



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 49

Suitors' Fund Act

WORKING PAPER

MARCH 1975

INTRODUCTION

The Law Reform Commission has been asked to review the *Suitors' Fund Act 1964-1971*.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole, or on any other aspect coming within the terms of reference are invited. The Commission requests that they be submitted by 23 May 1975.

Copies of the paper are being sent to the

Appeal Costs Board
Australian Legal Aid Office
Chief Justice and Judges of the Supreme Court
Judges of the District Court
Law Society of W.A. (Inc.)
Magistrates' Institute
Law School of the University of W.A.
Registrar of the District Court
Solicitor General
Under Secretary for Law
Under Treasurer
Citizens Advice Bureau
Institute of Legal Executives
Law Reform Commissions and Committees with which this Commission is in
correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

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TERMS OF REFERENCE

1. "To enquire into the operation of the *Suitors' Fund Act 1964-1971* 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."

THE SUITORS' FUND ACT 1964-1971

2. The *Suitors' Fund Act* was first enacted in Western Australia in 1964. It established a fund known as the "Suitors' Fund". The Fund is financed by a levy of 10c on certain originating processes in the Supreme, District and Local Courts and Courts of Petty Sessions (s.5, and see paragraph 17 below). It is administered by the Appeal Costs Board which consists 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).

3. The Fund is available to assist in 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 quantum of damages (s.15(1) and (2a));
- (c) a successful appellant in an appeal in which a conviction for an indictable offence is quashed without a new trial being ordered (s.12A(1));
- (d) a successful appellant in an appeal on a question of law against a conviction for an offence, on indictment or complaint, where a new trial is ordered (s.14(1) (b));
- (e) 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));
- (f) an accused where criminal proceedings in any court are adjourned by the prosecution through no fault of the accused or his legal adviser (ss.14(1) (d), 14(1a));
- (g) parties to any 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));
- (h) parties to civil proceedings where the hearing is discontinued through no fault of any of the parties and a new trial is ordered (s.14(1) (c));
- (i) the accused in criminal proceedings where the hearing is discontinued through no fault of his or his legal adviser and a new trial is ordered (s.14(1) (c)).

4. Where an unsuccessful respondent is eligible under the Act, he is entitled to reimbursement of his own costs of the appeal in addition to those of the appellant which he is ordered to pay. Costs of the proceedings from which the appeal is brought are not however in such cases recoverable from the Fund (s.3). On an appeal relating to damages where a new trial is ordered, it seems that an unsuccessful respondent is entitled to be reimbursed for the costs of the new trial in addition to those of the appeal, although the Act is somewhat obscure on this (see s.15(1) (a)). Relief available under the Act to an unsuccessful respondent includes costs incurred in a series of appeals (s.11), but this may not be so in the case of a successful appellant in those criminal proceedings to which the Act applies (see ss.12A; 14(1) (b)).

An appeal for the purposes of the Act includes an application for a prerogative writ to correct an error made by a lower court (*Ex parte Parsons* (1952) 69 W.N. (N.S.W.) 380) and an appeal by way of order to review (s.3), but does not include a reservation by a judge of the Supreme Court to the Full Court (*Supreme Court Act* s.43 and see *Callen v. Strathfield Municipal Council* [1971] 1 N.S.W.L.R. 122).

5. Any party to an appeal which succeeds on a question of law may apply to the Supreme Court for the granting of an indemnity certificate to the respondent (s.10(1)). Where the unsuccessful respondent, having been granted an indemnity certificate, does not pay the appellant's costs as ordered by the court, or does not apply for payment thereof from the Board, the appellant may apply on his behalf (s.11(2)).

6. Those entitled to benefit under the Act cannot, of course, claim more than the costs allowed by the court or on taxation. Further, an unsuccessful respondent cannot recover in total more than \$2,000 with regard to an appeal on a question of law (s.11(3) (b)). Originally the sum was \$1,000 but this was increased to \$2,000 in November 1970 (see *Gazette*, 1970 p.3461). In an appeal relating to damages the respondent is limited in total to \$1,000 (s.15(2) (b)). A limit of \$1,000 is imposed on a claim by an accused whose conviction is quashed or an

appellant who cannot obtain an order for his costs on the appeal against the unsuccessful respondent (s.12A(5)). There is no statutory limit on the amount that may be paid in the other instances in which relief is available.

7. The Crown is not entitled to benefit under the Act (ss.13, 14 & 15) except that, presumably, as a successful appellant in the circumstances referred to in paragraph 5 above, the Board may pay it its costs. A similar position applies in the case of a company with a paid up capital of \$200,000 or more (*ibid.*), but the wording of s.15A would appear to preclude any payment at all from the Fund to a subsidiary of such a company.

8. In the situations referred to in paragraph 3(a), (c) and (e) above, relief is at the discretion of the Supreme Court. In cases falling under paragraph 3(a) it is necessary to obtain an "indemnity certificate" and in cases falling under paragraph 3(c) and (e) a "costs certificate" from the Court before payment can be made from the Fund (ss.10 & 12A). An indemnity certificate entitles a respondent to payment of both his and the appellant's costs, and can only be awarded to the respondent. A costs certificate relates only to the appellant's costs and is therefore only awarded to him. There is no appeal from the grant or refusal of the application (s.13).

9. In cases falling under paragraphs 3(b), (d), (f), (g), (h) and (i) above, the requirements as to costs or indemnity certificates do not apply, application for payment being made direct to the Board. Further, in the case of appeals or motions relating to damages, an unsuccessful respondent is entitled as of right to his costs and those of the appellant ordered to be paid by him, and the Board has no right to refuse payment (see *Uren v. Australian Consolidated Press Ltd.* [1965] N.S.W.R. 37). It is possible that the Board also has no discretion in the cases of abortive or discontinued proceedings (see s .14 (1), and paragraph 61 below).

10. The Suitors' Fund Regulations 1965 set out the manner in which application is made to the Board for payment from the Fund. In most cases application must be made within six months after the appeal succeeded although the Board may, and usually does, extend this time limit. The application must be signed by the applicant in person, be in the prescribed form and, where appropriate, be supported by a costs or indemnity certificate, a copy of the judgement ordering payment of costs, the allocatur where the costs have been taxed, and proof of payment of the appellant's costs.

THE LAW IN OTHER JURISDICTIONS

11. Similar funds to that operating in Western Australia exist in Victoria (*Appeal Costs Fund Act 1964*), New South Wales (*Suitors' Fund Act 1951*), Tasmania (*Appeal Costs Fund Act 1968*) and Queensland (*Appeal Costs Fund Act 1973*).

12. In New South Wales the Fund is administered by the Under Secretary of the Department of the Attorney-General and of Justice, in Tasmania by the Master of the Supreme Court and in Victoria and Queensland by Boards similar to that in this State. The New South Wales Fund is financed by transferring to it a proportion of all court fees paid, whereas the other funds are financed by a levy on all or some originating processes, as in this State. The instances in which relief is available vary little between the States and all limit the amount of relief payable in respect of any one application (see Appendix I).

DISCUSSION

Need for the Fund

13. The dominant purposes of the *Suitors' Fund Act* are to "relieve litigants of the burden of costs that might be imposed upon them by reason of erroneous decisions upon questions of law" by lower courts (see *Gurnett v. The Macquarie Stevedoring Co. Pty. Ltd.* [No.2] (1956) 95 C.L.R. 106, 113), and to compensate litigants where proceedings are rendered abortive through no fault of either party. Originally the Fund was not intended to provide compensation for correcting errors of fact (except those relating to the quantum of damages) because it is said such an error would ordinarily arise from the fault of a party (see *Acquilina v. Dairy Farmers Co-op Milk Co. Ltd.* (No. 2) [1965] N.S.W.R. 772). However, under an amendment to the Act in 1971 dealing with criminal proceedings (s.12A(1)) some appeals on fact are included (see paragraph 3(c) above; and see also paragraph 32 below).

14. The basis on which relief is granted for errors of law is that such an error made by a lower court could ordinarily be attributed to a fault in the administration of justice (see *Jansen v. Dewhurst* [1969] V.R. 421). The purpose of the Act is not to promote litigation or to provide legal aid in a broad sense (see *Richards v. Faulls Pty. Ltd.* [1971] W.A.R. 129, 138; *Pataky v. Utah Construction & Engineering Pty. Ltd.* (1966) 84 W.N. (N.S.W.) 201).

15. The Commission considers that the need to maintain a fund to reimburse litigants for costs incurred as a result of matters over which they have no control is beyond question. Between August 1965, when the Fund was established, and June 1974, sixty-six claims have been met from it and over \$34,000 has been paid out. An analysis of the number of claims made on the Fund and of the money received into and paid out of it appears in Appendix II.

16. Legal aid, even where granted, meets only the unsuccessful respondent's own costs, and not those of the appellant ordered to be paid by him. The *Official Prosecutions (Defendants' Costs) Act 1973* applies only to a limited class of appellant. The principal need for the Fund therefore remains, but questions arise as to whether the Fund should be one of the primary sources of compensation to litigants or merely be one of last resort (see paragraphs 30 and 67 below).

Financing the Fund

17. The Fund is financed by a levy of 10c on the issue of a writ of summons in the Supreme Court and the District Court, on the entry of a plaint in the Local Court and on the issue of a summons to a defendant upon complaint commencing proceedings in a Court of Petty Sessions (s.5(1)). Only those who institute proceedings by those processes in those courts are required to contribute to the Fund.

18. In the courts mentioned in paragraph 17 above, proceedings may be instituted by other processes. For example, some proceedings in the Supreme Court and District Court may be commenced by originating summons and others by originating motion or petition. Further, some proceedings, such as applications for licences under the *Land Agents Act* and *Money Lenders Act*, are instituted in Courts of Petty Sessions without the need for a complaint.

19. Some applications for reimbursement of costs granted by the Appeal Costs Board have related to appeals from the Summary Relief Court, the Workers' Compensation Board, the Licensing Court and the Children's Court. Litigants in these tribunals are not required to contribute to the Fund, but are eligible for the relief it offers. Similar considerations apply to the Warden's Court, although no application has so far been made in respect of an appeal from it.

20. If the Fund is to be financed by a levy on originating processes, it would seem more reasonable for it to apply to all tribunals whose litigants may become eligible for relief from the Fund, and all originating processes rather than only some. An exception could be made for cases where no fees are payable for the issue of an originating process. Such an exception applies in Victoria and in Queensland. The cost of collecting the levy where no other fee is payable would not warrant its imposition.

21. It would seem more equitable if other parties, as well as the plaintiff or complainant, were called upon to contribute to the Fund, since they are ultimately eligible to be indemnified by it. This proposal could broadly be given effect by requiring the State Treasurer to pay a percentage of all court fees to the Fund, or by imposing a levy on all the fees now payable for the filing of any document in a court. The Fund is financed in New South Wales by the former method.

22. If the Fund is properly regarded as being in the nature of an insurance scheme, it would appear to follow that it be financed by contributions from those who are at risk and who might thus benefit from it. An alternative approach is to regard the fund as a form of social service, the purpose being to compensate those who suffer loss due to defects in the judicial system. If the latter view is adopted, it would seem to be more appropriate to finance the Fund from Consolidated Revenue, as other social services are funded.

23. A suggestion that the costs of all successful appeals be defrayed out of public funds was put to the English Evershed Committee (*Final Report of the Committee on Supreme Court Practice and Procedure* (1953) Cmd. 8878). That Committee considered that it was not within its terms of reference to consider the suggestion, but indicated that such a scheme might not be warranted (paragraphs 633 to 635). However, it suggested that public funds be used to finance appeals on points of law of exceptional public interest (paragraphs 640 to 643).

The Commission is tentatively of the opinion that the insurance approach which at present forms the basis of the Western Australian legislation is the better approach, subject to a more equitable levy (see paragraphs 20 and 21 above), but would welcome comment.

Appeals to which the Fund should apply

(a) Tribunals from which appeal is brought

24. Except possibly for appeals within ss.12A(2) and 15 of the Act (see paragraphs 3(b) and 3(e) above) the Act only permits an indemnity certificate to be granted in an appeal (as to the meaning of which see paragraph 4 above) from the decision of a 'court'. This is defined to include the Workers' Compensation Board but not all tribunals from which there is an appeal to the Supreme Court. For example, an appeal to the Supreme Court from a decision of the Barristers' Board or the Taxation Board of Review, which are not courts, would not be included (see *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530). Although a decision of the New South Wales Industrial Appeal Court suggests to the contrary, it is doubtful whether the Industrial Commission or Industrial Magistrate is a 'court' for this purpose (see *Harker v. Boon* (1956) A.R. (N.S.W.) 178, see also paragraph 28 below).

25. It is uncertain whether an appeal from a decision of the Master of the Supreme Court is an appeal against the decision of a 'court' within the meaning of the Act. The Master is an officer of the Court rather than a 'court' (*Supreme Court Act* ss.155 & 167(1) (c); but cf. R.S.C. 1971 O.1 R.4(2) and see *Blackall v. Trotter* (No.2) [1969] V.R. 946 at 947). This question is not insignificant, for the Master transacts a considerable amount of the Supreme Court business. The better view seems to be that in assessing damages, acting as a taxing master and in exercising other judicial functions he is acting as a court (R.S.C. 1971 O.60 R.4; see also *Blackall v. Trotter* (ibid); *Onions v. Government Insurance Office of New South Wales* (1956) 73 W.N. (N.S.W.) 279; *Woods v. Bode* (1957) 75 W.N. (N.S.W.) 280; *Re Standard Insurance Co. Ltd.* (1967) 86 W.N. (N.S.W.) 267).

In any event, the Commission is of the opinion that all appeals from the Master should be expressly included within the scope of the Act (see N.S.W. s.6(1B)). Similar considerations apply to the Registrar of the District Court (see paragraph 28 below) and to a limited extent to the Clerk of the Local Court.

26. There may also be justification for extending the Act to all cases where an appeal lies to a court against decisions of a tribunal acting judicially. Some tribunals, such as the

Barristers' Board and the Medical Board, have power to act both administratively and judicially. For example, the Barristers' Board acts administratively in granting a certificate to practise and judicially in punishing for breach of discipline.

27. The Victorian, Tasmanian and Queensland legislation go even further and extend to appeals from any court, "Board, other body or person" from whose decision there is an appeal to a superior court on a question of law (see Vic. s.2; Tas. s.8; Qld. s.4). This would appear to cover all such appeals, whether or not the body appealed from was a judicial tribunal or was acting judicially. In considering whether the Western Australian Act ought to be so extended, it should be borne in mind that to do so would alter the basic purpose of the Act, which is at present confined to compensating litigants for errors within the judicial system.

(b) *Courts to which appeal is brought*

28. The appeals in respect of which s.10 of the Act relates are restricted expressly to those made to the Supreme Court, High Court or Privy Council. An appeal from the Registrar of the District Court to a Judge of that Court or from the Industrial Commission or Industrial Magistrate to the Industrial Appeal Court would be excluded. There seems no clear policy justification for this, and there would appear to be a need to include the District Court and the Industrial Appeal Court in the list of appeal courts mentioned in the Act.

29. If appeals from tribunals other than courts in the strict sense are to be included within the Act, it would seem desirable to include Local Courts and Courts of Petty Sessions in the category of appellate courts, since many appeals from tribunals lie to these bodies.

(c) *Criminal matters*

30. Section 12A(1), which covers cases where a conviction is quashed on appeal, relates only to indictable offences, although it would seem to make no difference that the accused was in fact tried summarily (see *Criminal Code* s.1; but cf. *Justices Act* s.4). It is hard to justify limiting the relief in this subsection to indictable offences. It is not so limited where, under s.14 (1) (b), a conviction is quashed on a question of law and a new trial is ordered. This apparent anomaly is to some extent cured by the existence of the *Official Prosecutions*

(Defendants' Costs) Act 1973, which enables successful appellant against a summary conviction to obtain costs.

However the enactment of that Act has created a problem in that some successful appellants may now choose between two alternative sources of compensation. In the case of a police prosecution the successful appellant can either obtain costs out of Consolidated Revenue under the *Official Prosecutions (Defendants' Costs) Act*, or he can apply for a costs certificate under s.12A of the *Suitors' Fund Act*. The Appeal Costs Board has suggested that this is undesirable and that the law should provide that no order may be made under s.12A(2) where the costs are recoverable from another source.

(d) *Compromises*

31. Section 15 of the Act permits an unsuccessful respondent to obtain costs where an appeal court reduces damages awarded by a court of first instance. The same principles should apply to permit a plaintiff to claim where his application to compromise a suit is rejected, but on a trial of the issues he receives less than that offered on the compromise (cf. Vic. s.19A).

(e) *Fact and Law*

32. With two exceptions the Act limits the appeals in relation to which relief might be granted to those which succeed on a question of law (ss.10(1), 12A(2) , 14(1) (b)). These exceptions are an appeal on the quantum of damages, which is expressly provided for in the Act (s.15) is an appeal on a question of fact (*Wagner v. Moran* (1958) 75 W.N. (N.S.W.) 60; *Nominal Defendant v. Hook* (1962) 113 C.L.R. 641, 643); and the quashing of a conviction for an indictable offence and the substitution of a verdict of not guilty, though typically it is based on an error of law, may in principle be based on an error of fact (s.12A (1); Code s .689 (1)).

33. There seems to be little justification for distinguishing between law and fact for the purposes of relief under the Act. The need for a fund to reimburse litigants for costs arising out of erroneous decisions of the judicial machinery appears to be the same whatever the nature of the erroneous decision. That the court from which an appeal is brought draws an incorrect inference from facts may not necessarily be the fault of the unsuccessful respondent,

and his claim to relief would appear to accord with the general philosophy of the Act. If the distinction is designed to exclude those appeals which succeed because evidence additional to that adduced before the court from which the appeal is brought is tendered during the appeal (see R.S.C. Order 63 Rule 10) the statute goes too far, since it excludes appeals where no additional evidence is received. For example, it was held that an appeal in which the apportionment of liability in a negligence case was varied was excluded from the Act because it succeeded on a question of fact (*Smith v. Rogers* (unreported), Supreme Court of W.A. Appeal 68/1965).

34. It has been said that an appeal on any matter which was formerly in the province of the jury is an appeal on a question of fact and is excluded from the Act (*Edwards v. Noble* (1971) 125 C.L.R. 296, 299; *Wagner v. Moran* (*supra*)), but this is a vague test. Further, it is not always easy to determine whether; an appeal succeeds on a question of law or of fact, and there is difficulty in determining at what stage inferences from primary facts become inferences of law, not fact. The distinction has led to criticism from the courts and to conflicting conclusions (see *Hayes v. Federal Commissioner of Taxation* (1956) 96 C.L.R. 47, 51; *Commissioner of Inland Revenue v. Walker* [1963] N.Z.L.R. 339, 353; *Onions v. Government Insurance Office of New South Wales* (1956) 73 W.N. (N.S.W.) 279; *Jansen v. Dewhurst* [1969] V.R. 421; *Di Battista v. Motton* [1971] V.R. 565). In addition it cannot be said with any certainty that an appeal on a mixed question of law and fact is within the ambit of the Act.

35. If the distinction between appeals succeeding on questions of law and of fact were to be removed, the result would be that respondents to all successful appeals could apply for relief under the Act. However, the granting of relief from the Fund would still be in the discretion of the Supreme Court.

New trials

36. Section 14(1) (a) of the Act permits the Board to reimburse a litigant from the Fund for his costs in proceedings rendered abortive by reason of "the death or protracted illness" of a judge, magistrate or justice. The section makes no reference to elevation of such persons. In an event, which could be said to be within the spirit of the Act, it has been the practice of the Board to pay litigants their costs (two applications for relief out of the appointment of a

magistrate to the District Court bench). In the circumstances it seems desirable to provide specifically for all circumstances in which the presiding judicial officer is unable to continue.

37. The reference to a 'new trial' in s.14(1)(c) called, for interpretation in one case before the Board. In that case one of the members of the Full Court died and before the appeal could continue another retired so that the quorum was lost. What followed was a new appeal, but the Board was prepared to treat that as a 'new trial' for the purposes of the Act. Such an interpretation is not clearly justified by the terms of the Act, and the law may need clarification.

38. The meaning of 'new trial' may also be material in determining whether or not committal proceedings which are discontinued through no fault of the accused come within the Act. To qualify for relief under s.14(1) (c) it is necessary for the presiding judicial officer to order a 'new trial'. Committal proceedings are in the nature of a preliminary inquiry to determine whether or not the accused should be put on trial, and it is doubtful whether new committal proceedings can be described as a new trial. On the other hand, the phrase 'new trial' in s.14(1) (c) may deserve a wide interpretation, since the Appeal Costs Board is authorised to pay the accused the costs incurred in "the proceedings" before the hearing was discontinued. Similar considerations would probably apply in a discontinued inquest. Whatever the present legal position, it appears appropriate that s.14(1) (c) should extend to committal proceedings and probably to inquests.

39. Section 14 of the Act was amended in 1971 to entitle an accused to the costs of an adjournment granted at the request of the prosecution if the adjournment was not due to the fault of the accused. However if the prosecution obtains leave to withdraw proceedings or enters a nolle prosequi, the defendant would not be entitled to reimbursement out of the Fund for his costs of the proceedings up to that time. Unless the proceedings were being dealt with summarily, so that the *Official Prosecutions (Defendants' Costs) Act* applied, the accused would bear the costs himself. If an accused is entitled to the costs caused by an adjournment the Commission suggests he should also be entitled to his costs if the prosecution discontinues the proceedings. It might be appropriate to extend the *Official Prosecutions (Defendants' Costs) Act* to cover such cases.

40. Where a new trial in a civil the quantum of damages is ordered as the result of an appeal which succeeds on a question of law, there appears to be no provision in the Act to enable the costs of the first trial to be recovered from the Fund. Under an indemnity certificate the unsuccessful respondent is only entitled to recover the costs of the appeal (s.11(l)), which do not include those incurred in the court of first instance (s.3). Thus the costs of two trials will have to be met by the parties. In the case of an appeal relating to the quantum of damages, however, it appears that the unsuccessful respondent is entitled to the costs of the appeal and the new trial (s.15(1)).

Series of appeals

41. As previously mentioned the *Suitors' Fund Act* extends to appeals on questions of law to the High Court and the Privy Council. An indemnity certificate granted to an unsuccessful respondent is inoperative until the time for appealing from the decision in which the certificate was granted has expired, or where there is no time limit for appealing, until leave to appeal has been determined or an undertaking not to appeal has been given to the Board (s.12). An unsuccessful respondent who has been granted an indemnity certificate and who is unsuccessful in his subsequent appeal does not thereby vacate the certificate granted to him in the earlier appeal. If his appeal is successful, however, he vacates his certificate, even though a certificate is not issued to the other party as a result of the subsequent appeal (s.12). In such a situation, if the finally unsuccessful respondent is insolvent, the finally successful appellant may never be paid the costs of the appeal in the series in respect of which he had been granted a certificate.

42. An indemnity certificate issued 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)). It was pointed out by Moffitt J. in *Acquilina v. Dairy Farmers Co-op Milk Co. Ltd.* (No.2) [1965] N.S.W.R. 772, that this can lead to curious results where during the sequence the final respondent was at some stage an appellant. For example, if A (plaintiff) was unsuccessful against B (defendant) in the Local Court, was unsuccessful on appeal to the Supreme 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.

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, but it could be argued that A should not be reimbursed for the costs of appealing to the Supreme Court, unless perhaps the case was a test case or of public importance. Although the present limit on reimbursement (see paragraph 6 above) would make the question academic, the question would become of practical importance if the limit were abolished or raised substantially.

43. To overcome the problems described in paragraph above it might be better if the judge was empowered to grant an indemnity certificate in respect of each appeal in the sequence, treating each appeal on its merits. However, it might also be necessary to delay consideration of each application until the sequence of appeals was completed if the Fund is not to be used to finance further appeals. On the other hand, the Council of the English Law Society, in commenting on suggestions for the need for a suitors' fund in that country, recommended that an appellant (and presumably a respondent) should have a prior assurance of indemnity (see the Law Society's *Gazette* Vol. 70 p.2270). But if this were made possible it could lead to a proliferation of appeals, delays and a strain on the judicial system. It would in effect amount to the establishment of another source of legal aid.

44. It is not clear whether a costs certificate under s.12A can be vacated once granted, or whether when granted after a series of appeals it covers the costs of all those appeals (cf. s.11(1)). Similar doubts exist in the case of an appeal under s.15. There appears to be no reason why the provisions relating to a series of appeals and its effect on an indemnity certificate should not relate to appeals relating to damages. In respect of cost certificates it is probably desirable that provision be made for such a certificate to remain in force unless an indemnity certificate is subsequently issued which covers those costs.

Payment from the Fund

45. The general concept of the *Suitors' Fund Act* is to indemnify litigants upon whom the burden of costs falls. As it is usual for the unsuccessful respondent to be ordered to pay the successful appellant's costs on the appeal, it is usually only the respondent in an appeal who is entitled to reimbursement from the Fund (ss.10 and 15 cf. s.12A(2)). However, the Act provides that, where a respondent to whom an indemnity certificate has been granted

unreasonably refuses or neglects to pay the appellant his costs or the payment of such costs would cause him undue financial hardship, the Appeal Costs Board may "for and on behalf of the respondent" pay the appellant his costs (s.11(2)). In practice the Board makes payment direct to the appellant unless the respondent furnishes proof that he has paid the appellant prior to seeking reimbursement from the Fund. Of twenty-six certificates issued to unsuccessful respondents up to 30 June 1974, the Board has in thirteen cases paid the appellant his costs direct.

46. The Act was amended in 1969 to permit any party to an appeal which succeeds on a question of law to apply for the granting of an indemnity certificate to the respondent (s.10(1)). An appellant who suspects he may not be able to recover his costs from the respondent can apply for a certificate on behalf of the respondent, irrespective of the wishes of the latter. There have been only two instances so far where it has been necessary for a successful appellant to do so.

47. Where an unsuccessful respondent has been ordered to pay the successful appellant's costs of the appeal it does not seem practicable to permit the appellant to have a claim against the Fund other than through the respondent. If each party was at liberty to apply for a certificate in respect of his own costs the present cumbersome procedure would be avoided but other difficulties would arise. For example, if a successful appellant did not apply for a certificate the unsuccessful respondent, if he had been ordered to pay the appellant's costs, would still want to include them in his application for a certificate in the same way as at present. These problems might be overcome by requiring an application for a certificate to be made at the time the question of costs of the appeal is resolved. In this way the court would not have to order that the respondent pay the appellant's costs but could order that each party have a certificate in respect of his costs and so be paid directly out of the fund.

48. However, in the case of appeals to the High Court and the Privy Council, it would not be possible to adopt the solution of providing for certificates to be by those courts at the time they resolved the question of costs, since the State cannot invest the High Court, nor presumably the Privy Council, with the power to grant a certificate (see *Gurnett v. The Macquarie Stevedoring Co. Pty. Ltd.* (No. 2) (1956) 95 C.L.R. 106). An application for a certificate in respect of an appeal to those courts would still have to be made to the Supreme Court. There is the additional point that Regulation 4(5) (a) (v) of the Appeal Costs

Regulations requires a respondent to lodge with his application for payment under an indemnity certificate a receipt from the appellant for payment by the respondent of the, appellant's costs, ordered to be paid by the respondent. If such evidence is not provided it is the practice of the Board to make a direction under s.11(2) of the Act and pay the appellant direct such of his costs as have not been paid by the respondent. If some limit on the amount payable was retained it would be difficult to ensure that the appellant is paid his costs in full up to the limit payable from the Fund. The restriction on the award of indemnity certificates to unsuccessful respondents only, has not, since the amendment permitting appellants to apply for them, presented any real problems and on balance it seems desirable that it remain unaltered.

49. An unsuccessful respondent to an appeal 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] V.R. 869).

50. Although the Act enables a successful to obtain reimbursement for his costs in some where no order for payment of the same is made against the respondent these are restricted to appeals succeeding on a question of law (s.12A(2)). In a successful appeal relating to damages neither the appellant nor the respondent can claim relief " from" the Fund where no order for costs is made against the respondent. Further, a successful appellant can only benefit under the Act where there is a respondent (ss.11, 12A (2) and. 15). For example, a successful appellant in an *ex parte* appeal against the decision of the Licensing Court cannot claim relief from the Fund; although if there had been a respondent he could have done so even though that respondent took no part in the proceedings and merely submitted to an order of the appeal court (see *Hyam v. Hyam* [1969] 2 N.S.W.R. 513) .

51. The Western Australian Full Court in the case of *Perry v. The Queen* (unreported, No. 13 of 1974) held that an appellant who succeeded on appeal against his conviction for an offence could not qualify for relief under s.12A(2) of the Act unless there was an ordinary legal right for the appellant to obtain costs which had been taken away by some special provision of the law. In the case of appeals against convictions on indictment the appellant

ordinarily has no legal right to costs against the Crown. The result of this decision is to considerably reduce the instances when a successful appellant can seek relief under the Act. Where an accused has been put to expense correcting a decision of a lower court it seems proper that he should be reimbursed for his costs from the Fund, particularly when he cannot recover his costs from the Crown. In the circumstances, it may be desirable to give the Court a discretion to grant relief to a successful appellant when it has not, for any reason, awarded costs against the unsuccessful respondent.

52. A further problem arises where an unsuccessful respondent's costs are ordered to be paid by a party other than himself. In such a case no reimbursement for his costs can be claimed from the Fund (see ss.11(1) (b) and 15(1) (b)). This could be harsh. For example, in a case involving the interpretation of a trust instrument, the trustees are usually ordered to pay the respondent's costs out of the estate. If the respondent is a beneficiary he will therefore be called upon indirectly to contribute towards the costs of the appeal. It may be desirable in such a case to provide for costs to be claimed from the Fund.

53. There may be some doubt whether a guardian ad litem or next friend is entitled to a certificate, Although these persons are usually liable for costs they are not technically parties to an action. It therefore seems desirable to provide expressly that such persons are eligible to be granted relief under the Act, as is the case in the Victorian legislation (cf. Vic. s.2).

Financial limit to relief

54. Varying limits are imposed under the Act on the amounts which may be paid to litigants from the Fund in respect of appeals; no limits are imposed in other cases (see paragraph 6 above). There is a case for increasing the statutory limits where they apply, or even for removing the limits altogether. A large proportion of the amount normally claimed for costs in an appeal relates to disbursements. The cost of printing the appeal books which often represents more than half of the appellant's costs of the appeal has risen sharply in recent years. Moreover, since 1970, when the limit for an indemnity certificate was last increased, costs of litigation have increased by 50%. The limit imposed for appeals relating to damages has remained unaltered since 1964 and that for costs certificates since 1971. Removal of the limits would not necessarily seriously deplete the Fund, since only in some cases would the costs of the appeal be substantial. There have been four instances where

claimants, because of limits imposed, were not paid the full amount of costs allowed by the taxing master. In the absence of any statutory limit the Fund would have been drawn upon to the extent of a further \$5,853 (or about 6% of the total contributions received during the Fund's existence). In the hands of the litigants, however, this represents a significant sum.

55. The Council of the English Law Society in its comments to the Lord Chancellor on proposals by a sub-committee of the British Section of the Commission of International Jurists to establish a Suitors' Fund suggested that indemnity should be entire, and not subject to fixed limits (The Law Society's *Gazette* Vol. 70 p.2270). The subcommittee, on the other hand, suggested that "initially, it would seem desirable and more politically acceptable to set a low limit which might vary from court to court" (*Proposals for a Suitors' Fund* 1969). Those States which have Funds all impose some statutory limit on the amounts recoverable from the Fund (see Appendix I).

56. By broadening the basis for financing the Fund in the manner suggested in paragraphs 20 and 21 above, it may be possible to remove completely the statutory limits imposed, particularly if the levy was increased to a more substantial level than 10c. On the other hand, if the grounds for relief from the Fund were widened it would no doubt place an added burden on it. The Commission is tentatively of the opinion that the Fund's income should be adjusted to ensure that claimants are paid their costs in full, either by increasing the levy or by broadening the source of funds, or both.

Should relief be discretionary?

57. In general, the granting of relief from the Fund is discretionary (see paragraphs 8 and 9 above). In the case of appeals other than those relating to damages the discretion is vested in a judge of the Supreme Court (ss.10(2), 12A(3)). In the case of proceedings discontinued by order of a presiding judicial official the discretion is his (s.14(1) (c) and (d)). In the other cases no direction is needed from a court or judge and it appears that the Board has no option but must pay the reasonable costs of the claimant.

(a) *Court's discretion*

58. The Full Court in *Richards v. Faulls Pty. Ltd.* [1971] W.A.R. 129 held that the discretion was to grant, rather than to refuse to grant, relief under the *Suitors' Fund Act*. The Court said -

"...the 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 has succeeded on a question of law: *Reeve v. Fowler* [1965] N.S.W.R. 110 per Walsh J., at p.111. Of course the nature of the case may in itself show that a certificate should be granted and not infrequently the court is able to act without further evidence or argument." (p.138).

59. The Act does not lay down any criteria on which the discretion is to be based. The fact that an appeal succeeds on a point not raised in the first instance may deter the court from certifying relief from the Fund for the appellant (see *Acquilina v. Dairy Farmers Co-operative Milk Co. Ltd.* (No. 2) [1965] N.S.W.R. 772; *Di Battista v. Motton* [1971] V.R. 565 *Pataky v. Utah Construction & Engineering Pty. Ltd.* (1966) 84 W.N. (N.S.W.) 201; *Reeve v. Fowler* [1965] N.S.W.R. 110). The applicant may be denied relief from the Fund where the decision of the court from which the appeal was brought was based on a wrong submission made by him (see *Di Battista v. Motton (supra)*).

60. Since the purpose of the Act is to afford protection to those who incur costs as a result of errors in the judicial machinery it may seem preferable that relief be granted unless there was good reason to the contrary. The recommendation of the sub-committee of the Commission of International Jurists (see paragraph 55 above) was that discretion should be to refuse to grant. On the other hand, as applications for relief are usually supported by all parties, to alter the onus in the manner suggested may well place the court in the position of a protagonist. In addition, it is possible that the number of successful applications would be increased resulting in an increased demand on the Fund. There are no records of the number of applications refused because of an inability to satisfy the onus referred to and the Commission is therefore unable to estimate the likely cost to the Fund of a change in the discretion.

(b) *Board's discretion*

61. In the case of abortive, adjourned or discontinued proceedings (s.14) and in the case of successful appeals on a question of law against convictions where a new trial is ordered (s.14) it may be that the Board has a discretion to refuse to pay any money from the Fund. However in the case of appeals relating to damages once the respondent is ordered to pay the appellant's costs of the appeal he is "entitled to be paid from the Fund" (s.15(1)).

62. It is difficult to find any good reason why in obtaining benefit under the Act appeals relating to damages should be treated differently from other appeals. The same considerations taken into account by the judges in exercising their discretion relating to other appeals are applicable (see paragraph 59 above). It therefore seems appropriate either that claims arising out of such appeals should also be discretionary, or that in all cases payment should be as of right.

(c) *Who should exercise discretion?*

63. The court hearing the proceedings out of which the claim for relief arose would appear to be the appropriate tribunal to be vested with the discretion to grant relief, because it would know best the circumstances giving rise to the application. If the operation of the Act was extended to cover appeals to courts other than those at present stipulated it would in many cases avoid a separate application to the Supreme Court (cf. Vic. s.13; N.S.W. s.6(1A); Qld. s.15(3)). Thus on an appeal to the District Court from the Registrar the application could be disposed of by that court. For the sake of simplicity it may be desirable to provide that the application for relief should, except in exceptional circumstances, be dealt with at the time the question of costs is disposed of. In the case of appeals to the High Court or the Privy Council applications would still have to be made to the Supreme Court (see paragraph 48 above).

Powers of Appeal Costs Board

64. The Appeal Costs Board has suggested to the Commission that the Board be expressly empowered to refer to the Full Court any question arising out of the exercise of its powers under the Act, and to engage solicitors and counsel for this purpose; and that the Full Court be empowered to order the costs of the parties of such a reference be paid from the Fund.

The principal reason for the suggestion is that in certain cases questions have arisen as to the validity of the issue of a certificate and as to the consequent powers and responsibility of the Board.

65. The Commission hopes that many of the difficulties faced by the Board under the present law will disappear when the Act has been clarified. However, inevitably, fresh questions will arise. The Commission therefore considers that the suggestion of the Board has some merit. On the other hand, it may be preferable to retain the existing situation. There seems to be no legal bar under the existing law to the Board seeking a declaration as to its powers, and the Commission has been advised that the Crown Law Department would make counsel available to appear on the Board's behalf.

66. The Board also suggests that the Act should make provision for the court to direct service on the Board of an application for a costs or indemnity certificate where doubt exists, and for the Board to appear and be heard thereon.

The Commission agrees that the court should have the assistance of counsel other than that of the applicant for a certificate if it so wishes, but thinks it may be preferable to place this responsibility on the Solicitor General or his delegate.

Legal aid

67. 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 the benefits under the *Suitors' Fund Act*. There appears to be no reason why, in principle, such litigants should be in any different position with regard to the Suitors' Fund than others. To prevent a legally aided litigant making a profit, the aid given to him could be repaid to the Legal Assistance Fund from the Suitors' Fund. This would not amount to a superfluous transfer of funds. Both Funds are separate and their source of money and their administration and purposes differ. In some cases such payments would involve the transfer of money from a fund within the State to one controlled by the Commonwealth.

68. The right of a legally aided litigant to recover from the Suitors' Fund could be subrogated to the administrators of the Legal Assistance Fund. Any money contributed by a legally aided person to his own costs would need to be repaid to him from the legal assistance scheme. Much the same scheme operates under the *Legal Contribution Trust Act* when another litigant is ordered to pay a legally aided litigant's costs (see s.44). Alternatively the Appeal Costs Board could pay the Legal Assistance Fund an amount equal to the aid given by it and the balance if any to the legally aided litigant. Much the same system operates in New South Wales. For obvious reasons, it would not seem desirable to pay the full amount of money due from the Suitors' Fund to the legally aided litigant and impose on him an obligation to reimburse the Legal Assistance Fund.

69. If it was considered desirable for legally litigants to benefit under the *Suitors' Fund Act* it would be desirable to amend ss.11(1) and 12A(4) of the Act to permit the Appeal Costs Board to pay persons other than litigants. An immediate benefit arising out of such an amendment is that it would permit the Board to pay a litigant's 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.

70. Because of his legal aid it might be said that a legally aided litigant has not incurred any "additional costs" by reason of an abortive trial or an adjournment. It may be necessary to amend s.14(1) of the *Suitors' Fund Act* to overcome this difficulty (cf. N.S.W. s.6A (1A)).

Should companies benefit?

71. The Act prohibits a company having a paid up capital of \$200,000 or more, or a subsidiary thereof or company related thereto from receiving payment from the Fund (ss.13, 14, 15 and 15A). This provision was apparently included to prevent undue strain on the Fund and because it was considered that the exclusion of such bodies would not cause them financial hardship.

72. In so far as the provision attempts to impose a means test it is not entirely consistent. It does not follow that because a company's paid up capital is \$200,000 it has assets to that

value. Further, a company with a very small paid up capital could have assets well in excess of \$200,000. Moreover, an individual with assets exceeding \$200,000 is not excluded. Further, the limitation does not always operate to exclude companies which have a paid up capital exceeding that stipulated.

Many actions are conducted in the name of the parties only, the conduct of the action being left to an insurance company exercising its rights of subrogation. In the case of an unsuccessful respondent whose rights were subrogated to an insurance company that company would receive the benefit of the respondent's rights under the Act. These inconsistencies could be overcome by removing completely the restrictions on companies eligible for relief under the Act. The Council of the English Law Society suggested to the Lord Chancellor that corporations should not be excluded from the operation of a Suitors' Fund, particularly if they were called upon to contribute to it (Law Society's *Gazette* Vol. 70 p.2270).

Should the Crown benefit?

73. The Crown is excluded from benefiting under the Act (ss.13. 14 and 15) .The Crown is in a special category and although on one view it could be argued that it should be entitled to the benefits of the Fund it would seem better on balance to continue to exclude it.

QUESTIONS AT ISSUE

74. The Commission would welcome views on any of the following questions, or on any other matter relating to the terms of reference -

- (a) How should the Fund be financed?
 - (1) by a levy -
 - (i) on only those originating processes at present stipulated;
 - (ii) on all originating processes issued out of the Supreme Court, District Court, Local Courts and Courts of Petty Sessions on which fees are payable;
 - (iii) on all documents filed in the Supreme Court, District Court, Local Courts, Courts of Petty Sessions; or

(iv) on documents filed in all courts and tribunals whose litigants may become eligible for relief from the Fund?

(2) by a means other than a levy on documents? If so, by what means?

(paragraphs 17 to 23)

(b) Should the Fund cover appeals from -

- (i) the Master or similar officer of a court;
- (ii) judicial tribunals (e.g. Medical Board);
- (iii) an arbitrator exercising authority under the *Arbitration Act*;
- (iv) other tribunals?

(paragraphs 24 to 27)

(c) Should the Fund cover appeals to -

- (i) the Industrial Appeal Court;
- (ii) Local Courts;
- (iii) Courts of Petty Sessions?

(paragraphs 28 and 29)

(d) Should defendants who can claim under the *Official Prosecutions (Defendants' Costs) Act* be eligible for relief under the *Suitors' Fund Act*?

(paragraph 30)

(e) Should relief be permitted in the case of an award of damages being less than that suggested in a rejected compromise?

(paragraph 31)

(f) Should relief be available for all appeals irrespective of whether they are decided on matters of fact or law? If not, should any distinction be made between appeals relating to criminal and civil matters? Should any distinction be made between indictable and simple offences?

(paragraphs 32 to 35)

(g) Should relief be available in all cases where a presiding judicial officer is unable to continue?

(paragraph 36)

- (h) Should relief be available in respect of an appeal or other proceeding rendered abortive because of matters beyond the control of either party?
(paragraphs 37 and 38)
- (i) Should relief be available where the Crown withdraws criminal proceedings to commence further proceedings based on the same facts?
(paragraph 39)
- (j) Should costs of the first trial be recoverable from the Fund where an appeal unrelated to the quantum of damages succeeds and a new trial is ordered?
(paragraph 40)
- (k) Should provision be made enabling the court to grant a certificate entitling a litigant to relief prior to the hearing of an appeal?
(paragraphs 41 to 44)
- (l) Should each appeal in a series of appeals be treated separately? If not, should an unsuccessful respondent be entitled to the costs of unsuccessful appeals instigated by him?
(paragraph 41 to 44)
- (m) Should each party to a successful appeal be able to obtain relief from the Fund independently of the other? If not, should a respondent be able to recover from the Fund where he is not ordered to pay the appellant's costs?
(paragraph 47)
- (n) Should an appellant in all cases, be able to apply for relief from the Fund where no order for costs is made against the respondent, or where there is no respondent?
(paragraphs 50 and 51)

- (o) Should relief be available where costs are ordered to be paid from a fund in which a party is beneficially interested?
(paragraph 52)
- (p) Should a guardian ad litem or next friend be able to claim relief under the Act?
(paragraph 53)
- (q) Should there be any financial limit imposed on the amount a party can recover under the Act? If so -
 - (i) what should it be;
 - (ii) should there be differing limits for differing types of actions?
(paragraphs 54 to 56)
- (r) Should relief under the Act be discretionary? If so,
 - (1) should the discretion be exercised by -
 - (i) the Supreme Court;
 - (ii) any other court;
 - (iii) the Appeal Costs Board;
 - (iv) some other person or body?
 - (2) should the discretion be one to grant or refuse to grant relief?
 - (3) should relief be extended to any part of the claimant's costs where appropriate?
(paragraph 57 to 63)
- (s) Should the Appeal Costs Board have the right to refer to the Full Court questions arising out of the operation or application of the Act?
(paragraphs 64 to 66)
- (t) Should legally aided persons be able to benefit from the Fund? If so, should those persons' rights under the Act be subrogated to the Legal Assistance Fund?
(paragraphs 67 to 70)

- (u) Should the Appeal Costs Board have the power to pay
 - (i) a claimant's solicitor;
 - (ii) the Legal Assistance Fund,
 - (iii) any other person? If so, whom?

(paragraph 69)

- (v) Should companies be excluded from the benefits of the Act? If not, to what extent should they be eligible for relief?

(paragraphs 71 to 72)

- (w) Should any other persons, bodies or corporations be excluded from the benefit of the Act?

(paragraphs 71 to 72)

- (x) Should the Crown be excluded from the benefits of the Act?

(paragraph 73)

WORKING PAPER APPENDIX I

LIMITS IMPOSED ON PAYMENTS OUT OF THE FUND

	Indemnity Certificate (cf. W.A.s.10)	Costs Certificate (cf. W.A. s.12A)	Appeals on damages (cf. W.A. s.15)	Abortive Proceedings (c.f. W.A. s. 14)
N.S.W.				
To Supreme Ct.	\$3,000			
To High Ct.	\$5,000			
To Privy Council	\$7,000			
Any other	\$3,000	Nil	\$3,000	\$3,000
Vic.	\$4,000	\$200	\$4,000	unlimited
Tas.	\$2,000	\$120	\$2,000	“
Qld.	\$4,000	\$200	\$4,000	“
W.A.	\$2,000	\$1,000	\$1,000	“

All the States limit the amount payable to a respondent to no more than that payable to an appellant (cf. W.A. ss.11(3) and (15(2))).

WORKING PAPER APPENDIX II**STANDING OF THE FUND**

Year ended	Contributions From Levy	Costs paid	Balance at End of year
	\$	\$	\$
30.6.66 (9 mth period)	11,536.40	Nil	11,563.78
30.6.67	9,240.70	586.90	20,499.07
30.6.68	10,072.90	1,853.00	29,186.68
30.6.69	10,584.80	2,740.10	38,319.77
30.6.70	10,479.80	6,404.90	43,784.56
30.6.71	10,258.60	6,944.10	48,906.85
30.6.72	11,205.40	4,138.60	58,087.23
30.6.73	11,838.70	3,579.05	74,382.20
30.6.74	11,164.50	8,324.85	78,622.11

CLAIMS ON THE FUND
SOURCE OF RELIEF

Year Ended	10(1)	15(1)	12A(1)	14(1) (b)	12(A) (2)	14(1) (d)	14(1) (a)	14(1) (c)	Total Claims Paid
30.6.66	-	-	-	-	-	-	-	-	Nil
30.6.67	2	-	-	-	-	-	-	2	4
30.6.68	2	-	-	-	-	-	-	1	3
30.6.69	2	-	-	-	-	-	2	-	4
30.6.70	3	-	-	-	-	-	8	3	14
30.6.71	8	-	-	-	-	-	2	-	10
30.6.72	6	-	-	1	-	-	2	1	10
30.6.73	4	-	-	-	-	-	-	2	6
30.6.74	10	1	-	-	3	-	-	1	15
	37	1	-	1	3	-	14	10	66