

**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 49**

**Suitors' Fund Act**

## **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 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.)

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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*

- (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)).

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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 allocation of costs, and where payments of have been taxed, and



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



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 The S plyther than only some. An exception cou32.25 0 can cow bee no fe coaee paywhose lits raissue of

## **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



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.



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(1)), 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 *Aaquilina 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 151 cf. s.12A(2)). However, the Act provides that, where a respondent to whom an indemnity certificate has been granted





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 appellant to obtain reimbursement for his costs in some cases 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

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 1960654 Tc 0.3154 -,2o6 -2ion rs5 Tf 'Bt



(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

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 C







(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*

- (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

- (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;

## 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.	\$2,000	\$200	\$2,000	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**

<b>Year ended</b>	<b>Contributions From Levy</b>	<b>Costs paid</b>	<b>Balance at End of year</b>
	\$	\$	\$
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

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**CLAIMS ON THE FUND**
**SOURCE OF RELIEF**

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

**WORKING PAPER APPENDIX III**  
**SUITORS' FUND LEGISLATION IN AUSTRALIA**

<b>Jurisdiction</b>	<b>Fund Controlled by</b>	<b>Fund Financed by</b>	<b>Fund Covers</b>	<b>Maxima</b>	<b>Are Appeals to other than ordinary courts covered</b>	<b>Whether (a) Crown (b) Companies excluded from Act</b>
<b>W.A.</b> Suitors Fund Act 1964	Appeal Costs Board – (a) Chairman (b) Law Soc. Rep (c) Barrister's Bd. Rep	(a) 10c on writ of summons in Sup.& Dist. Cts. (b) 10c on entry				





<b>VIC</b> Appeal Costs Fund Act 1964	Appeal Costs Board (composed as in W.A.)	(a) \$2 on writ of summons in Sup Ct. (b) \$2 on orig. summons in County Ct. (c) 10c on complaint or orig. summons in summary Ct.	(a) Successful appeal - (i) on law from any body to Sup.Ct., Ct. of General Sessions, Industrial Appeals Ct., High Ct., Privy Council (ii) on law from Ct. of Petty Sessions to Sup. Ct. where res. N1t. d1 TD -07 yons to
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