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30 September 2011

Mr P McKnight  
Executive Director  
New South Wales Law Reform Commission  
GPO Box 5199  
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By email: [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

Dear Sir/Madam,

### **New South Wales Law Reform Commission Consultation Paper 13 Inquiry into the law on security for costs and associated costs orders**

Baker & McKenzie welcomes the New South Wales Law Reform Commission's invitation to assist its inquiry into the law relating to security for costs and associated costs orders, and to comment on Consultation Paper 13.

#### **Introduction**

The Commission is considering whether the current law and practice in New South Wales relating to security for costs and associated orders, such as protective costs orders and public interest orders, strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim, regardless of their means, and ensuring that a defendant is not unduly exposed to the costs of defending that litigation. Consultation Paper 13 explores whether the *Civil Procedure Act 2005*, the *Uniform Civil Procedure Rules 2005* and the *Legal Profession Act 2004* should be amended to ensure that balance is appropriately struck.

Baker and McKenzie is a global law firm with 69 offices in 41 countries, including offices throughout the Asia Pacific region. To assist the Commission's consideration of whether to recommend amendments to the legislation and court rules referred to above, we have, with the assistance of our Asia Pacific offices, researched how the law and practice relating to security for costs operates in other Asia Pacific jurisdictions, and whether any of the reforms being considered by the Commission are already in operation in those jurisdictions.

The jurisdictions we have covered are Hong Kong, Singapore, Malaysia, Japan, Indonesia, the Philippines, Taiwan, Thailand and Vietnam.

We do not advocate for any position on the matters discussed in the Consultation Paper. Rather, we are providing information about how these matters are dealt with in other jurisdictions, to assist the Commission in considering how best to deal with them in New South Wales.

The results of our research are set out below, arranged by reference to the questions raised in the Consultation Paper.

**Question 2.1(1) – Should legislation provide a broad ground for Courts to order security for costs where the order is necessary in the interests of justice?**

In none of the countries surveyed is there is a broad ground for Courts to make an order for security for costs "where the order is necessary in the interests of justice". In all of the jurisdictions where courts can order security for costs, there are specific grounds upon which courts are permitted to make such an order. Those specific grounds are set out in rules of court, codes or legislation (including corporations legislation). Accordingly, the position in other jurisdictions is similar to the current position in New South Wales.

**Question 2.3 – Where the plaintiff is ordinarily resident outside Australia, should the enforceability of an Australian costs order in the Plaintiff's country of residence be a relevant factor that courts may consider in assessing an application for security for costs? Should UCPR r 42.21 be amended to reflect such a principle, or amended to provide that courts should not take that factor into account?**

In some Asia Pacific jurisdictions, specifically Hong Kong and Singapore, the courts have taken into account the enforceability of a costs order in a foreign plaintiff's country of residence as a factor in determining whether or not to order security for costs. However, as far as we are aware, none of the countries we have surveyed has enshrined this factor in its legislation, code or court rules dealing with security for costs.

**Question 2.4 – Should a plaintiff's failure to notify the defendant of a change of address be specified in UCPR r 42.21 as a ground for an application for security for costs?**

As is currently the case in New South Wales, one of the grounds for ordering security for costs in Hong Kong, Singapore and Malaysia is where a plaintiff changes its address during the course of the proceedings with a view to evading the consequences of the proceedings.

In none of the jurisdictions surveyed is a mere failure by the plaintiff to notify the defendant of a change of address a specified ground for an application for security for costs.

**Question 2.6 – Should UCPR r 42.21 be amended to provide a list of discretionary factors that courts may take into account when deciding whether or not to order security for costs?**

In no jurisdiction surveyed do the court rules contain a list of discretionary factors which courts may take into account when deciding whether or not to order security for costs. The court rules list the circumstances in which the courts have jurisdiction to order security for costs, but do not also specify the discretionary grounds which may be considered.

There is no reference in any of the court rules to the matters referred to in Questions 2.6(b) to (d). However, the courts in various countries may take those factors into account. For example:

- (a) in Hong Kong, the general principle is that the court ought to consider all the circumstances in the case in deciding whether it is appropriate to order security for costs, and if so, in what amount. The courts may take into account the fact that the proceeding is a public interest proceeding. They may also take the complexity of the matter in account in determining the quantum of security to be ordered;
- (b) in Singapore, the courts generally do not take into account the factors listed in question 2.6(b) to (d) in determining whether to order security for costs, but the complexity of the subject matter may be taken into account in determining the amount of security that will be awarded; and
- (c) in Thailand, courts will determine the amount of security for costs based on the total amount in dispute (rather than based on likely legal costs); that is, the higher the amount in dispute, the higher the amount of security.

**Questions 2.8 and 2.9 – Should UCPR r 42.21(1)(d) be amended to reflect the terms of s 1335(1) of the *Corporations Act 2001 (Cth)*? Should corporate plaintiffs continue to be treated differently from plaintiffs who are natural persons in relation to security for costs?**

Hong Kong, Singapore and Malaysia all have provisions similar to section 1335(1) of the Corporations Act, providing an additional jurisdictional basis for ordering security for costs against corporate plaintiffs. In all of those jurisdictions, the provision contains the words "by credible testimony", as is the case in section 1335(1). None of the jurisdictions has amended its court rules to ensure consistency between the court rules and the relevant provision in the corporations legislation.

Accordingly, in Hong Kong, Singapore and Malaysia, the impecuniosity of the plaintiff alone is a sufficient basis to order security for costs against a corporate plaintiff, but not against a plaintiff who is a natural person.

In Thailand and Taiwan, on the other hand, corporate plaintiffs are not treated differently from plaintiffs who are natural persons in relation to security for costs.

**Question 2.10 – Should UCPR r 42.21 be amended to include:**

- (a) **a procedure allowing defendants to request a corporate plaintiff to disclose its overall financial status; and**
- (b) **a presumption that a corporate plaintiff is impecunious, if the plaintiff refuses the request for disclosure?**

None of the jurisdictions surveyed have provisions of this nature.

In Hong Kong, a plaintiff company's failure to disclose its financial status is a factor that will influence the court's decision whether to order security for costs.

**Question 2.11 – Should UCPR r 42.21(1)(d) be amended to make it inapplicable in cases where a corporation is suing former directors, controlling shareholders or officers of the corporation where the corporation is under administration or liquidation?**

None of the jurisdictions surveyed have a limitation to this effect.

In (at least) Hong Kong, the court may, in its discretion, refuse to grant security if a corporate plaintiff can show that granting the security would stifle a genuine claim, especially in cases where the company's insolvency was caused by the acts of its former directors, controlling shareholders or officers.

**Question 2.12 – Should UCPR r 42.21 be amended to provide that courts have the power to order security for costs against a person who, although not designated as plaintiff, is making a claim? If so, how should such a provision be formulated?**

In Hong Kong, the Rules of the High Court contain such a provision. Order 23, rule 1(3) is formulated as follows:

*"The references in the foregoing paragraphs [being the paragraphs setting out the Court's jurisdiction to order security for costs] to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim."*

Singapore and Malaysia have provisions in their court rules in relevantly identical terms to the above Hong Kong rule.

Vietnam does not have a procedure whereby courts can order security for costs against cross-claimants or counter-claimants.

### **Chapter 3 – Litigation funding**

Formalised litigation funding does not appear to be as prevalent at this stage in other Asia Pacific jurisdictions as it is in Australia.

In some countries litigation funding agreements are permitted, but the law as it pertains to such agreements is at an early stage of development. It is not dealt with specifically in the legislation, codes or rules of court of those countries. In other countries (such as Malaysia and Taiwan), litigation funding agreements are still prohibited.

In Hong Kong and Singapore, litigation funders are not prohibited, but they are not yet prevalent as litigation funding agreements are still at risk of being found to be champertous and hence unenforceable.

Nevertheless, as the courts may have regard to all the circumstances of the case when considering whether or not to make an order for security for costs, the receipt of litigation funding would be taken into account. This factor is not referred to in the court rules, however; as indicated above, the court rules dealing with security for costs do not contain a list of discretionary factors to be taken into account by the court.

We are not aware of any obligation for parties to disclose litigation funding agreements in any of the Asia Pacific jurisdictions surveyed.

**Question 3.3 – Should legislation be adopted to give courts the power to order costs against litigation funders?**

In Hong Kong, section 52A(2) of the High Court Ordinance gives the court jurisdiction to order costs against persons who are not party to the proceedings, if the court is satisfied it is in the interests of justice to do so. This permits courts to order costs against third-party litigation funders.

In Singapore, courts also have the power to make costs orders against non-parties (although such orders are exceptional), and the power could theoretically be used to make costs orders against litigation funders. We are not aware of any reported decision in Singapore where a court has done so, however.

**Question 3.4 – Should legislation be adopted giving courts the power to make security for costs orders against litigation funders?**

The only jurisdiction surveyed where such a power exists is Singapore. Order 23, rule 1(3) of the Rules of Court of the Supreme Court of Singapore provides as follows:

*"Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court that a party, who is not a party to the action or proceeding (referred to hereinafter as a "non-party")... has contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover in the action or proceeding, and the non-party is a person against whom a costs order may be made, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the non-party to give such security for the defendant's costs of the action or other proceeding as the Court thinks just."*

Since costs orders can be made against non-party litigation funders, the above power allows the court to order security for costs directly against litigation funders.

**Question 3.7 – Does the law and practice on security for costs apply satisfactorily in the case of plaintiffs who are supported by legal aid?**

The application of the law on security for costs to legally-aided plaintiffs varies widely across Asia Pacific jurisdictions. Most differ from the position in New South Wales, where courts treat legally-aided parties in the same way as other parties when making costs orders and have power to order security for costs against legally-aided parties.

In Hong Kong and Malaysia, the law on security for costs also applies to legally-aided plaintiffs, but the courts tend to be unwilling to exercise their discretion to grant security against such plaintiffs because it would rarely be considered just having regard to all the circumstances of the case.

In Singapore, the *Legal Aid and Advice Act* provides that (except in certain circumstances) a legally-aided party shall not be liable for costs to any other party in any

proceedings. Although security for costs is not expressly dealt with, it follows from this that a legally-aided plaintiff would not be susceptible to an order for security for costs.

Thailand has a legal assistance program to help impoverished people who cannot afford legal fees. However, parties who receive assistance under this program are not excluded from the security for costs provisions.

**Question 3.9 – Should Section 99 of the *Civil Procedure Act* and Section 348 of the *Legal Profession Act* be amended to include an exemption for legal practitioners who have provided legal services on a pro bono basis?**

Costs orders can be made personally against legal practitioners in three of the jurisdictions surveyed (Hong Kong, Singapore and Malaysia). There is no express exemption for legal practitioners acting on a pro bono basis in any of those jurisdictions.

In Hong Kong, costs orders can be made personally against lawyers where costs are wasted as a result of the lawyer's improper or unreasonable act or omission, or undue delay or other misconduct or default. The Court of Final Appeal has taken the view that the Court's jurisdiction to make costs orders against lawyers personally should be regarded as punitive. The fact that a lawyer is acting pro bono would be irrelevant to the policy behind these punitive orders. Accordingly, Hong Kong is unlikely to create a pro bono exemption of the type being considered.

In Taiwan and Vietnam, costs orders can not be made personally against legal representatives.

**Chapter 4 – Public interest costs orders**

None of the jurisdictions surveyed has legislation specifically giving courts the power to make public interest costs orders.

Hong Kong is the jurisdiction where the law relating to costs in public interest litigation appears to be furthest advanced, but this has been developed through case law rather than legislation. The term "public interest litigation" is used in Hong Kong cases, but it has not been given a precise definition. In *Chu Hoi Dick v Secretary for Home Affairs (No. 2)* [2007] 4 HKC 428, the Court set out the following principles to determine when a proceeding was a "public interest" proceeding (such as to warrant a departure from the usual position that costs follow the event):

1. The litigant brought proceedings to seek the Court's guidance on an issue of general public importance. The purpose of the litigation was to benefit the community as a whole, such that the public should bear the costs of the litigation, which may be construed as costs incidental to good public administration.
2. The judicial decision has contributed to the proper understanding of the law in dispute.
3. The litigant has not obtained private gain from the outcome.

The usual costs order for public interest litigation in Hong Kong is no order as to costs. However, in *Town Planning Board v Society for Protection of the Harbour Ltd (No.2)*

[2004] 2 HKLRD 95, the Court of Final Appeal awarded indemnity costs in favour of a successful public interest litigant, due to the special and unusual features of that case. The features included the "manifest public importance of the case" (the protection of Hong Kong Harbour), the fact that the public interest would not have prevailed if the litigation had not been brought, and the limited financial resources of the public interest litigant, being a society dependent on public donations.

Jurisdiction to grant protective costs orders was recognised in Hong Kong in *Chan Wai Yip Albert v Secretary for Justice* (unreported, HCAL 36/2005).

In Malaysia, there is no strict definition of public interest litigation. Courts use the following test:

*"Public interest litigation is usually entertained by a Court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual."*

None of the countries surveyed has a public interest fund to provide financial assistance for the costs of public interest litigation of the type contemplated in Question 4.9 of the Consultation Paper.

### **Question 5.1– Assessing the appropriate amount of security for costs**

Of the jurisdictions surveyed, Hong Kong is the only one where standardised scales and guidelines of costs are used in preparing evidence of likely costs in support of a security for costs application. The scales are the same as those used for taxation of costs. In other jurisdictions, the amount of security is left to the jurisdiction of the court, without assistance from scales of costs.

Costs assessors (or their equivalents) do not sit alongside judges in hearings on the amount of security for costs in any of the jurisdictions.

### **Question 5.2 – Form of security**

In none of the jurisdictions surveyed do the court rules or legislation provide a list of the possible forms of security for cost that the courts may order. Each of Hong Kong, Singapore and Malaysia has a rule in almost identical terms to UCPR r 2.21(2), giving the court a wide discretion in deciding what form of security should be ordered in each particular case.

### **Question 5.3 – Should the UCPR be amended so that, if the court orders the plaintiff to give security for costs, there is an automatic stay of proceedings until the plaintiff provides security?**

In Hong Kong, Singapore and Malaysia, there is no automatic stay of proceedings until the plaintiff provides security, but the courts have power to order a stay until security is provided and that is the usual order made.

The practice varies in other jurisdictions, but in none of the jurisdictions surveyed do the court rules or legislation provide for an automatic stay of proceedings until security is provided.

**Question 5.7 – Should the UCPR be amended to incorporate the procedures for dealing with security for costs when the main proceedings are finalised? If so, how should such provisions be framed?**

Most jurisdictions deal with the enforcement, or discharge, of the security through rules developed by case law. Taiwan is the only jurisdiction where the procedure has been codified.

Article 104 of the Taiwan Civil Procedure Code sets out the procedure for discharging security. The court must order the return of the security if the provider of the security demonstrates any of the following circumstances:

- (a) the cause requiring the provision of security has terminated;
- (b) the security provider proves that the beneficiary of the security has consented to the return of the security;
- (c) the security provider proves that he/she has, after the conclusion of the action, requested an answer from the beneficiary of the security to exercise its rights within a given period of 20 days or more, and the beneficiary has failed to do so; or the court has, after the action is concluded, served a notice to the beneficiary of the security to exercise its rights within a designated period of time and produce to the court the evidence of its exercise of those rights, and the beneficiary has failed to produce such evidence.

**Questions 5.8 to 5.11 – Security for costs in appeal proceedings**

The procedures relating to security for costs in appeal proceedings vary extensively across the jurisdictions surveyed.

In Hong Kong, the Rules of the High Court provide that the Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just. As in New South Wales, security for costs may be granted more readily in appeal proceedings than at first instance (given the existence of a judgment against the appellant already), and the jurisdiction conferred on the Court of Appeal to grant security is wider than at first instance. For example, unlike in proceedings at first instance, mere insolvency or impecuniosity of the appellant, without more, is a recognised ground for granting security for costs.

For appeals to the Court of Final Appeal, security as a condition for the grant of leave to appeal may be ordered, up to an amount of HK\$400,000. Otherwise, there is no difference between the position in an appeal and on an application for leave to appeal as regards security for costs.



The appeal courts in Hong Kong do have power to dismiss an appeal, or an application for leave to appeal, for failure to provide security for costs as ordered.

In Malaysia, security for costs is available in both appeal and leave to appeal proceedings. The same procedures apply to both. The courts have power to dismiss appeals and applications for leave to appeal if security is not provided as ordered.

In Singapore, the court rules require that in all appeals from subordinate courts to the High Court, the appellant must provide security for the respondent's costs of the appeal. The amount of security is presently fixed at SGD2,000 for Magistrate's Court actions and SGD3,000 for District Court actions. The High Court may at any time, in any case where it thinks fit, order further security for costs to be given.

Similarly, in all appeals to the Court of Appeal, the court rules require the appellant to provide security in an amount currently fixed at SGD15,000 for appeals against interlocutory orders, and SGD20,000 for all other appeals. Again, the Court of Appeal may order further security to be given if it thinks fit.

If the appellant does not provide the required security for costs, his/her notice of appeal will be rejected, with the effect that he/she cannot proceed with the appeal.

In Thailand, security for costs is available in appeal and Dika (Supreme Court) proceedings. The provisions of the Civil Procedure Code of Thailand relating to security for costs in proceedings at first instance apply mutatis mutandis to cases on appeal and Dika appeal.

If the appellant (or plaintiff) does not provide security as ordered, the court must issue an order striking the case out of the case-list, unless the respondent (or defendant) successfully applies for the continuation of the proceeding or an appeal is lodged against the order granting security for costs.

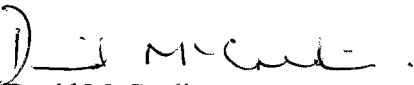
In Thailand there is no concept of leave to appeal.

In Taiwan, security for costs is not available in appeal proceedings.

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We hope the information provided above will be of assistance to the Commission in its consideration of the issues relating to the law on security for costs. We would be happy to obtain and provide further information if the Commission requests.

Yours faithfully,  
**Baker & McKenzie**



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