an abuse of process. This decision paved the way for more litigation funders to finance class actions, although there has not been a big influx of new entrants to the market. There are currently very few players in the litigation funding market and the barriers to entry are high within that market.
- 4.6 In the New South Wales Supreme Court decision of *The Australian Derivatives Exchange Ltd v Doubell* [2008] 1174, Barrett J refers to guidelines laid down by Hodgson JA in *Green (as liquidator of Arimco Mining Pty Ltd v CGU Insurance Ltd)* 2008 NSWCA 148 for courts determining whether or not to order security for costs where there a third party is funding a liquidator. His Honour found that the matter could be dealt with by the provision of undertakings by the liquidator to pursue the indemnity provided for in the funding agreement. This highlights alternative means to a blanket security that may offer a safeguard to defendants without defeating a claim of an impecunious plaintiff by the imposition of a permanent stay.
- 4.7 The position of a commercial third party litigation funder must be distinguished from a legal practice that conducts a claim on a speculative basis because the funder does stand to make a super profit from a successful outcome and it acts solely in pursuit of that profit. As noted in [3.2] above, law firms do not expect super profits by speculating claims and the reasons for the conduct of those claims vary but include the desire to see a client access justice. Law firms owe duties to the court and their clients that stand above any contractual obligation that a funder may have. For example, law firms should not settle cases to profit at the expense of their clients when a funder is entitled to do so under contract.

5. Representative proceedings

- 5.1 Class or representative actions are notoriously costly, partially because of the length and complexity of the proceedings, the amount of interlocutory applications that are made in an effort to strike out the claims in the first instance and the tactics employed by defendants to "take every point" in an endeavour to frustrate the timely conduct of the matters and exhaust the plaintiffs' resources, or the resources of those funding the litigation. A number of the class actions run by this firm have incurred fees in excess of \$5 million.
- 5.2 Section 33ZG(c)(v) of the FCAA makes it clear that the representative proceeding regime does not affect the operation of any other law in relation to security for costs and hence security for costs can be ordered to be paid in a representative proceeding. The *Civil Procedure Act 2005* (NSW) and UCPR operate in a similar way.
- 5.3 In determining applications for security for costs in representative actions, the court has had regard to a number of factors in the exercise of their discretion, however there is no general rule which operates: *Cooper v Universal Music Australia Pty Ltd* [2006] FCA 642.
- 5.4 In representative proceedings, notwithstanding that there is not a certification process required prior to the commencement of class actions as there is the USA, there are a number of controls and measures available to the Federal Court and the Victorian Supreme Court to terminate or stay a class action. This includes the

provision in s 33ZG of the FCAA that nothing in Part IVA⁴ affects the Court's power under provisions other than this part. Accordingly, the Court's power in relation to a proceeding in which there is no reasonable cause of action disclosed, or that is oppressive, vexatious, frivolous, or an abuse of process, can be exercised.

5.5 In practice, solicitors for defendants have readily utilised the Federal Court's provisions in the FCAA to bring applications to strike out class actions if there is a perceived basis on which to do so, usually pursuant to s 33N(1), which grants the power the order to discontinue a class action where:

- (a) The cost of the class action would be excessive having regard to the costs which would be incurred if each group member conducted a separate proceeding;
- (b) The relief sought can be obtained by means of a proceeding other than a class action;
- (c) A class action would not provide an efficient and effective means of dealing with the claims of group members; or
- (d) It is otherwise inappropriate for the proceedings to continue as a class action.

5.6 In NSW the Supreme Court's power to strike out a representative claim brought under r7.4 of the UCPR is discretionary and without legislative or judicial guidance of the sort available to the Federal Court. It is submitted that the NSW Parliament should give urgent consideration to the introduction of a regime that aligns with Part IVA of the FCAA to resolve this issue.

5.7 In *Woodhouse v McPhee* (1997) 80 FCR 529, Merkel J considered whether an order for security for costs should be made in circumstances where the representative applicant brought a bona fide and arguable claim which raised important issues of principle. His Honour made the following comments with regard to the nature of Part IVA proceedings:

"The respondents accept the difficulty in obtaining an order for security for Costs against an impecunious but bone fide individual applicant but have put their claim on the basis of the benefits to be derived from the proceedings by the other employees. As pointed out above policy considerations derived from s 43(1A) will usually dilute the significance of, and the weight to be given to, that consideration in a properly brought Part IVA claim. Even if, contrary to that view, I were to disregard these policy considerations, in the circumstances of the present case the importance of the issues raised by the claim and the public policy considerations to which I have referred above are of such weight that I would nevertheless exercise my discretion against ordering security for costs.

There may be circumstances which arise in a particular case under Part IVA that may warrant a different approach to that set out above. For example, if the claim was spurious, oppressive, or clearly disproportionate to the costs involved in pursuing it or if the proceedings were structured so as to immunise persons of substance from costs orders I would not

⁴ Section 33ZG of the *Supreme Court of Victoria Act*

consider the fact that the represented persons were entitled to the benefit of s 43(1A) to be a consideration which in any way operates against an order for security in such cases".⁵

- 5.8 As highlighted by the above comments by Merkel J, it is within the discretion of the Court to make orders for security for costs in circumstances where a claim made is oppressive, spurious, or clearly disproportionate to the costs or structured to immunise persons of substance from costs orders.
- 5.9 Further, where the plaintiff is merely a nominal plaintiff, it is open to the Court to make an order for security for costs.
- 5.10 Where class actions are funded by plaintiff solicitors, the costs of running those actions are a high barrier to entry which restricts the number of players in the market. Any increase in those costs arising from an influx of applications for security for costs would limit further the amount of new entrants in the market with adverse affects on competition and limiting access to justice for the public.
- 5.11 One of the key persuasive factors in determining security for costs applications is whether an order for security for costs would stifle the legal proceedings. The high cost of prosecuting representative proceedings provides a significant disincentive for their conduct. This is exacerbated by the costs regime, including the costs indemnity rule whereby the representative plaintiff bears the liability for adverse costs orders, unless indemnified by a third party. The prospect for orders for security for costs being made against impecunious plaintiffs is a further disincentive. The operation of the costs rules can therefore serve to discourage class actions notwithstanding the merits of many such claims.
- 5.12 There is a question over whether an order for security for costs to be paid and contributed to by group members would remove the immunity from costs for group members provided for within s 43(1A) FCAA.
- 5.13 Case law demonstrates that, where there is a public interest element to litigation, the courts have been reluctant to order security for costs if its effect would be to stultify the claim. Class actions commonly involve an element of public interest. In some instances, representative proceedings are the only means by which the infringement of private or public rights can be enforced. If an action in the public interest is allowed to be extinguished by seeking orders for security for costs then one of the purposes of representative procedures will be defeated.
- 5.14 In our submission, representative proceedings should be treated differently in respect of applications for security for costs than individual actions for a variety of reasons as detailed above, which we summarise as follows:
- (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 lack of resources for most plaintiffs;
 - (d) the disincentive to commence class actions on an economic basis due to the existing costs regime;

⁵ *Woodhouse v McPhee* (1997) 80 FCR 529 at 534

- (e) the tendency of evidence from respondents to present unsustainable amounts as estimates for their costs; and
- (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.

5.15 For all of the reasons set out above, we submit that it is inappropriate for representative proceedings to be subject applications for security for costs unless the claims are lacking in merit or funded by a third party litigation funder.

6. Recommendations

6.1 In our submission, there are measures that could be adopted to address some of the problems discussed in these submissions, including the following:

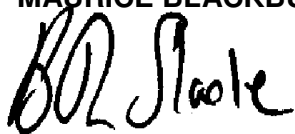
- (a) Consider introducing legislation to immunise representative proceedings (unless funded by third party commercial funders) from security for costs orders, relying instead on the court's extensive powers to stay or terminate class actions;
- (b) Consider expanding the powers of the court to direct third party or litigation funders to provide security for costs where they are funding proceedings and stand to benefit in a commercial sense from the proceedings; and
- (c) While not restricting the broad and wide discretion of the courts to order security for costs, provide more specific guidelines in the legislation and/or regulations as to the factors which will be taken into account and which will be determinative of whether to award for security for costs to promote more consistency in the decisions made.

7. Conclusion

7.1 In our submission, any expansion of the rights of defendants to make applications for security for costs in any claims, let alone representative proceedings or where solicitors act for plaintiffs on a speculative basis, will present a formidable impediment to the further access to the courts. If defendants are given greater scope than at present to bring security for costs applications in representative proceedings against representatives or the members of the group then, unless such security is to be met by a litigation funder then this will unduly limit the willingness of plaintiffs and lawyers to institute or conduct representative actions. This will result in the stultification of a number of meritorious actions and will adversely impact on access to justice that ought be available to all the community and not merely the privilege of the financially well-resourced.

Yours faithfully,

MAURICE BLACKBURN



Ben Slade
MANAGING PRINCIPAL NSW



Christine Monnox
ASSOCIATE