Queensland practitioners ought to be aware that Suncorp (and perhaps other insurers) has a policy of notifying the Australian Taxation Office when their investigations uncover possible understatement of income in personal injury cases not explained by the plaintiff at trial.

In such cases it is likely a s218 Notice will thereafter be issued by the ATO to the insurer, demanding that the insurer pay the amount referred to in the Notice by way of the plaintiff's estimated unpaid tax.

In such circumstances there is significant potential for the award, out of which a lawyer was expecting to receive fees, being taken wholly or substantially by the Taxation Office.

In *Deputy Commissioner of Taxation v. GIO and Anor* (1993) 26 ATR 544; 93 ATC 4901 the Commissioner issued a s218 Notice to the GIO requiring payment of an amount assessed to tax in respect of the plaintiff taxpayer. The personal injury claim was commenced in July 1986, the s.218 Notice issued in October 1986 and judgment obtained in 1991. The Federal Court at first instance upheld the solicitor's argument that the damages were subject to an equitable lien in respect of the solicitor's work done in relation to the plaintiff's personal injury claim with the GIO. The Full Federal Court affirmed the lower court's decision, stating that the Commissioner's charge was subject to the existing lien in favour of the solicitor. Special leave to appeal to the High Court was refused.

The result was that the Commissioner received the judgment monies after satisfaction of the plaintiff's solicitor and own client costs. Repayment of the plaintiff's litigation loan account in priority to the Commissioner's charge was not permitted.

It does not seem from the decision that the rendering of a bill was essential for the efficacy of the lien. From the writer's experience however, this is relevant to the ATO in its consideration of the validity of a claim by a solicitor in such a case. It may therefore be prudent for a bill to be raised and rendered if the issue of a s218 Notice appears likely.

A further precaution to avoid the possible charging of funds in this way may be to tailor any settlement deed or consent order accordingly. For example, it may be possible to specify that the damages be paid to the solicitor's trust account and be applied by the solicitor firstly to pay costs and outlays. In such case a secondary defence to the Commissioner's charge could be raised to the effect that those funds attributable to costs never fell within the ambit of the charge as they were never payable to the plaintiff taxpayer.

APLA (Qld) Response to the Law Reform Commission's Review on Litigation Costs

Rob Davis, Qld APLA Secretary

The Law Reform Commission recently called for submisions from interested parties in response to their review of the "Litigation Cost Rules". The following is an extract from the submission made by the Queensland Branch of APLA.

The comments contained herein are directed primarily towards the recommendations contained in Chapter 4 of the Draft Recommendations. Our comments relate specifically to personal injury, compensation of relatives, public interest, and professional negligence actions by (natural) individual consumers:

(a) The assumptions inherent in the comment contained in paragraph 2.14 that: *"The ability to recover costs helps to ensure that these litigants are not deterred from pursuing their rights by the possibility of being out-of-pocket even though successful," is* seriously disputed by this Association. It is our view, and one that we believe has the force of considerable logic and experience, that plaintiffs are constantly deterred from pursuing their rights because of the indemnity cost rule.

APLA's position:

We strongly argue for the abolition of the indemnity cost rule, and its replacement by a one way-shift in favour of plaintiffs in personal injury, compensation of relatives, public interest, and professional negligence claims by natural individuals.

(b) We totally agree with the comments in paragraph 2.23 that: *"Cost allocation rules should not - be used to control the causes of action that can be brought before courts and tribunals (or) impede access to justice."* Sadly, any fair appraisal of the existing cost rules in personal injury and professional negligence cases leads inescapably to the conclusion that the indemnity cost rule already, and deeply, offends the spirit of both of these criteria. Hence our position that the indemnity cost rule must go.

APLA's position:

The indemnity cost rule should be abolished as it is unfairly used to control the causes of action that can be brought before courts and impedes access to justice for injury victims.

(c) Your analysis in paragraph 2.30 entirely misses the point, as it attempts to use ABS Statistics of the cost of "seeking legal advice" to support an argument that people are not deterred from legitimate litigation because of the indemnity cost rule. The cost of seeking "legal advice" has absolutely nothing to do with the loser pays rule. The real question is, *"How many are deterred from enforcing legitimate claims, or forced to undersettle those claims, because of the fear of losing and having to pay the opponents' costs?"*

APLA's Position:

Every day plaintiffs are denied access to justice because of the indemnity cost rule. This rule, and the variations to it under the various "open offer of settlement" rules found in most courts, unfairly prejudices ordinary plaintiffs and benefits insurers and institutional defendants.

(d) Refer paragraph 2.40. It is our view that delay and interim cost orders (when obtained) are tools used by institutional defendants to deter ordinary plaintiffs from pursuing their claims. Where interim costs are recovered by plaintiffs they should be enforceable immediately. When obtained by defendants, enforcement should be deferred until after final verdict.

(e) Your comment on page 12 that: *"This information suggests that on balance and with appropriate exceptions and safeguards, the 'loser pays' model is likely to be of more assistance to litigants with valid claims and defences than the 'user pays' model" is* disputed for the reasons expressed previously. Your comment, referring to recoverable costs, that: *"This recovery is sometimes used by people to obtain legal representation on the basis of a speculative or contingence fee arrangement,"* is overstated. To the extent that this occurs, it is of minor benefit to access to justice compared to the much greater injustices that are avoided by abolition of the indemnity cost rule. To the extent that it is a factor, it can easily be compensated for by a one way shift in favour of plaintiffs.

APLA's position:

The disadvantages to plaintiffs through abolition of the indemnity cost rule are overshadowed by the advantages to the general community through increased access to justice. To the extent that any disadvantage occurs it can easily be addressed by a total or partial one way shift in favour of plaintiffs in certain types of litigation.

(f) Your conclusion in paragraph 4.2 that: *"The most significant cost barrier to legal services and the court system is the cost of a person's own legal representatives"* is incorrect insofar as it relates to personal injury and professional negligence victims. The cost barrier, to the extent that it exists, arises mainly for the poor with poor claims. The widespread availability of speculative fees and contingent fee arrangements for injured victims, means that their own legal costs are not the major barrier in most cases. The most significant barrier to true access to justice by ordinary plaintiffs is the fear of losing and having to pay the defendants' costs.

(g) We agree with your comment at page 18 that: *"However it appears that the risk of an adverse cost order is most likely to affect people who may suffer substantial hardship, such as the loss of their home, car or livelihood, if required to pay the opponents' costs, and people or organisations involved in public interest litigation who have little or no personal interest in the matter."*

APLA's Position:

The prejudice suffered by these groups through the indemnity cost rule outweighs the benefits they derive from the rule in its present form. The benefits derived by insurers and institutional defendants through the indemnity cost rule are disproportionate and unfair when compared to the burdens the rule imposes on injured victims.

(h) We agree with your comment at page 19 that: *"The cost indemnity rule seems to have less impact on those who have sufficient resources to litigate (who tend to make litigation decisions on the basis of their own costs) and those with nothing to lose".* Sadly, this leaves the majority of ordinary Australians unfairly prejudiced by the indemnity cost rule.

(i) We agree with your comments at page 19 that persons wishing to pursue frivolous, vexatious or fraudulent claims are not: *"...deferred by the risk of an adverse cost order"*. But there is no doubt that the existing indemnity cost rules do deter meritorious claims and prejudice the negotiating position of meritorious plaintiffs.

(j) We agree with your comments on page 19 that: *"Changes to the cost rules for civil proceedings should focus on the need to ensure that the rule does impede access to the court system by people who may suffer substantial hardship if required to pay costs of by people pursuing litigation that is in the public interest."* Hence our position that the indemnity cost rule must go as it does all of these things already.

(k) We generally endorse the sentiments expressed in your "Draft Recommendations" at pages 21 and 22 to the extent that they seek to alleviate the harshness of the indemnity cost rule as it impacts on the average plaintiff. We dispute the adequacy and the means of your suggested reform. We believe that the approach recommended by the commission is unworkable in that it imposes on a plaintiff the burden of applying for *a priori* certification of "substantial hardship" at the commencement of the action. Defendants will vigorously oppose such applications for certification, a process that will result in a "financial circumstances" hearing and the potential for unnecessary delay and expenditure by all parties. It will give defendants an opportunity to harass already risk-averse plaintiffs in the witness box in the hope of making them even more reluctant to go to trial. A better alternative would be to impose a one-way shift in favour of plaintiffs, subject only to defendants being able to convince the court, at trial, that the plaintiff should pay the successful defendants costs because the plaintiff's claim was either frivolous, vexatious or fraudulent.

APLA's position:

The rule that "costs shall follow the event" should be modified in personal injury, compensation of relatives, public interest and professional negligence actions (by individuals) to provide for a one-way shift in favour of the successful plaintiff. This rule should only be subject to the court's discretion to award costs against a plaintiff in cases of fraudulent, vexatious or frivolous claims.

Development of WA Branch of APLA

Sukhwant Singh, WA

In about January 1992, Sukhwant Singh, of solicitors, Smith Williamson Singh, decided that a specialist association of personal injury lawyers was required to focus on the reform and applicability of law relating to personal injury claims and to promote the interests of injured persons in Western Australia generally. While the Law Society had an effective personal injury committee, that committee had balanced representation from lawyers acting for injured persons and for insurer-defendants. The integrity of the Law Society was such that it was not possible to promote solely the interests of personal injury lawyers and injured persons.

In April 1992, Sukhwant Singh approached several colleagues in the profession to discuss the formation of an association for lawyers interested in personal injury law. An initial meeting was held on 10 June 1992 at Friedman and Lurie's office. Those present were Sukhwant Singh, Leonard Cohen, Neville Friedman, Jeff Lurie, Jim McManus and Stewart Yesner. Plans were put in place for the formation of the association, a general meeting was called for (all interested persons being essentially lawyers predominantly acting for injured persons) and a meeting held on 4 August 1992 when a resolution was passed to form the Association. The name proposed and accepted was the "Association of Lawyers for Injured Persons" was formed. An initial working committee was formed and the work of the infant association began on 11 August 1992.

The present steering committee was formed on 27 November 1992 and consists of Sukhwant Singh (Convenor), Henry Christie (Treasurer), Debbie Andrews, Gulshan Chopra, Leonard Cohen, Matthew Glossop, David Hoffman (Editor, Newsletter), Kathryn Holloway, John Howe, Jeff Lurie, Jeff Potter and Stewart Yesner. This steering committee will dissolve as soon as ALIP is formally set up as a WA branch of APLA, which is expected to occur in the next few months.