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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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

(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.

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 venc

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

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

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.

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

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.

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

(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 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.

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

(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.