**THE LAW REFORM COMMISSION**
**OF WESTERN AUSTRALIA**

Project No 49 – Part A

# The Suitors' Fund Act
# Part A : Civil Proceedings

**REPORT**

**MARCH 1976**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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## TERMS OF REFERENCE

1. The Commission was asked "to enquire into the operation of the *Suitors' Fund Act 1964*, for the purpose of determining whether the purposes for which the Act was introduced are being fulfilled, and if not, for the purpose of rendering the Act more effective."

## WORKING PAPER

2. The Commission issued a working paper on 12 March 1975. The names of those who commented on the paper are listed in Appendix I. A copy of the paper is attached as Appendix II.

## THE SUITORS' FUND ACT

3. The *Suitors' Fund Act 1964* established a Fund known as the "Suitors' Fund", to assist in the payment of costs of litigants in certain cases. The Fund is financed by a levy of 10c on the issue of a writ of summons in the Supreme Court and District Court, on the entry of plaint in the Local Court and on the issue of a summons to a defendant upon complaint in a Court of Petty Sessions: s.5. The Fund is administered by the Appeal Costs Board, consisting of three members appointed by the Governor, of whom one is the chairman, one a nominee of the Barristers' Board and one a nominee of the Law Society: s.8.

4. The *Suitors' Fund Act* at present applies to both criminal and civil proceedings, though the circumstances in which costs are payable out of the Fund in these two types of proceedings are not identical. Further, the insurance concept which applies to civil proceedings (see paragraph 8 below) is inappropriate for criminal proceedings. The Commission has concluded that the civil side should be funded separately from the criminal side, and has accordingly decided to issue its report on this project in two parts. Part A of this report deals with civil proceedings, and Part B with criminal proceedings.

# PART A : CIVIL PROCEEDINGS
# OUTLINE OF PRESENT ACT

## ELIGIBLE CLAIMS

5. Under the present Act, the Fund is available to assist in the payment of costs incurred by -

(a) an unsuccessful respondent in an appeal which succeeds on a question of law (s.10(1));

(b) an unsuccessful respondent in an appeal or motion for a new trial relating to the quantum of damages (s.15(1) and (2a));

(c) a successful appellant in an appeal on a question of law where, because of some Act or rule of law, the court does not order the respondent to pay the costs of the appeal (s.12A(2));

(d) parties to proceedings rendered abortive by –

(i) the death or protracted illness of the presiding judicial officer, or

(ii) disagreement of the jury (s.14(1) (a));

(e) parties to proceedings where the hearing is discontinued through no fault of any of the parties and a new trial is ordered (s.14(1) (c)).

The maximum level of compensation for an unsuccessful respondent in respect of an appeal on a point of law ((a) above) is $2,000, and on quantum of damages ((b)) is $1,000. The maximum for a successful appellant who cannot obtain an order against the respondent ((c)) is $1,000. There is no maximum for abortive or discontinued proceedings ((d) and (e)).

## PROCEDURE

6. In a case falling within paragraph 5(a) above, the respondent cannot obtain any reimbursement from the Fund unless the Supreme Court, in its discretion, grants him an indemnity certificate: s.10. In (b), the respondent is entitled as of right to reimbursement, application being made direct to the Appeal Costs Board. In (c), the appellant must obtain a costs certificate from the Supreme Court before payment can be made: s. 12A(2). In (d) and

(e), application is made direct to the Board, though in the case of (e) the applicant must produce a certificate from the court concerned as to the facts: s.14.

Where an unsuccessful respondent is eligible under the Act, he is entitled (subject to the limit) to reimbursement of his own costs of the appeal in addition to those of the appellant he is ordered to pay: ss. 11 and 15. If the successful appeal is the final appeal in a series of appeals, he is entitled in the case of (a), but not apparently in the case of (b), to compensation for the costs of all the appeals in the series (again, of course, subject to the limit) : *ibid*. He is not, however, entitled to the costs of the original proceedings from which the appeal is brought, but in the case of (b), it appears he is entitled to the costs of the new trial, where one is ordered: s.15.

In the case of (c), if the successful appeal is the final appeal in a series, it appears that the appellant may be reimbursed only for his costs in the final appeal, and not for the others in the series: s.12A(2).

## LEGISLATION ELSEWHERE

7. Appendix III sets out in tabulated form the salient features of legislation of a similar type in other Australian jurisdictions.

## DISCUSSION AND RECOMMENDATIONS

### Nature and Purpose of Fund

8. The Suitors' Fund is simply a pool of money made up of contributions of litigants, together with interest accruing from investment of any sums not immediately required, which can be drawn on by litigants in certain cases where decisions are upset on appeal or proceedings are rendered abortive. Put broadly therefore, the *Suitors' Fund Act* sets up what is tantamount to a compulsory insurance scheme whereby, on payment of what is in effect a premium, litigants are insured against expenses arising out of certain court proceedings. That this is the true nature of the scheme was confirmed by the Minister in charge of the Suitors' Fund Bill in the Legislative Assembly. He said: "It is considered that the levy is in the nature of an insurance premium by intending litigants." 168 WA Parl. Deb. (1964) 1621.

9. The Commission considers that this approach is appropriate, and that the Fund should continue to be made up of contributions from those at risk. The Fund should not be regarded as a source of legal aid or welfare assistance, to be confined to those who are in financial need or to be paid for out of Consolidated Revenue.

10. A corollary of this approach is that the amount of a litigant's contribution should bear some relationship to the risk involved and the maximum amount of compensation payable and should, as far as practicable, be paid by all those who may become eligible to claim from the Fund. A further corollary is that all those who contribute to the Fund should be eligible for its benefits.

11. As with other insurance schemes, the success of the Suitors' Fund depends upon it being reasonably simple to administer and certain in its application. An applicant should not be subjected to complicated or costly procedures in order to substantiate his claim, and the discretion of the authority determining his claim should not be unduly wide.

**Deficiencies in Present Act**

12. The Commission is of the view that the present Act contains certain anomalies and deficiencies. Principally, these are that -

(a) the maximum levels of compensation, where they apply, are too low;
(b) the method of financing the Fund is inequitable and administratively inconvenient;
(c) the class of appeals covered by the Fund is too limited, and there are other anomalies associated with appeals;
(d) the class of abortive or discontinued proceedings covered by the Fund is not sufficiently wide;
(e) the basis for the exercise of the discretion to grant relief is not sufficiently defined;
(f) certain classes of persons are excluded from obtaining compensation from the Fund, even though they contribute to it;
(g) the administration of the Fund is unduly complicated;
(h) certain other matters require rectification.

The Commission's recommendations in respect of associated matters are contained in paragraphs 13 to 58 below.

**(a) The limits of compensation**

13. The Commission considers that the limits of compensation for appeals (see paragraph 5 above) should be raised to amounts which would provide a substantial reimbursement, if not a complete indemnity, having regard to the amounts of money that can be at risk. As was pointed out in paragraph 54 of the working paper, the costs of litigation have increased by at least fifty percent since the limits of compensation were last set in 1970. In particular, the amounts are insufficient to provide significant compensation where appeals to higher courts are concerned.

In New South Wales different limits are imposed in respect of different appeal courts. The maximum amount for an appeal to the Supreme Court is $3,000; to the High Court, $5,000; to the Privy Council, $7,000; and for other appeals, $3,000. The Commission understands that the New South Wales scheme has operated successfully within these limits, and it recommends that similar limits should apply in this State. In paragraph 54 of the working paper the possibility of removing the limits altogether for appeals was canvassed, but the Commission does not consider that it would be desirable to go so far at this stage, since in some cases the costs could be very large and might deplete the Fund.

14. It is difficult to justify imposing different limits for appeals on questions of law ($2,000) and for appeals on the quantum of damages ($1,000). The Commission recommends that the limits should be the same, whatever the nature of the appeal.

15. At present, there is no limit to the amount of compensation payable in respect to costs thrown away in abortive or discontinued proceedings: see paragraph 5 above. The Commission can see no objection to this situation, and recommends that it should continue. Except where the court makes a special order, the total costs that can be incurred by a party in Supreme Court or District Court proceedings are $10,000 plus disbursements (see RSC 0.66, R.16 and 4th Schedule), and where the proceedings were not completed the costs thrown away would obviously be much less.

It is not uncommon, at least in England and in other Australian States, if the duration of the trial is likely to be long, for the parties to insure against the risk of the judge being unable to continue. To guard against depletion of the Fund from this cause, the Commission recommends that the administrators of the Fund should be empowered to insure the Fund against such a risk. Such a power would be analogous to that given to the Legal Contribution Trust under s.14(2) of the *Legal Contribution Trust Act 1967* to effect a policy of insurance indemnifying the Solicitors' Guarantee Fund against claims. Under that section, the State Government Insurance Office is authorised to undertake liability under such a policy.

**(b) Financing the Fund**

16. At present the levy is 10c on certain originating process: see paragraph 3 above. The scheme is therefore financed by plaintiffs and complainants. The amount has not been altered since the *Suitors' Fund Act* was enacted in 1964.

The Commission is of the view that the contribution should be by way of a percentage levy on all civil court fees. The Commission considers that this would be more equitable than the present system. Other parties, as well as the plaintiff, are ultimately eligible for payment from the Fund and it is equitable therefore that they should contribute to it. The Commission has been informed by the Under Secretary for Law that the system of levying originating process causes a great deal of work. Each court must supply special quarterly returns in respect of the relevant originating process issued in that court: s.6. It would be much more convenient to set the levy at a certain proportion of the total court fees collected, returns of which are in any case supplied by each court to the Under Secretary for Law.

The system of financing the Fund by a percentage levy on court fees is the one used in New South Wales. In Victoria, Queensland and South Australia the Fund is financed by a levy upon originating process. However, in Victoria this method was adopted because court fees there are paid by means of revenue stamps, so that an accurate figure of the court fees paid cannot be obtained: see 273 Vic. Parl. Deb. (1963-64) 3135.

As a corollary to its recommendation that criminal proceedings should be funded separately (see paragraph 4 above), the Commission recommends that only civil court fees should be subject to the levy. On the other hand, since appeals from decisions of the Licensing Court,

the Warden's Court and the Workers' Compensation Board are within the scheme (see ss. 3 and 10) the Commission recommends that the court fees of these bodies should be subject to the levy.

17. The amount of the levy is next to be considered. The following sets out the amount of the fees collected in the Supreme Court, the District Court and the Local Court in 1974 and 1975 -

| | **1974** | **1975** |
|---|---|---|
| Supreme Court | $138,335 | $144,999 |
| District Court | $149,038 | $135,675 |
| Local Court | $295,238 | $262,488 |
| Total | $582,611 | $543,162 |

A levy of two per cent of court fees would have yielded $11,652 in 1974 and $10,864 in 1975, which is about the amount contributed to the Suitors' Fund in 1974-75 from the existing levy. If the Commission's recommendation as to the limits of compensation (see paragraph 13 above) and as to the classes of proceedings to be covered (see generally below) are accepted the Fund is likely to be drawn on to a substantially greater degree than in the past. It is, however, impossible to assess accurately how much the increase would be. The Commission considers that, taking into account the fact that the Fund had a surplus of $93,849 at 30 June 1975, a levy should be struck at a rate which brings in twice as much income as at present: that is approximately $22,000. To do this the levy would have to be four per cent of court fees (the amount derived from the recommended levy on the court fees of the Licensing Court, the Warden's Court and the Workers' Compensation Board would be very small, and can be ignored in these calculations). If this proves inappropriate, the levy could be altered, as has been done in New South Wales. In that State the levy was originally set at ten per cent of court fees, reduced to one per cent in 1955 and raised again in 1966 to four per cent. The Commission has been informed that it is intended to reduce it again.

18. A further question arises as to whether the levy should be struck as a percentage of court fees as a whole, or whether the levy for each court should be assessed separately. It could be argued in favour of the latter alternative that it would prevent litigants in one court subsidising litigants in the others. Under the existing system the imbalance is quite marked. From figures supplied by the Appeal Costs Board, it appears that about half of the money paid

out of the Fund has been in respect of Supreme Court civil proceedings, whereas money collected from the levy on writs of summons in that Court amounts to only about 1/60th of that paid into the Fund. Under the proposed system of levying court fees the amount of the disparity would not be as great, but some imbalance would remain.

However, to levy each court separately would tend to reintroduce undue complexity and administrative inconvenience, which are the very concepts the Commission wishes to eliminate from the scheme. On balance, therefore, the Commission recommends that the levy should be struck as a percentage of civil court fees as a whole.

### (c) Appeals

*Fact and law*

19. At present, in common with other Australian jurisdictions that have a Suitors' Fund, an unsuccessful respondent is not entitled to claim for compensation for the legal costs of appeals which succeed on a point of fact, not on a point of law. (This is subject to the special exception of appeals on the quantum of damages, which are appeals on fact: see paragraph 32 of the working paper).

In paragraphs 32 to 35 of the working paper the Commission suggested that it was unduly restrictive, and gave rise to arbitrary distinctions, to confine compensation to the costs of successful appeals on law. All those who commented on this aspect agreed.

The making of an error of fact by a court of first instance need be no more the fault of the party in whose favour it was decided than an error of law. A judge's function is to evaluate the evidence, as well as to apply the law, and an error in the former case should be as compensable as an error in the latter. But in any case it seems too narrow a view to regard the purpose of the Fund as providing compensation solely for judicial "error". In the Commission's view, the purpose of the Fund in the context of appeals is to provide a means by which a litigant is insured against the legal costs involved in having a decision in his favour upset on appeal. Such a risk exists whether or not the appeal is on fact or on law.

The Commission therefore recommends that appeals on points of fact as well as of law should be covered by the scheme.

*Bodies from which appeals are brought*

**(i) Courts**

20. Except possibly for those within s. l2A(2) (see paragraph 5(c) above), the only appeals covered by the Fund are those from "courts" which, as defined, include the Workers' Compensation Board, but not all tribunals or bodies from which an appeal lies to the Supreme Court. For example an appeal to the Supreme Court from a decision of the Barristers' Board or the Medical Board would not be included, since these boards are not 'courts'.

21. In the working paper the Commission raised the question whether appeals from bodies other than courts should be included in the scheme. The Law Society in its comments proposed that the scheme should cover appeals from all "judicial" tribunals, which presumably would include such bodies as the Barristers' Board and the Medical Board. The Commission itself had suggested the possibility of such an extension: see paragraph 27 of the working paper. The Victorian, Queensland and Tasmanian Acts go even further, and include appeals from any "board or other body from whose decision there is an appeal to a superior court on a question of law": Vic. s.2.

On further considering the matter, the Commission is now of the opinion that the present position should not be disturbed. The basic purpose of the Act is to insure against various risks inherent in the judicial system including the reversal of decisions on appeal and abortive trials. The judicial system is ordinarily understood as covering courts only, and not domestic tribunals. A difficulty with the Law Society's proposal is that the notion of a body which is not a court, but which is "judicial", is imprecise and would be difficult to apply. Although the Victorian, Queensland and Tasmanian schemes avoid this defect since they include any body whatever, these jurisdictions do not include appeals on fact, whereas the Commission proposes that this class of appeal should be included: see paragraph 19 above.

To extend the scheme beyond courts would add to its administrative complexity and involve making other changes. If the principle is accepted that the obtaining of a benefit from the

Fund should depend on having contributed to the Fund (see paragraph 10 above), a levy would have to be struck on the fees of all such tribunals or bodies. Those which do not at present charge fees (e.g. the Barristers' Board) would be required to do so.

22. The Commission accordingly recommends that, except for the matters raised in paragraph 24 below, the present definition of court should remain unchanged. The question could be re-examined when experience has been gained of the other changes which may be made to the Act as the result of the Commission's recommendations.

23. Consequentially upon the Commission's recommendation in paragraph 22 above, s.12A(2) of the Act should be amended so as to limit its operation to appeals from courts. It is apparent from Hansard that the Government did not intend the provision to cover appeals from other bodies: see 190 WA Parl. Deb. (1970) 940. This should be clarified.

**(ii) Master of the Supreme Court**

24. The Commission recommends that a decision of the Master of the Supreme Court should expressly be deemed to be that of a court. At present, this is not clear in all cases: see paragraph 25 of the working paper. It would be undesirable for such an appeal to be excluded on the technical ground that the Master is an officer of the court, rather than a "court". A similar position should apply to the Registrar of the District Court: see paragraph 33 below.

**(iii) Family Court**

25. One further matter is to be noted. The *Family Court Act 1975* (W.A.) provides for the setting up of a Family Court in this State. The Court will exercise federal jurisdiction under the Commonwealth *Family Law Act 1975*, and such State jurisdiction as is given to it under the *Family Court Act* (principally adoption and affiliation proceedings).

26. The Family Court will exercise appellate jurisdiction as well as original jurisdiction, in that it will hear appeals from courts of summary jurisdiction outside the metropolitan area of Perth, which are given both federal and non federal jurisdiction to hear certain family law matters by the respective Acts. The question of including the Family Court's appellate jurisdiction within the Suitors' Fund is discussed in paragraph 30 below.

27. In respect of its original jurisdiction, since the Family Court will be a "court" for the purposes of the *Suitors' Fund Act*, appeals **from** it will be covered, provided the body **to** which the appeal lies is included in the scheme (as to which see paragraph 30 below). A similar position exists in regard to family law proceedings in courts of summary jurisdiction.

*Bodies to which appeals are brought*

28. At present, only appeals to the Supreme Court, the High Court and the Privy Council are included in the scheme: s.10. The question is whether this list should be extended.

**(i) Family Court and Full Court of Family Court of Australia**

29. As mentioned in paragraph 26 above, the Family Court has both appellate and original jurisdiction. In respect of its appellate jurisdiction appeals will lie to it from decisions of courts of summary jurisdiction. In respect of its original jurisdiction an appeal will lie from it to the Full Court of the Supreme Court when the decision concerns a matter arising out of its non federal jurisdiction (*Family Court Act* (W.A.) s.33(2)), and to the Full Court of the Family Court of Australia when the decision concerns a matter arising out of its federal jurisdiction (*Family Law Act* (C'th), s.94(1)).

30. In paragraph 8 above, the Commission described the Suitors' Fund as essentially an insurance scheme, whereby in exchange for payment of a "premium" a party was insured against the payment of costs in certain cases.

However, apparently no court fees are to be payable in relation to proceedings in the Family Court, either in its federal or State jurisdiction. This would mean that, on the principles set out above, parties to proceedings on appeal from decisions of the Family Court ought not to be entitled to be covered by the Fund.

It seems clearly undesirable that parties to these proceedings should be excluded. The decision that court fees are not to be charged was made as a concession to them, and it would be unfortunate if a decision intended to benefit them in one area deprived them of benefits elsewhere. On the other hand, it also seems undesirable that such parties should be eligible for

the benefits of the Fund without any contribution having been made to the Fund in respect of them, since this would mean that they were being subsidised by other litigants.

The appropriate course therefore seems to be that, as the decision not to provide for court fees was made by the Commonwealth Government in respect of the Court's federal jurisdiction and by the State Government in respect of the Court's State jurisdiction, those Governments should make a contribution to the Suitors' Fund covering their respective areas. It would be a simple matter to make an annual payment to the Fund, based on the total number of cases involved in the Family Court for that year for each jurisdiction, and calculated on some notional court fees. Such payments would preserve the principle under which the Fund should operate, and yet not exclude those who could be in real need of reimbursement of their legal costs.

31. Similar considerations apply to appeals from decisions of courts of summary jurisdiction in family law matters.

32. One further point arises in connection with the Family Court. In proceedings under the Commonwealth *Family Law Act* (i.e. in proceedings under the Court's federal jurisdiction), the general rule will be that each party will bear his own costs: s.117. There is, however, nothing in the State Family Court Act under which the same rule would apply to the Court when it was exercising its non federal jurisdiction. Under the *Suitors' Fund Act* at present, although a successful appellant can apply for reimbursement of his own costs in certain cases (see s.12A), an unsuccessful respondent who is not ordered to pay the appellant's costs, cannot claim reimbursement for his own costs: see paragraph 49 of the working paper. It would therefore be of no advantage to unsuccessful respondents, at any rate as far as its federal jurisdiction is concerned, to include appeals from the Family Court within the scheme unless this restriction were removed. The Commission's recommendation in this regard is contained in paragraph 45 below.

**(ii) District Court**

33. In paragraph 28 of the working paper, the Commission pointed out that an appeal from the Registrar of the District Court to a judge of that Court would not be covered by the Fund. The Commission considers that such appeals should be included, for the same reason that

appeals from the Master of the Supreme Court to a judge of the Supreme Court should be included: see paragraph 24 above. In that paragraph the Commission recommended that the Registrar of the District Court be deemed to be a 'court' for the purposes of the Act. The recommendation that the District Court should be included in the list of appellate bodies is simply a corollary of that recommendation.

The Commission is not aware of any other instance where the District Court functions as an appellate tribunal from a decision of a court (the Finance Brokers Supervisory Board, to be set up under the *Finance Brokers Control Act 1975*, would not be a court, so that appeals from its decisions to the District Court, which that Act provides for, would not be covered by the Fund). However, in the Commission's report on *Dividing Fences* (Project No. 33), the recommendation is made that dividing fence disputes be determined by the Local Court with a right of appeal to the District Court. If this recommendation is accepted, such appeals would be covered by the Fund if the District Court is added to the list of appellate bodies.

Moreover, from a general point of view, it seems desirable to take account of the possibility of the District Court being vested with appellate jurisdiction in the future by adding it to the list of appellate bodies in s.10 of the *Suitors' Fund Act*.

**(iii) Industrial Appeal Court**

34. In paragraph 28 of the working paper, the Commission suggested that appeals to the Industrial Appeal Court from decisions of the Industrial Commission and the Industrial Magistrate should be included in the scheme. The Industrial Magistrate exercises a quasi criminal jurisdiction (see the *Industrial Arbitration Act 1912*, ss.99, 100 and 103), and this Part of this report is concerned only with civil proceedings. Accordingly the question of whether appeals from the Industrial Magistrate should be included in the scheme will be dealt with in Part B of this report.

35. In the view of the Commission, the Industrial Commission is not a "court" for the purposes of the *Suitors' Fund Act*. Since the Commission recommends that no change should be made in the present law in this respect (see paragraph 22 above), there would be no point in adding the Industrial Appeal Court to the list of courts set out in s.10 of the *Suitors' Fund Act*. Victoria includes its Industrial Appeals Court within the list of appellate bodies covered

by the scheme (Vic., s.13(4)), but in that jurisdiction appeals on points of law from **any** body, and not only courts, are included in its scheme.

*Series of appeals*

36. An indemnity certificate granted to an unsuccessful respondent in the final appeal of a sequence of appeals covers not only the costs of that appeal, but also of all the appeals in the sequence: s.11(1) (a) (ii) and (b) (ii). In paragraph 42 of the working paper the Commission pointed out that this could lead to curious results where during the sequence the final respondent was at some stage an appellant. For example, if A (the plaintiff) was unsuccessful against B (the defendant) in the Supreme Court, was unsuccessful on appeal to the Full Court, succeeded in the High Court, but on B's appeal the Privy Council reversed the decision of the High Court, A would, if granted an indemnity certificate as the unsuccessful respondent in the Privy Council, be entitled to his own costs and those of B in all the appeals including the first which, in the light of subsequent events, was wrongly conceived by him. Though there could be no objection to A being reimbursed from the Fund for the costs incurred by him in the appeal to the Privy Council, since that appeal was necessary to correct an error made by the High Court, possibly A should not be reimbursed for the costs of appealing to the Full Court.

Although the present limit on would make the question academic, if the Commission's recommendations as to limits. (see paragraph 13 above) are implemented, the question could become a real one.

37. The Commission accordingly suggested in the working paper that, instead of an indemnity certificate automatically covering all appeals in the series, the person who has the function of granting an indemnity certificate (at present a judge of the Supreme Court sitting in chambers: s.10(2)) should be empowered to grant an indemnity certificate in respect of each appeal in the sequence, treating each appeal on its merits. All the commentators agreed. The Commission recommends accordingly.

38. There is a further anomaly in the existing system in the case of a series of appeals. Under the present Act, an unsuccessful respondent (A) who has been granted an indemnity certificate and who is unsuccessful in a further appeal does not thereby vacate the certificate granted to him in respect of the first appeal. If his further appeal is successful, however, he

vacates his certificate, whether or not an indemnity certificate is granted to the other party (B) in respect of the further appeal: s.12. The Commission considers that an indemnity certificate, once granted, should not be able to be vacated, and it so recommends. This would not necessarily mean that the Fund would be required to make any payment in respect of that certificate. The certificate would only operate in a case where the final appeal court ordered A, and not B, to pay the costs of the appeal in respect of which he had been granted a certificate. In that case, A could be indemnified by the Fund in respect of those costs.

39. As a corollary to its recommendation that appeals on fact as well as on law should be covered by the Fund (see paragraph 19 above), the Commission recommends that the provisions as to indemnity certificates and as to payment of costs in respect of a series of appeals, should also apply to appeals on fact.

The provisions as to indemnity certificates do not at present apply to appeals on the quantum of damages: see s.15; see also paragraph 49 below. It also appears that reimbursement of costs is not possible for any intermediate appeal in a series of such appeals: see paragraph 6 above. The Commission considers that appeals on the quantum of damages should be treated in the same way as other appeals, and recommends that appropriate provision be made accordingly.

*New trials*

40. Under the present Act, where an appeal as to the quantum of damages succeeds and a new trial is ordered, it seems that the unsuccessful respondent can claim not only for the costs of the appeal he is ordered to pay, but also for the costs of the new trial, if he is ordered to pay them: s.15(1). However, there is no similar provision for payment of the costs of a new trial ordered to be had when an appeal succeeds on a question of law: s.11. In the Commission's view this is anomalous, and the Commission recommends that the same rules should apply irrespective of the ground on which a new trial is ordered: cf. paragraph 39 above.

However, the question then arises as to whether the law should provide that compensation should be payable in respect of the new trial or for the costs of the first trial. In its comments, the Law Society said that compensation should be payable in respect of the first trial, since "It is after all the first trial that has gone wrong and given rise to expense which it is considered the system and not the parties should bear. If the costs of the second trial are to be paid, the

Fund in effect would be giving legal aid." The Commission agrees with this view. This in fact was the principle adopted by the legislature in the analogous case of abortive and discontinued proceedings. Compensation is payable for the costs of those proceedings before they were rendered abortive or discontinued, and not for the costs of the fresh proceedings: s.14.

The Commission accordingly recommends that, where a new trial is ordered, compensation should be payable in respect of such costs of the first trial as were thrown away. Some of these costs, for example the solicitor's fee for getting up the case and counsel's original fee on brief, probably would not be entirely wasted.

*Position of appellant*

41. In paragraphs 45 to 51 of the working paper the Commission discussed the position of the successful appellant. Normally it is the unsuccessful respondent who is ordered to pay the costs of the appeal and an indemnity certificate can be given only to him. However, the successful appellant may obtain payment of his costs from the Fund where the respondent has been granted an indemnity certificate if the Appeal Costs Board is satisfied that -

(a) the respondent unreasonably refuses or neglects or is unable through lack of means to pay the appellant;

(b) payment of those costs would cause the respondent undue hardship; or

(c) the respondent cannot be found: s.11(2).

A similar provision exists in relation to appeals on the quantum of damages: s.15(1).

42. In paragraph 47 of the working paper, the Commission discussed whether the successful appellant should be able to claim directly against the Fund in every case, but tentatively decided against such a course mainly on the ground that the appellant would still be able to claim directly against the respondent, so that the respondent would still need to include the appellant's costs in his own claim against the Fund. The Commission confirms this view. However, it considers that it would be desirable to oblige the body controlling the Fund

(see paragraph 57 below) to ensure that the appellant's costs are paid or secured before it pays the respondent. This step would not only provide for the circumstances listed in ss.11(2) and 15(1) of the Act (see paragraph 41 above) but where the respondent is bankrupt or, if a company, is in liquidation, which are not expressly covered by those subsections. The question of the rights of the parties in the case of a respondent's bankruptcy arose in *Jones v. Skelton* (No.4) [1966] 2 NSWR 167. The respondent concerned had been the unsuccessful respondent in an appeal, and had been ordered to pay the costs of the appellant. Before he had paid these costs he became bankrupt. As assignee of the bankrupt's estate, the Official Receiver applied for an indemnity certificate.

The Court held that the right to apply for an indemnity certificate was "property of the bankrupt" within the meaning of s.60(1) of the Commonwealth *Bankruptcy Act 1924* (now s.58(1) of the Commonwealth *Bankruptcy Act 1966*), and accordingly vested in the Official Receiver. The Court therefore granted an indemnity certificate to the Official Receiver, but only on condition that he gave an undertaking that he would request the Under Secretary of the Department of the Attorney General and of Justice (the equivalent to the Appeal Costs Board of this State) to pay the appellant's costs direct.

The Commission's recommendations is in the conformity with the general approach of the Court in *Jones v. Skelton*, but would go further by obliging, not merely empowering, the Board or other responsible authority (see paragraph 57 below) to ensure that the appellant's costs are paid.

43. Under s.12A(2) of the Act, the appellant can claim against the Fund in a case where the court would "but for the provisions of some other Act or law, have ordered costs of the appeal… to be paid by the respondent." The Commission regards this provision as a useful one. However, it recommends the following changes, which are designed to extend the benefits of the section -

(a) in accordance with the recommendation in paragraph 19 above, costs of successful appeals on fact as well as on law should be covered in the section;

(b) if the appeal is a final appeal in a series, the appellant should be eligible for reimbursement of his costs of the intermediate appeals, in accordance with the recommendations in paragraphs 36 to 39 above;

(c) the section should be made to apply to *ex parte* appeals, that is appeals where there is no respondent, such as appeals against certain decisions of the Licensing Court: see paragraph 50 of the working paper.

Under s.12A(5) the amount payable is at present limited to $1,000. The Commission recommends that, since only one party's costs are involved, the limit should be raised to one half the amounts proposed in paragraph 13 above.

*Position of respondent*

44. An unsuccessful respondent to an appeal who is not ordered to pay the appellant's costs cannot claim reimbursement for his own costs. This is because the Act limits the amount payable to a respondent to the amount of the appellant's costs ordered to be paid by him: ss.11(3) (a), 15(2) (a). The courts are in general not prepared to deviate from the ordinary rules for awarding costs to enable parties to claim from the Fund: see *Re Pennington, deceased* [1972] VR 869.

45. The Commission considers that this position is unjust, particularly since the court's decision not to make an order against the respondent obviously would not imply that the respondent was in some way blameworthy. For example, the appeal court may decide not to make an order for costs against the respondent where the appeal succeeds on a ground not raised in the court below, or where the appeal succeeds on one ground but fails on others.

The Commission accordingly recommends that an unsuccessful respondent should be able to claim reimbursement for his own costs, whether or not he was ordered to pay the appellant's costs. The limit of reimbursement where the respondent's costs are concerned should be one half of the limits proposed in paragraph 13 above.

**(d) Abortive or discontinued proceedings**

46. At present, litigants can be reimbursed their costs from the Fund in respect of proceedings rendered abortive by reason of "the death or protracted illness" of the judge, magistrate or justice: s.14(1) (a). The section makes no reference to the situation where a magistrate is appointed to the District Court or a Judge of the District Court is appointed to

the Supreme Court, or a Judge of the Supreme Court is appointed to the High Court. Two applications for reimbursement were granted by the Appeal Costs Board, arising out of the appointment of a magistrate to the District Court, as being within the spirit of the Act.

The Commission suggested in paragraph 36 of the working paper that it was desirable to provide specifically for all circumstances in which the presiding judicial officer was unable to continue. All commentators agreed. The Commission recommends accordingly.

47. There is a possible difficulty in the case of reimbursement of the costs of discontinued proceedings: see s.14(1) (c). The reference in that provision to the ordering of a new trial could possibly be held to exclude fresh proceedings before the Full Court, since proceedings before that court are not ordinarily described as a "trial". The Appeal Costs Board has in fact been prepared to reimburse applicants in such cases, but it would be preferable for the legislation to provide specifically for them, and the Commission recommends accordingly.

48. A similar problem to that referred to in paragraph 47 above arises in regard to coroners' inquests. However, for the purposes of this report, the Commission has classified such proceedings as criminal, since they have some of the same functions as committal proceedings. Accordingly it will deal with them in Part B of this report.

**(e) Basis for granting relief**

49. Under the present Act, an unsuccessful respondent in an appeal relating to the quantum of damages is entitled to payment from the Fund of his costs and the costs of the appellant he is ordered to pay: s.15(1). However, in appeals on questions of law, which is the only other class of appeal included at present, relief is at the discretion of the Supreme Court: s.10(l). There appears to be no valid reason for distinguishing in this way between these two classes of appeals, and the Commission considers that whatever is to be the basis for relief in the case of the one class, should be so in the other: see paragraph 39 above.

50. The Commission gave consideration to the question whether, in the case of appeals, relief should not be discretionary, but as of right. If the Commission's recommendation that successful appeals on fact as well as those on law should be included in the scheme (see paragraph 19 above) were implemented, all that an unsuccessful respondent would need to do

would be to show that he was ordered to pay the costs of the appeal. Parties would then always know whether or not they would be granted relief, and the extra expense and delay involved in arguing a case for relief would be avoided. On the other hand, to make relief as of right could encourage parties to defend appeals which they would otherwise have attempted to settle, and would tend to clog the court system. On balance, therefore, the Commission recommends that the discretionary approach should be retained.

51. The question then arises as to what should be the principles on which the discretion is to be exercised. Under the existing law, the discretion is a discretion to grant; it is not a discretion to refuse: *Richards v. Faulls Pty. Ltd.* [1971] WAR 129 at 138, a decision of the Full Court, which involved the question whether, as a matter of law, the Workers' Compensation Board could find on the evidence that a worker had been guilty of serious misconduct. An unsuccessful respondent to an appeal must show some ground calling for the exercise of the discretion in his favour and he does not do this merely by showing that the appeal succeeded on a point of law: *ibid.* It appears that a respondent cannot succeed on a claim against the Fund unless the question of law "might at least reasonably be resolved in different ways, so that in a sense the unsuccessful party may be thought to have suffered some "misfortune" owing to a doubt about the correct rule of law to be applied" : *ibid*.

52. The Commission considers that this places too heavy a burden on the applicant, and that the test should be the reasonableness of the applicant's action at the trial below, rather than the reasonableness of the conclusions of the trial court. This test would accord with the insurance approach: see paragraph 8 above. The Commission therefore recommends that the Act should be amended to provide that an applicant should be granted relief if the judge issuing the indemnity certificate is satisfied that, in conducting his case at the trial, the applicant acted reasonably.

Under the existing Act appeals on questions of fact are not included (except for appeals on the quantum of damages). In paragraph 19 above the Commission has recommended that appeals on questions of fact should be included. If this were implemented but the general onus remained unchanged, an applicant would presumably not be able to claim relief unless the trial court's view of the facts was reasonable. In this case, also, the Commission considers that the test should be the reasonableness of the applicant's conduct of his case at the trial.

## (f) Exclusion of certain classes of person

*Companies*

53. At present, companies having a paid up capital of $200,000 or more, and their subsidiaries, are excluded from the benefits of the Act: see paragraphs 71 and 72 of the working paper. No other form of corporate body is excluded. The Commission considers that this exclusion is inequitable. Such a company would contribute to the fund and should therefore benefit from it. As emphasised in paragraph 9 above, the purpose of the Fund is not to provide legal aid. If it were, then possibly its benefits should be confined to those in need. In any case, if the criterion of having $200,000 or more in paid up capital is regarded as a means test, it is discriminatory. It does not follow that because a company has a paid up capital of $200,000 it has assets of that value. Further, a company with a very small paid up capital could have assets of more than $200,000. Moreover, individuals with assets of more than that figure are not excluded.

Of the other States with a Suitors' Fund, only New South Wales excludes such companies, and the Commission has been informed by the Under Secretary of the Department of the Attorney General and of Justice that the Government intends to remove the restriction when the Act comes up for review.

The Commission recommends that all companies should be eligible for relief under the Act.

*The Crown*

54. The question whether the Crown should continue to be excluded from the Act also arises. All the commentators on the working paper considered that it should. However, the Commission can see no reason why the Crown should not be eligible for the benefits of the Fund. In New South Wales the Crown does not pay court fees and therefore makes no contribution to the Fund, which would of course justify its exclusion. In this State the Crown pay court fees like any other person, and should not be excluded. The Commission so recommends.

*Legally aided litigants*

55. The increasing availability of legal aid from both State and Commonwealth sources may mean that an increasing number of litigants who have been legally aided will qualify for benefits under the *Suitors' Fund Act*. The question of legally aided litigants was discussed in paragraphs 67 and 68 of the working paper, where it was suggested that legally aided litigants should be in the same position with regard to the Suitors' Fund as other litigants. All the commentators agreed.

The general principle should be followed that he who contributes to the Fund should be eligible for its benefits. Under the legal aid schemes run by the Law Society of Western Australia and the Australian Legal Aid Office, the court fees of a legally aided litigant are, depending on his means, usually paid for by the scheme. But it would really make no difference whether a legally aided litigant paid the court fees personally or whether someone else paid his fees on his behalf: in either case the Suitors' Fund would benefit from the contribution. It should be emphasised once again that the Suitors' Fund is not a legal aid scheme and there is thus no question of providing the litigant with two sources of legal aid.

Accordingly the Commission recommends that a legally aided litigant should not be excluded from the Fund. However, a provision should be included in the legislation empowering the authority controlling the Fund to make payment direct to the legal aid body. The legislation should also provide for apportionment, to deal with cases where the aid was only partial.

**(g) Determination of claims and administration of Fund**

*Granting of certificate*

56. At present, indemnity certificates and costs certificates are granted by a judge of the Supreme Court sitting in chambers: ss.10(2) and 12A(3). The Commission considers that this position is satisfactory, except where the application is in respect of an appeal from the Registrar of the District Court to a judge of that Court (see paragraph 33 above) or an appeal from a court of summary jurisdiction to the Family Court (see paragraph 31 above) or an appeal from the Family Court to the Full Court of the Family Court of Australia: see

paragraph 30 above. In the case of an appeal from the Registrar of the District Court, it would be more convenient for a judge of that Court to hear the application, and for a judge of the Family Court to hear the application in the other cases.

*Appeal Costs Board*

57. The Commission considers that the function of the Appeal Costs Board could be adequately performed by the Master of the Supreme Court. At present the Master is in fact chairman of the Board, although there is no statutory requirement in this regard.

The Commission's basis for its view is that of simplicity of administration. It is not that the costs of administration would be less, for the Law Society and Barristers' Board representatives on the Board receive no remuneration.

The responsibilities of the Board are similar to those which the Master of the Supreme Court is accustomed to discharge, and it would be more convenient if the task was given to him, as has been done in Tasmania. One advantage would be that claims against the Fund could be disposed of as they arose, instead of being deferred until a meeting of the Board could be arranged. Another is that it would seem to be feasible to require less documentation in support of an application for payment, at least where it concerned Supreme Court proceedings: see the *Suitors' Fund Regulations 1965*.

The discretions exercisable would relate principally to a decision as to the amount of costs involved in new trials or abortive proceedings (see ss.11, 12A, 14 and 15), whether the appellant or persons other than litigants should be paid direct (see paragraph 42 above and paragraph 58(b) below), whether the time within which application must be made should be extended, whether costs should be taxed or additional information submitted: see *Suitors' Fund Regulations 1965*, Regs. 6, 7 and 9. All of these are functions which the Master is accustomed to exercise. Questions of insuring against certain claims against the Fund (see paragraph 15 above) could be decided on the advice of the State Government Insurance Office.

## (h) Other matters

58. The following lists a number of miscellaneous reforms which the Commission recommends should be implemented. They are designed to rectify minor anomalies.

(a) A claim against the Fund should be permitted where an award of damages is no more than that suggested in a rejected compromise: see paragraph 31 of the working paper. This situation would arise where the plaintiff was under a legal disability, so that court approval was required for the parties to enter into a compromise. If the court declined to approve the compromise, the question of damages must be litigated.

(b) The Fund should be authorised, in special circumstances, to pay persons other than litigants: see paragraph 69 of the working paper. At present the Fund cannot do so, even though it has reason to believe that the claimant will not reimburse his solicitor. There has been one instance where a litigant who received money from the Suitors' Fund was indebted to his solicitor for costs in respect of the proceedings to which the certificate related, but apparently refused to reduce the debt even though he received the money on the basis of his having incurred those costs.

(c) Relief should be available where costs are ordered to be paid from a fund in which a party is beneficially interested: see paragraph 52 of the working paper. In such a case the party is, to some extent, really paying the costs himself, and in the Commission's view should be eligible for relief.

(d) A guardian *ad litem* or next friend should be able to claim against the Fund: see paragraph 53 of the working paper. At present these persons are, technically speaking, not parties. In the Commission's view if they incur costs they should clearly qualify for relief.

(e) A reservation of a case by a judge of the Supreme Court to the Full Court under s.43 of the *Supreme Court Act 1935* should be included in the definition

of "appeal" in s.3 of the *Suitors' Fund Act*. It is analogous to stating a case for the opinion of the Supreme Court, which is already included.

## SUMMARY OF RECOMMENDATIONS

59. The Commission recommends that -

(a) the limits of compensation, where they apply, should be raised;

(paragraphs 13, 43 and 45)

(b) the controller of the Fund should be able to insure the Fund against certain claims;

(paragraph 15)

(c) the contributions to the Fund should be by way of a levy on civil court fees;

(paragraph 16)

(d) costs of successful appeals on fact should also be covered by the Fund;

(paragraphs 19 and 43)

(e) the Master of the Supreme Court and the Registrar of the District Court should be included in the definition of "court" in s.3 of the Act;

(paragraph 24)

(f) the Family Court and the Full Court of the Family Court of Australia and the District Court should be included in the list of appellate bodies to which the Act applies;

(paragraphs 30 and 33)

(g) in view of the fact that no court fees will be payable in the Family Court or in respect of family law proceedings in courts of summary jurisdiction, the Commonwealth and State Governments should each contribute a sum to the Fund in lieu of a levy;

(paragraphs 30 & 31)

(h) in the case of a series of appeals, each appeal should be dealt with separately, as far as concerns the issuing of an indemnity or costs certificate;

(paragraphs 36 and 43)

(i) an indemnity certificate or costs certificate once granted, should not be revocable;

(paragraphs 38 and 43)

(j) where a new trial is ordered on appeal, the costs of the first trial thrown away should be claimable from the Fund;

(paragraph 40)

(k) in certain cases the controller of the Fund should be required to pay the appellant direct, and an appellant should be able to claim under s.12A(2) where there is no respondent to the appeal;

(paragraphs 42 and 43)

(l) a respondent should be able to claim reimbursement of his own costs notwithstanding that he was not ordered to pay the appellant's;

(paragraph 45)

(m) costs should be claimable in all cases where the judge does not continue, and this provision should apply to appeals;

(paragraphs 46 and 47)

(n) in the case of appeals, relief should be granted if the applicant had acted reasonably at the trial hearing;

(paragraph 52)

(o) all companies should be eligible for relief under the Act;

(paragraph 53)

(p) the Crown should be eligible for relief under the Act;

(paragraph 54)

(q) legally aided litigants should be eligible for relief under the Act;

(paragraph 55)

(r) in regard to appeals to the Family Court and the Full Court of the Family Court of Australia, an application for a costs or indemnity certificate should be heard by a judge of the Family Court; and an analogous position should exist in relation to appeals to the District Court;

(paragraph 56)

(s) the Appeal Costs Board should be abolished and its functions given to the Master of the Supreme Court:

(paragraph 57)

(t) certain miscellaneous matters should be implemented.

(paragraph 58)

(*signed*) David K Malcolm
*Chairman*

Eric Freeman
*Member*

R W Harding
*Member*

16 March 1976

# APPENDIX I

## List of those who commented on the working paper

Institute of Legal Executives (W.A.) (Inc.)

Law Society of Western Australia

Treasury Department

Burton R.H., S.M.

Temby I.D.