SUITORS' FUND AMENDMENT (COSTS OF NCAT APPEALS) BILL 2016

First Reading

Bill introduced on motion by Mr Paul Lynch, read a first time and printed.

Second Reading

Mr PAUL LYNCH (Liverpool) (10:54): I move:

That this bill be now read a second time.

It gives me much pleasure to introduce this bill on behalf of the Opposition. It deals with a very precise and specific proposal within a very narrow compass. It is a blindingly obvious proposal which the Government should have pursued when it introduced the legislation to establish the NSW Civil and Administrative Tribunal [NCAT]. As is an all too frequent occurrence, this Government missed the opportunity to do something that was both sensible and obvious. The Government did not do it; the Opposition does. The object of the bill is to provide an amendment to the Suitors' Fund Act 1951. The proposed amendment is to allow appeal panels of the NCAT to grant indemnity certificates to respondents to successful internal appeals made under the Civil and Administrative Tribunal Act.

The indemnity certificate allows the respondent to an appeal to be reimbursed in particular circumstances out of the Suitors' Fund. The reimbursement is of all or part of the appellant's costs of the appeal paid by the respondent. In certain circumstances the certificate entitles the appellant to be paid directly from the fund all or part of the appellant's costs of the appeal. That would mean that a person who makes an internal appeal to an appeal panel of the NCAT on a question of law and succeeds on that appeal can recover costs of the appeal that are ordered to be paid by the appeal panel.

The current restrictions on the Suitors' Fund scheme continue. Certificates cannot be granted to corporations with paid-up share capital of $200,000 or more, or to corporations related to body corporates with such capital. The principal Act is the Suitors' Fund Act. It commenced on 1 November 1951. In 1987 the Act was amended. In passing the then Leader of the Opposition, the Hon. John Dowd, noted that the Suitors' Fund had been an integral part of the court system but unnoticed by the public. In a paper in 2010, Crown Solicitor's Office senior solicitor Valentine Muscio somewhat tongue in cheek said it was unnoticed by the legal profession as well. In relation to the NCAT, it has been unnoticed by the Government. In his paper Mr Muscio draws several extracts from the speech of the Hon. Clarence Martin, the then Attorney General, who moved the second reading of the bill introducing the scheme in 1951. For members who are interested I recommend Mr Muscio's summary of the then Attorney General's speech.

Since 1951 the Act has been amended on a number of occasions. The circumstances in which payments were permitted were enlarged including for example where proceedings were rendered abortive by the death or protracted illness of the judge or magistrate concerned. Other jurisdictions have adopted similar provisions in Western Australia, Victoria, Tasmania, Queensland, the Commonwealth, the Australian Capital Territory and the Northern Territory. A number of cases are referred to by Mr Muscio in the paper I have just mentioned setting out the general principles that are involved. I particularly draw attention to comments made by Justice Nagle in *Evatt v New South Wales Bar Association* [1968] 3 NSWLR 573 at 574 and Justice Moffit in *Acquilina v Dairy Farmers Cooperative Milk Co Ltd (New South Wales)* [1965] NSWR 772 at 774. Mr Muscio wrote:

> After considering all the case law cited in this paper, I believe that the purpose of the Act is to provide litigants in certain circumstances with relief from the burden of unnecessary costs incurred by some mishap in the court

> system which has prevented proceedings from concluding when they were anticipated to conclude, so long as no responsibility for the mishap lay on the party to be assisted by the Act.

Of course the scheme is not unlimited. It is not, as some have described it, a treasure chest. The maximum per application is $10,000 except in High Court matters, where it is $20,000. There has indeed been some quite robust public criticism of the scheme for not being more generous. This bill does not seek to increase those limits. The grant of a certificate by a tribunal or a court is entirely discretionary. The Director-General of the Attorney General's Department has discretion as to the amount paid. The scheme is traditionally funded from a proportion of court fees. Over time the power to issue a certificate has been extended to a number of courts. It has not, however, been extended to the NCAT. The authority for that proposition is *Berger v Boulder Projects Pty Ltd* [2015] NSWCATAP 274.

Section 6 of the principal Act permits a respondent in a successful appeal on a question of law to the Industrial Relations Commission [IRC], the District Court or the Land and Environment Court to apply for a certificate. The number of applications made under the fund is significant but not large. The advice I have received sets them out as follows: in the financial year 2010-2011 there were 85 applications; in 2011-2012 there were 137 applications; in 2012-2013 there were 109 applications; in 2013-2014 there were 30 applications; and in 2014-2015 there were 58 applications. I am grateful to the Parliamentary Library for that information. My questions on notice to the Attorney to elicit that information were entirely unsuccessful.

The argument for extension of this scheme to NCAT is powerful. In fact, it should have been done when this Government introduced the legislation establishing NCAT. It is a good example of the lack of attention paid by this Government to the legislation it introduced. The NCAT has a significant and wide jurisdiction. It can make an order for up to $500,000 for a claim under the Home Building Act or an application under the Agricultural Tenancies Act. It can make an order up to $400,000 relating to a retail tenancy claim. There is a right of appeal from the NCAT appeal panel where parties are routinely legally represented. There are other jurisdictions where certificates under the Suitors' Fund Act can be granted. The limit of the Local Court jurisdiction is $100,000 from whence an appeal lies to the Supreme Court.

An indemnity certificate can be issued in appropriate cases by the Supreme Court, but not by the NCAT panel, even though the jurisdiction limits are significantly larger in monetary terms. It seems anomalous for the scheme to apply to such appeals from the Local Court or the Supreme Court but not to NCAT appeals. Regarding the details of the bill, I note the provisions are simple. Schedule 1 to the bill provides an amendment to the Suitors' Fund Act to include NCAT. In particular, there is an amendment to section 6. The basis behind the bill is put this way by James Mack, a barrister and contributor to a publication by New South Wales Society of Labor Lawyers entitled "Legal Tweaks". He wrote:

> The Suitors' Fund Act ought to be changed to ensure that those who have had their day in the tribunal miscarry have the same access to costs relief as though who have had their day in court miscarry.

I thank Mr Mack for the assistance he has provided in the preparation of this bill. It is a sensible and reasonable proposal to fix up a gap that the Government has left. I commend the bill to the House.

Debated adjourned.

The DEPUTY SPEAKER: I fix the resumption of this debate as an order of the day for a future day.