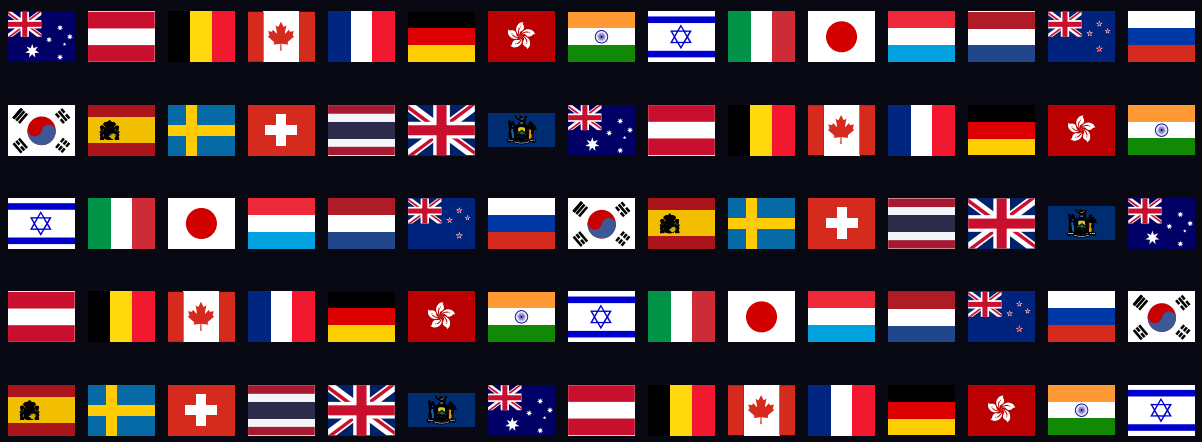
LITIGATION FUNDING

Australia



LEXOLOGY
Getting The Deal Through

Consulting editor
Woodsford

Litigation Funding

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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REGULATION

Overview

Is third-party litigation funding permitted? Is it commonly used?

Third-party litigation funding is permitted in Australia. However, the environment is increasingly complex with several recent judicial and legislative developments affecting the conduct of third-party litigation funding. The developments predominantly relate to third-party litigation funding of representative proceedings, with third-party litigation funding being subjected to a degree of scrutiny not previously seen.

Maintenance and champerty are obsolete as crimes at common law (Clyne v NSW Bar Association (1960) 104 CLR 186, 203) and maintenance and champerty have been abolished as a crime and as a tort by legislation in New South Wales, South Australia, Victoria and the Australian Capital Territory. In Queensland, Western Australia, Tasmania and the Northern Territory, the torts of maintenance and champerty have not been abolished.

Notwithstanding legislation, it remains the position in all Australian jurisdictions that general principles of contract law, pursuant to which a contract may be treated as contrary to public policy or as otherwise illegal, are not disturbed. This means that a third-party litigation funding agreement could be set aside by an Australian court if it were found to be inconsistent with common law public policy considerations.

The High Court in Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) CLR 386 (Fostif) considered provisions of the New South Wales legislation abolishing maintenance and champerty as torts. The High Court held that third-party funding per se was not contrary to public policy or an abuse of process. The Court ruled that the fact that a funder may exercise control over proceedings and bought the rights to litigation to obtain profit did not render the funding arrangements contrary to public policy. The Court held that profiting from assisting in litigation and encouraging litigation could only be contrary to public policy if there was a rule against maintaining actions (which in New South Wales had been abolished). Concerns raised about the possibility of unfair bargains and the potential for litigation funding to distort the administration of justice were rejected. The Court ruled that where these concerns arose they could be adequately dealt with through existing doctrines of contract and equity (unfair contracts), abuse of process (rules of court dealing with the administration of justice) and existing rules regulating lawyers' duties to the court and clients (conflicts, etc).

Importantly, Fostif did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished. In Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No. 4) [2019] QSC 228 Crow J ruled, in the context of a third-party funded class action being conducted in the Supreme Court of Queensland, that the torts of maintenance and champerty had not been abolished but that provisions of the Civil Proceedings Act 2011 (Qld) regulating class action procedure lay down a regime that permits class action proceedings to be funded by a commercial litigation funder. That ruling was upheld on appeal with the Court of Appeal concluding that the litigation funding arrangement was not contrary to public policy and the litigation funder was not in a substantially different position from an insurer defending a claim. The Court reasoned that where maintenance offends against the law, it can be adequately dealt with through abuse of process principles: Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors [2020] QCA 250.

In a joint publication by the Law Council of Australia and the Federal Court of Australia it was stated that:

The availability of funding has not been attributed to any overall rise in litigated matters, suggesting that litigation funding is being used cautiously to improve access to justice while bringing commercial gain and without encouraging vexatious or unmeritorious claims.

The available statistics about class action filings in the year in review demonstrate that the gradual trending growth of funded litigation was held in relative check. Between June 1997 and May 2002, funded class actions comprised only 1.7 per cent of all class actions. In the period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court were funded. From 2013 to 2018, 64 per cent of filed class actions were funded and between March 2017 and 2018, this number increased to 78 per cent. This stabilised in 2020, with 75 per cent of filed class actions being funded. In the year ending 30 June 2021, there were at least 63 class actions filed in Australia, up from 53 in the previous year. However, only 38 per cent of those class actions were funded, down considerably from the previous financial year.

The recognisable decrease in funded class actions during 2021 may be attributable to the regulations imposed on third-party litigation funders with the introduction of the Corporations Amendment (Litigation Funding) Regulations 2020 (Regulations) . Further, measures implemented for the stated purpose of providing relief to businesses impacted by the covid-19 pandemic may have limited the opportunities for funded litigation. The Corporations (Coronavirus Economic Response) Determination (No. 4) 2020 provided that entities and their officers would only be liable for breaches of continuous disclosure obligations if there was knowledge, recklessness or negligence, a higher threshold for liability than previously imposed. What was introduced as a temporary covid response has now been made permanent with the passage of the Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth).

The other observable trend in funded class action filings is that the percentage of shareholder lawsuits has fallen and there has been an increase in the number of consumer class actions (arising out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry) and employment actions alleging underpayment of wages.

Law stated - 18 November 2021

Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

There is presently no legislation or regulation in Australia that limits the fees that funders can charge, although consultation by the Australian Government Treasury and Australian Securities and Investments Commission (ASIC) into the best way to guarantee a statutory minimum return of gross proceeds of a class action to class members has recently closed. While it is yet to be seen how any such statutory minimum return will be imposed, should it be imposed, fees and interest that funders can charge will be affected.

The High Court in Fostif held that contract law considerations such as illegality, unconscionability and public policy may still arise in relation to a litigation funding agreement but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of each particular case.

Theoretically, Australian courts can set aside a litigation funding agreement where the funder's interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person's inability to judge for him or herself, by reason of weakness, necessity or ignorance. Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. A bargain may be set aside as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of that special disadvantage.

Prohibitions against unconscionable and misleading or deceptive conduct that may apply to dealings between litigation funders and funded litigants are also reflected in general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

The Federal Court Class Actions Practice Note (GPN-CA) requires disclosure to group members who are clients or

potential clients of the applicant's lawyers regarding applicable legal costs or litigation funding charges in class action matters, and sets out the manner in which these arrangements should be communicated. The Court must also be provided with a copy of any litigation funding agreement. Disclosure of a litigation funding agreement to other parties to the litigation is also required with the disclosure being redacted to conceal information that might reasonably be expected to confer a tactical advantage.

While not a means of formally limiting litigation funding charges, settlements in funded class actions (including the amounts allocated for the payment of a funder's fee) are subject to approval by the court.

Prior to the High Court decision in BMW v Brewster [2019] HCA 45, it was usual for courts in the conduct of funded class action litigation to make common fund orders, both as part of a class action settlement and at an early stage of proceedings. A common fund order has the effect of binding all members of the represented group to the terms of a funding agreement, not just those who have executed the agreement. The purpose of the common fund order was to equalise the distribution of damages so that unfunded claimants must also contribute to the costs of the claim, including the funder's fee. However, in Brewster the High Court declared that common fund orders made prior to a settlement are invalid. It was held by the majority that, on a proper interpretation, neither of these statutory provisions empowered a court to make common fund orders.

While the Brewster High Court decision has ended the making of common fund orders at an early stage of funded class proceedings, there is debate whether the High Court left open whether such orders may be made at the conclusion of proceedings in the context of a settlement approval. In this regard views differ among trial judges, and the question remains unresolved by an Australian appellate court.

For example, in McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No. 3) [2020] FCA 461, Beach J held that discretion to make a common fund order could be enlivened by the settlement approval power. Whereas, in Cantor v Audi Australia Pty Limited (No. 5) [2020] FCA 637, Foster J concluded that he did not have power to make a common fund order at settlement.

At the appellate court level, the question of whether courts have the power to make a common fund order in a settlement context has recently been considered by the New South Wales Court of Appeal in Brewster v BMW Australia Ltd [2020] NSWSC 1261 and by a Full Court of the Federal Court in Davaria Pty Limited v 7-Eleven Stores Pty Ltd [2020] 384 ALR 650. Both appeals were resolved with the courts declining to make declarations that the power existed. Neither matter had been resolved by settlement or judgment and the courts concluded it was not appropriate to answer the question at a stage of the proceedings where there may or may not be settlement and the court did not have before it the terms of any settlement. The factual context of a settlement being presented to the court for approval was considered to be a very different situation to that at the commencement or early stage of litigation, where the court is asked to order a particular percentage or commission which a funder may extract from any eventual settlement or judgment, when that sum and the attitude of group members towards settlement are unknown. Considering these decisions, the uncertainty surrounding settlement common funds orders will likely only be answered judicially when, or if, a common fund order is applied for at the time of settlement or final judgment.

Additionally, an observable trend has been the increased prevalence of competing overlapping class actions and how the courts have sought to manage multiplicity through the application of case management principles. In 2019–20, there were at least 22 competing class actions, with an additional 11 competing claims in the year in review. A feature of these multiplicity disputes has been the courts evaluating the hypothetical returns to class members from the competing funding proposals. This increased competition has placed downward pressure on pricing.

Law stated - 18 November 2021

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

In August 2020, the Regulations were introduced to require third-party litigation funders in Australia to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme (MIS) regime under the Corporations Act 2001 (Cth) if they advise about, deal in or operate a litigation funding scheme. The AFSL and MIS regimes are overseen by ASIC.

The High Court held in Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (2009) 260 ALR 643 that in certain circumstances a litigation funding scheme may constitute an MIS. In 2012, the federal government provided a safe harbour for persons providing financial services to a litigation scheme from all forms of MIS regulation that apply to providers of financial services and credit facilities. On 22 August 2020, the Regulations came into force, removing the previous safe harbour for litigation funding schemes from the AFSL and MIS regimes, meaning that third-party litigation funders funding class action and multi-plaintiff actions may be required to hold, or be an authorised representative of, an AFSL. The safe harbours for insolvency litigation funding schemes and litigation funding arrangements other than in relation to class actions remain in force. However, it is currently unclear from the definition of an insolvency litigation funding scheme as to whether third-party funded claims are captured by the safe harbour. This uncertainty may soon be clarified, as new draft legislation was released by the government in October 2021 that, if passed, will remove this ambiguity in the context of class actions, with the legislation providing that any multi-plaintiff funded litigation will be classified as a managed investment scheme. The proposed legislation contains other measures including (1) an amendment to the definition of an MIS such that class action litigation funding schemes are considered MISs, (2) a cap on the allowable funding fee such that 70 per cent of any claim proceeds must go to group members, and (3) a provision that the Court only has the power to make orders extending the funding commission to group members who are a part of the funding scheme.

Litigation funding schemes that have retail clients will be required to be registered with ASIC as an MIS under Chapter 5C of the Corporations Act 2001 (Cth) and will need to be operated by a 'responsible entity'. A responsible entity must be an Australian public company with at least two Australian directors, licensed to operate litigation funding schemes.

AFSL holders are required to abide by their licence conditions and the general conduct obligations under section 912A of the Corporations Act 2001 (Cth) . AFSL holders authorised to provide financial services to retail clients are also required to become a member of an external dispute resolution scheme. ASIC has made the ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 to manage the transition to the new regulatory regime by providing relief in a number of areas of the AFSL and MIS regimes that would otherwise be unsuitable for the structure of a litigation funding scheme.

Insolvency litigation funding schemes and litigation funding arrangements that remain within the safe harbour must adopt and maintain adequate processes to manage conflicts of interest. Criminal and civil sanctions apply for non-compliance with the conflict management requirements. The conflict management requirements are policed by ASIC.

The purpose of the Regulations is to ensure that conflicts – ordinarily where the interests of funders, lawyers and claimants diverge – are appropriately managed by the litigation funder. ASIC's Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations under the Regulations, but otherwise do not prescribe the required mechanism for compliance with the Regulations. There is a requirement that providers of litigation funding maintain adequate practices and follow certain procedures for managing conflicts of interest. However, the Regulations do not prescribe the content of the policy or the processes that a litigation funder must have in place to respond to a conflict of interest.

The Federal Court Practice Note Class Actions (GPN-CA) requires that 'any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and

duty") between any of the applicants, the class members, the applicant's lawyers and any litigation funder'. Similar practice notes operate in Victoria, Queensland and New South Wales.

Law stated - 18 November 2021

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

There are no specific professional or ethical conduct rules that apply to the role of legal professionals in advising clients in relation to third-party litigation funding or in funded proceedings.

Australian legal practitioners are regulated by state-based regimes prescribing professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons.

The interposition of a third-party litigation funder into the lawyer-client relationship raises ethical issues around conflicts, loyalty, independence of a lawyer's judgement and confidentiality. Legal practitioner conduct rules in all Australian jurisdictions deal with each of these concepts. The conduct rules reflect a lawyer's fiduciary duty towards his or her client and primary duty to the court.

A practitioner (which includes a law practice) will have a conflict of interest when the practitioner serves two or more interests that are not able to be served consistently, or honours two or more duties that cannot be honoured compatibly.

The year in review has seen increased scrutiny of the conduct of lawyers and third-party litigation funders. That scrutiny has usually arisen in the context of the courts' supervision of the settlement of class actions. Legislation regulating the conduct of representative proceedings in Australia require courts to approve settlements. Those powers provide a level of discretion in the courts to moderate the legal and other professional costs incurred in conduct of the litigation, the third-party funder fees and interest, and to enquire into the probity of the funding arrangements. An example of how the settlement approval process can expose allegations of ethical violations and professional misconduct has arisen in the approval of the settlement of a class action commenced against Banksia Securities Limited in the Supreme Court of Victoria. At the instigation of a disgruntled class member the Court has embarked on a wide-ranging enquiry into the integrity of the solicitor, client and funder relationships and the professional fees rendered. A feature of that litigation, reflected in other cases in the year in review, is the willingness of the Court to appoint contradictors and independent counsel to represent the interests of class members in the settlement approval process. Furthermore, the contradictor in the Banksia Securities class action has taken a more active role in the settlement approval trial including by cross-examining various witnesses.

While the Banksia Securities final settlement approval litigation is yet to resolve there is a likelihood that the Court will significantly moderate the professional fees that can be deducted from the settlement and that recommendations may be made by the Court that lawyers involved in the conduct of the action face disciplinary action. Another issue exposed by the Banksia Securities litigation is the Court's willingness to protect the sanctity of the solicitor-client relationship by insisting on a clear delineation between the funder entity, the lawyers retained and the interests of the representative client. With the trial of the settlement approval coming to an end in March 2021, the Victorian Supreme Court is yet to deliver judgment in a matter that may have widespread implications for the funder-lawyer-client relationship.

Law stated - 18 November 2021

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

The case management of class actions commenced in the Federal Court and other state courts involving litigation funding require at or prior to the initial case management conference that each party disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order.

All settlements reached in class action proceedings must be approved by the court. Where a settlement involves a funder's success fee being deducted from funds otherwise available to class members, those terms are subject to judicial scrutiny as to reasonableness and proportionality.

Since the introduction of the Regulations in August 2020 requiring third-party litigation funders in Australia to hold an AFSL and comply with the MIS regime under the Corporations Act 2001 (Cth), ASIC, which oversees those regimes, now has a particular interest in and oversight of the third-party litigation funding space.

In addition, following amendments in July 2020 to allow lawyers to enter into damages-based contingency fee arrangements for class actions, the court is able to grant group costs orders where appropriate or necessary. The Victorian Supreme Court plays a supervisory role in the facilitation of this new legislation, and will determine the percentage to be allocated to the plaintiff law firm that can be charged as a contingency.

Finally, there are other instances where the terms of litigation funding agreements are subject to review by the courts. In a corporate insolvency context, it is common for a liquidator to enter into a funding agreement with a third-party funder to pursue recoveries on behalf of creditors.

Under the Corporations Act 2001 (Cth) , a liquidator is required to seek the approval of the company's creditors or the court's approval, where the terms of a contract that he or she enters into will last for more than three months. This means that in many cases where a liquidator enters into a litigation funding agreement, court approval is sought.

Law stated - 18 November 2021

FUNDERS' RIGHTS

Choice of counsel

May third-party funders insist on their choice of counsel?

Yes. It is a permissible level of control over the litigation process for a third-party funder to insist on their choice of lawyers retained. Third-party funders are invariably consulted when it comes to retaining counsel. Commonly, the funder will, pursuant to the funding arrangement, appoint the lawyers to provide the legal work, and the retainer agreement between the lawyers and the funded client will be pursuant to terms agreed by the funder, subject to the lawyers' overriding duties to act in the best interests of their client.

Law stated - 18 November 2021

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Yes. It is a permissible level of control over the litigation process for the litigation funding agreement to provide that the funder has the right to give instructions to the lawyers concerning the conduct of the litigation, subject to the funded client having the right to override the funder's instructions.

Commonly, save in respect of settlement (see below), in circumstances where a conflict arises between the lawyer's duty to his or her client and the funder, the lawyer is required to prefer the interests of and to take instructions from his or her client. It is submitted that this level of control over the litigation process is consistent with the principles in Fostif and not contrary to public policy.

In a settlement context, funders may attend and be involved in settlement discussions. In recognition of the funder's interest in the resolution of the litigation, where there is a difference of opinion between the funded client and the funder in respect of a settlement offer, the standard practice among funders operating in Australia and consistently with the Australian Securities and Investments Commission's Regulatory Guide 248 is that the difference of opinion is referred to the most senior counsel acting in the matter for advice as to whether the settlement offer is reasonable in all the circumstances, and whether the parties agree to act in accordance with that advice. In the class action context, any settlement reached on behalf of the representative applicants, including the reasonableness of the funder's commission, will be subject to court approval. The Federal Court Practice Note Class Actions (GPN-CA) sets out a range of requirements for parties to satisfy the court that the proposed settlement is fair and reasonable and in the interests of the group members.

Once a settlement has been reached, the funder will invariably be involved in the application to the Court for the approval of the settlement. This is because in the course of the settlement approval application, the plaintiff will be seeking orders providing that a certain percentage of the recovery be paid to the funder to reimburse it for the costs expended, and in its fee for funding the proceeding. This necessarily involves input from the funder, as the Court will often weigh into the appropriateness of these amounts.

In these circumstances, it is usual that the funder will retain its own independent counsel, rather than the solicitors for the group members also representing the funder's interests. It is increasingly common for a funder to retain its own independent counsel for certain aspects of the proceedings, and the necessity may arise, for example, where the funder is making an application for a common fund order early in the proceedings.

In some circumstances, a funder's involvement in the interlocutory steps in a proceeding can be looked on negatively by the court. In an application for the approval of an opt-out notice in Kerry Michael Quirk v Suncorp Portfolio Services Limited , known as the Suncorp Class Action, Justice Hammerschlag of the Supreme Court of New South Wales considered that the opt-out notice was being used by the funder to procure class members to sign up to litigation funding agreements. The proposed opt-out notice informed group members that if they did not sign a litigation funding agreement, the funding may be withdrawn and the action may not proceed. The court ordered that the opt-out notice be revised to remove these references.

Law stated - 18 November 2021

Veto of settlements

Do funders have veto rights in respect of settlements?

In class actions, a funder cannot veto a settlement and any differences of opinion between a funder and a representative applicant regarding a proposed settlement are dealt with in accordance with the dispute process outlined in the funding agreement. Typically, the practice is that the most senior counsel retained in the matter determines the matter. For other types of funded litigation, the funder's control over a settlement is subject to terms of the funding agreement.

Law stated - 18 November 2021

Termination of funding

In what circumstances may a funder terminate funding?

Commonly, litigation funding agreements entered into in Australia allow a funder to terminate the litigation funding agreement without cause on the giving of notice.

Usually, the circumstances giving rise to the termination of a funding agreement will relate to the commercial viability of the claim, a material change to the legal merits or to the value of the claim. Circumstances may also arise where the funder considers that there is an irreconcilable and unavoidable conflict of interest in its continuing to be a party to the funding agreement. Contract law principles that apply to the termination of contracts generally will apply.

It is usual that the litigation funder will have responsibility to pay adverse costs and provide security of costs incurred up to the date of termination. In Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159, the funder (LCM) terminated a litigation funding agreement that obliged LCM to satisfy orders for security for costs. Beech J held that under that litigation funding agreement LCM was obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

Law stated - 18 November 2021

Other permitted activities

In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

It is recognised and accepted that litigation funding plays an important role in providing access to justice. Especially in the class action context, decisions of Australian courts following Fostif are philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

In a number of cases where the court has considered a common fund order, or orders that could affect the funder's interest, the courts have permitted the funder to retain its own representation and appear before the court to make submissions.

This was seen recently in the application for settlement approval in Alison Court v Spotless Group Holdings Ltd, in which the funders for the action, Therium and Investor Claim Partners, retained their own counsel to represent their interests. Counsel for the funders agreed to forgo A$1.5 million of the costs for which they were seeking to be reimbursed to prevent the funding commission being further reduced by the Court.

Law stated - 18 November 2021

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

'No win, no fee' conditional costs agreements are permitted in Australia.

There are prohibitions on legal service providers obtaining a fee calculated by reference to the amount of a settlement or judgment, though Victorian legislation allows contingency fees to be paid to plaintiff law firms in class action proceedings commenced in the Supreme Court of Victoria. In the jurisdictions where contingency fee arrangements are prohibited, lawyers are permitted to charge an 'uplift' of up to 25 per cent of 'at risk' fees based on standard hourly

rates. The permissible percentage uplift may vary from state to state.

The Productivity Commission's Access to Justice Report (September 2014) recommended lifting the prohibition on contingency fee arrangements because they promote access to justice by addressing imbalances between individual litigants in complex matters and well-resourced defendants.

The recommendation was on the basis that comprehensive disclosure was provided as to the percentage of damages to be recovered by law firms, responsibility for liability for disbursements and adverse costs orders and capping the percentage limit on a sliding scale (to prevent law firms gouging or earning windfalls on high-value claims).

As a safeguard against contingency fees giving rise to unmeritorious claims, the Commission referred to the existing powers of courts to make adverse costs orders against non-parties, the regulation of the legal profession and lawyers' ethical and professional obligations. The Commission's recommendations have yet to be implemented.

The question of contingency fees was addressed in a report of the Australian Law Reform Commission and also in a report of the Victorian Law Reform Commission. Both reports recommended that the ban on solicitor contingency fee arrangements be lifted in class actions subject to limitations that included a prohibition on solicitors recovering a contingency fee if a litigation funder is also taking a percentage of the recoveries.

The Victorian Supreme Court regime permits contingency fees to be paid to plaintiff law firms in class action proceedings. The new legislation provides that the liability for the payment of legal costs must be shared among the plaintiff and group members in the class action, known as a group costs order.

The first application for a group costs order was made in Fox v Westpac; Crawford v ANZ [2021] VSC 573, by the plaintiffs on behalf of group members. Pending the making of a group costs order, each action was being conducted pursuant to 'no win, no fee' funding arrangements. In declining to make the group costs order sought by the plaintiff firms, Nichols J ruled that group costs orders will only be awarded where it is 'appropriate or necessary to ensure that justice is done in the proceeding', having regard to the protection of group member interests. The plaintiffs led evidence comparing the likely returns to group members under a third-party litigation funding arrangement and the proposed group costs order. However, Nichols J contended that the relevant comparator was the 'no win, no fee' arrangement, being the true and not hypothetical alternative. The 'no win, no fee' arrangement and group costs order would each provide an indemnity to the plaintiffs against adverse costs and any obligation to post security. In light of this, alongside the lack of evidence available at such an early stage of the proceedings, Nichols J was not prepared to award a group costs order. However, her Honour did incorporate in the orders that the plaintiffs could reassess their position and reapply under section 33ZDA at a later time.

In effect, the decision in Fox v Westpac; Crawford v ANZ may lead plaintiff lawyers and funders to revisit their early stage or interim funding arrangements to maximise the chances of obtaining a group costs order in the Supreme Court of Victoria. Contingency style payments to law firms have also been considered in the context of settlement approval hearings. In Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited [2019] FCAFC 107, notwithstanding that a law firm may not enter into a cost agreement where the amount payable to the law practice is calculated by reference to the amount of any award that may be recovered, Lee J observed that a common fund order incorporating a contingency payment could be made and could be approved in a settlement approval. Lee J's comments did not form part of the ratio of the decision of the Full Court.

Whilst there may be a move towards contingency payments being payable from a settlement sum, in all states except Victoria it is still in breach of the Legal Profession Uniform Law for lawyers to enter into a costs agreement that contains a contingency fee.

Law stated - 18 November 2021

Other funding options

What other funding options are available to litigants?

Disbursement funding refers to the provision of finance for third-party costs that form part of any litigation, such as barrister fees, expert reports and court filing fees. Disbursement funding is commonly obtained alongside a 'no win, no fee' arrangement provided by a plaintiff law firm.

Portfolio funding is an alternative to case-specific litigation funding, which, in effect, provides a law firm (or corporate) with a facility of committed capital to draw on to fund more than one case in an approved portfolio of cases in the firm's pipeline. While relatively new, we expect to see portfolio funding arrangements becoming more commonplace in the Australian litigation funding market.

After-the-event insurance (ATE), while having long been available in the UK market is relatively new in Australia. It can be purchased after a dispute has arisen or a proceeding is contemplated and covers a claimant's liability to pay adverse cost orders in the event that litigation fails. When purchasing ATE insurance for use in Australian courts, it is important to understand whether the policy includes an obligation on the insurer to provide security for costs and the form in which such security will be provided, in particular, the availability of a deed of indemnity by the insurer.

On 1 January 2017, the Commonwealth Government extended funding for its Fair Entitlements Guarantee Recovery Program that is litigation funding for liquidators of companies and trustees in bankruptcy. It is focused on recovering employee entitlements paid by the Commonwealth Government to employees of insolvent enterprises. Evidence of the scheme in practice can be seen in Needham, Re; Bruck Textile Technologies Pty Ltd (In Liquidation) [2016] FCA 837.

Law stated - 18 November 2021

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

It is not possible to say how long a commercial claim may take to reach a decision at first instance.

All Australian civil courts adhere to procedures, court rules and written practices of case management directed to the cost-effective, efficient and expeditious administration of justice. Cases must be brought under court management soon after their commencement. Different kinds of cases require different kinds of management. The general rule is that the number of court appearances must be minimised. Realistic but expeditious timetables must be set and trial dates are generally set as soon as possible and practicable. Unless there is good reason, the timetable provided to the legal practitioners to manage the progression of the case must be adhered to. One key objective of the state and federal regimes currently in place is to identify the issues in dispute early in the proceedings. Alternative dispute resolution is encouraged and sometimes mandated. There is monitoring of the courts' caseloads in order to provide timely and comprehensive information to judges and court officers managing cases.

The Productivity Commission's report into Government Services 2021 set out the clearance rates for Australian courts for 2019–20. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that the Supreme Courts of each state and the Federal Court cleared around 98.5 per cent of all civil matters listed in 2019–20. However, complex commercial matters are unlikely to be resolved within one year of commencement. According to the Federal Court of Australia 2019–20 Annual Report, major causes of actions were categorised as corporations, bankruptcy, and native title matters. Of these major causes of action, 10.8 per cent took over 18 months to finalise. In 2019–20, 22.5 per cent of corporations matters in the Federal Court's original jurisdiction were over 18 months old.

Law stated - 18 November 2021

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

The number and proportion of appellate proceedings commenced is dependent on many factors, including the number of first-instance matters disposed of, the nature and complexity of such matters and subsequent issues raised on appeal, and legislative provisions altering the jurisdiction of the court.

Nationally, in 2019–20, 1,263 appellate cases were filed in the Federal Court. This represents an overall decrease in the number of appeals filed from the previous year, with 1,415 filed in 2019–20. The Federal Court of Australia 2019–20 Annual Report attributes this trend to the 35 per cent decrease in the number of migration matters filed. However, there was an increase in the Federal Court's non-migration appeals since 2018–19, particularly in the areas of taxation, administrative and constitutional law and human rights, and commercial and corporations (including commercial contracts, banking, finance and insurance and regulator and consumer protection).

In the reporting year, 1,168 appeals and related actions were finalised by the Federal Court. At 30 June 2020, most appeals (61.2 per cent) in the Federal Court's docket were under 6 months old, and 26.5 per cent were 6 to 12 months old. Only 3.1 per cent were over 24 months old.

In New South Wales, as a further example, the Supreme Court of New South Wales Provisional Statistics (as at 14 May 2021) show that 346 cases were filed in the New South Wales Court of Appeal during the 2020 calendar year, and 382 cases were finalised. Note, where an appeal has been preceded by a grant of leave, this is counted as one continuous case, with a final disposal being counted only when the substantive appeal is finalised. For this reason, the figures for disposals of notices of appeal (and applications for relief) and disposals of applications for leave, combined, exceed the number of final disposals.

Law stated - 18 November 2021

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no available data showing the proportion of judgments requiring contentious enforcement processes.

Enforcement of judgments in Australia can be undertaken through insolvency mechanisms. Non-compliance with a judgment is a recognised basis for the appointment of a liquidator or a trustee in bankruptcy. Judgments may also be enforced with the assistance and supervision of the court through the issuing of writs of execution. A judgment creditor may obtain a garnishee order directing a third party who holds funds on behalf of the judgment debtor, or owes the judgment debtor funds, to pay the funds, or a proportion of the funds, to the judgment creditor. In some jurisdictions, judgment creditors have a right to secure a judgment against real and personal property of the judgment debtor through the registration of a security interest.

Law stated - 18 November 2021

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

Yes. Class actions are permitted in Australia and are common. Class actions can be funded by third parties. In late 2016, the Supreme Court of Queensland became the third state after New South Wales and Victoria to introduce court procedures specifically directed to the conduct of class actions in that court. Legislation was recently introduced to the Western Australian parliament in the Civil Procedure (Representative Proceedings) Bill 2019 , which seeks to provide a legislative regime for the Supreme Court of Western Australia, to mirror the current Federal Court regime pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth) .

Separate from the class action regime, the court also has the power to determine elements of a proceeding as a separate question where a question is common to a number of pending cases and would otherwise need to be decided more than once. This power is contained in rule 28.2 of the Uniform Civil Procedure Rules 2005 (NSW), and equivalent provisions exist in all other jurisdictions.

Law stated - 18 November 2021

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Yes. The courts in Australia have power to order that an unsuccessful party pay the costs of the successful party although the amount that may be recovered varies from court to court. Costs are at the discretion of the court. Unless it appears to the court that some other order should be made, costs follow the event. The usual adverse order for costs requires the unsuccessful party to pay the successful party's reasonable legal costs.

There are differing regimes for the determination of the reasonable legal costs that an unsuccessful party is obliged to pay.

There is currently no case law in Australia that holds that an unsuccessful party to litigation may be required to pay the litigation funding costs of the successful party.

Law stated - 18 November 2021

Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

Yes. That a court can order costs against a non-party was confirmed by the High Court in Knight v FP Special Assets (1992) 174 CLR 178 (Knight). In this case, Mason CJ and Deane J stated that there was a general category of cases in which an order for costs should be made against a non-party. The category consists of circumstances where the non-party has played an active part in the conduct of the litigation and where the non-party has an interest in the subject of the litigation. In these circumstances, an order for costs should be made against the non-party if the interests of justice require that it be made.

In a third-party litigation funding context, the Knight case was cited in Gore v Justice Corp Pty Ltd (2002) FCR 429 FCA 354, where Justice Corp was held liable to pay the appellants' costs in this appeal and the costs of and incidental to the hearing of the appellants' notice of motion in the court below.

In Ryan Carter and Esplanade Holdings Pty Ltd v Caason Investments Pty Ltd & Ors [2016] VSCA 236, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against a litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director and company secretary of Global and shareholder. The decision arose in a context where the amounts ordered by way of security for costs were insufficient to cover the defendant's actual costs. Arguments that making a costs order against the company director was 'piercing the corporate veil' were rejected. The Court of Appeal determined that the trial judge had exercised his discretion appropriately, there was no miscarriage of justice and the appeal was dismissed.

Legislation also confers power on the courts to make adverse costs orders against non-parties. For example, section 98 of the Civil Procedure Act 2005 (NSW) confers a general power to make costs orders against parties and non-parties alike.

Non-party costs orders have rarely been made against litigation funders because in almost all third-party funded cases the funded litigant will be ordered to provide security for the defendant's costs. However, recent cases suggest this may no longer be the norm.

In Wigmans v AMP Ltd (No 3) [2019] NSWSC 162 , five competing class actions had been commenced, all with different lawyers and funders; four in the Federal Court, and one in the Supreme Court of New South Wales. There ensued a contest as to whether the litigation would be conducted in the Federal Court or the Supreme Court of New South Wales. Those applications were resolved in favour of the representative applicant in the Supreme Court action and the four Federal Court actions were transferred to the Supreme Court. Under the Civil Procedure Act 2005 (NSW) the Supreme Court did not have power to make a cost order against the Federal Court applicants. Stevenson J ruled that the Court has power to make a costs order against non-parties and held that as each of the funders stood to make a significant profit from the fruits of the litigation, in the circumstances where the applications had failed, each of the funders should pay the costs. In Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd (No. 2) [2021] NSWSC 1202, Stevenson J also ordered that a litigation funder be jointly and severally liable for the costs incurred by a defendant. In coming to this decision, Stevenson J considered five factors relevant to whether an order should be made for costs against a non-party. The factors were, whether the non-party:

- provided funding for the litigation;
- had a direct interest in, and entitlement to, a substantial part of the fruits of the litigation;
- was involved in the litigation purely for commercial gain;
- had a right to information and involvement in decision making in relation to the litigation; and
- agreed to provide an indemnity to the unsuccessful party for any adverse costs order.

Law stated - 18 November 2021

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

The court has the power to order a plaintiff to give security for the defendant's cost of defending the plaintiff's claim. The court can order a stay of proceedings until security is given and if there is persistent non-compliance, the court may dismiss the plaintiff's claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court.

Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against it should the plaintiff's claim fail. Orders for security for costs have been seen as necessary due to the financial benefit litigation funders stand to gain from a successful outcome in the proceedings.

In its report 'Litigation Funding and the Regulation of the Class Action Industry', the Australian Parliamentary Joint Committee on Corporations and Financial Services noted a submission by Dr Peter Cashman that although a litigation funder may be readily able to satisfy any costs order made against it, certain circumstances may give rise to an order for security for costs, including that the litigation funder may be based in a jurisdiction outside of Australia.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs. Courts will also consider whether there is an option for the litigation funder to cease funding during the proceedings when determining whether to make an order for security.

If recourse to the third-party funder's balance sheet is not accepted as satisfactory evidence of the funder's ability to meet its indemnity obligations, recognised forms of security include the payment of money into court, bank guarantees and in more recent times, ATE insurance and deeds of indemnity from insurers securing direct recovery rights to the defendants in the event of an adverse cost order.

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. Ordinarily, the defendant(s) will provide the court with an estimate of the costs they believe will be incurred and this will be a matter for evidence. In complex claims, it is usual that security orders will be given in stages by reference to identified phases in the litigation.

Law stated - 18 November 2021

If a claim is funded by a third party, does this influence the court's decision on security for costs?

If the matter is funded, the court will generally order security for costs. It is a relevant consideration in the granting of security that a third-party litigation funder intends to benefit from any recovery (Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744).

In the case of Perera v Getswift Limited [2018] FCA 732, the Court observed that, 'it is accepted that in the event that funders are using the processes of the court to procure a commercial benefit, a sine qua non of this is the provision of adequate security.'

The Australian Law Reform Commission Report also made a recommendation that there be a statutory presumption that a litigation funder will provide security for costs.

Law stated - 18 November 2021

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is permitted and is commonly used, particularly in funded class action litigation.

ATE insurance policies can be put forward in the context of security for costs applications as a form of security. Judicial views on the acceptability of this have been varied.

In the matter of DIF III Global Co-Investment Fund LP (formerly Babcock & Brown DIF III Global Co-Investment Fund LP) v BBLP LLC (formerly Babcock & Brown LP) [2016] VSC 401 (DIF) the Court accepted as adequate security a deed of indemnity proffered by an overseas-based ATE insurer. In Capic v Ford Motor Company of Australia Ltd, the Court approved security for costs being provided by way of a deed of Indemnity from an ATE Insurer in the United Kingdom, together with a payment of A$20,000 into Court for the purpose of covering the enforcement costs of the deed in the

United Kingdom.

In Peterson Superannuation Fund Pty Ltd v Bank of Queensland Limited (No. 3) [2018] FCA 1842 the representative plaintiff's litigation funder sought to recover the costs of its ATE insurance premiums from the settlement sum. The representative plaintiff opposed this on the basis that the ATE insurance policy only protected the litigation funder against costs exposure. Because recovery of the ATE insurance premium was agreed in the litigation funding agreement, the Federal Court of Australia found that to prevent reimbursement would be to alter the terms of the funding agreement. However, the Court did find that ATE insurance costs were relevant to the level of risk to which the funder was exposed, and in finding that those risks were low, reduced the finder's commission from 25 per cent to 13.7 per cent.

In Bonham as trustee for the Aucham Super Fund v Iluka Resources Ltd (Security for Costs) [2019] FCA 1693, Perram J accepted that the particular deed of indemnity proffered in this case as security for costs was sufficient. Although the insurers did not have assets in the jurisdiction, the applicant contended that additional elements of security would be put in place so that enforcement in the United Kingdom and Ireland could occur at no expense to the respondent. On the issue of whether the security of costs previously paid to court by the applicant could be replaced by the aforementioned deeds of indemnity and a lesser amount paid to court, Perram J found against the applicants. Perram J reasoned that interlocutory orders ought not to be revisited simply because one party retrospectively views the agreed upon bargain as one that is not good.

The issue was more recently considered by the Supreme Court of Queensland in Equititrust Limited v Tucker [2020] QSC 269, in which Bond J held that security in the form of a deeds of indemnity from its ATE insurer posed an 'unacceptable disadvantage' to the defendants. Earlier in the proceedings, Bowskill J also rejected the applicant's application to provide a deed of indemnity as a form of security, finding that the applicant had failed to establish that a deed of indemnity was adequate.

Recently, in Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No. 3) [2020] FCA 1885, a litigation funder sought reimbursement of ATE insurance premiums together with a 'settlement CFO'. Lee J observed, 'If a funder wishes to defray their risk of performing that obligation it is matter for the funder but, in my view, it is not a cost that ought be passed on separately to group members when the Court controls the remuneration', and declined to make separate provision for the reimbursement of ATE insurance premiums in parallel with the settlement CFO.

Law stated - 18 November 2021

DISCLOSURE AND PRIVILEGE

Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

For class actions commenced in the Federal Court and certain of the state courts, claimants are required to disclose the litigation funding agreement subject to redactions to conceal information which might reasonably be expected to confer a tactical advantage to another party. The commercial terms may be redacted. Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd (t/as ANZ Investment Bank) [2016] FCA 306 provides examples of terms that may be redacted.

The Class Actions Practice Note that applies to litigation in the Federal Court of Australia (CAPN), requires that prior to the first case management hearing, an applicant's lawyers shall, on a confidential basis, disclose their costs agreement and any litigation funding agreement to the judge presiding over the first case management hearing. Similarly, the CAPN provides that no later than seven days prior to the first case management hearing, the applicant's lawyers shall file and serve a notice in the specified form together with a copy of the litigation funding agreement.

The CAPN also covers the level of detail required in the applicant's disclosure to the Court and to other parties (including the respondents); information regarding the amount of funding received or estimated cost to prosecute the litigation ('war chest information') does not need to be disclosed under the CAPN.

Litigation funding schemes that are MISs require a product disclosure statement (PDS) which is made publicly available. Consistent with the approach taken in the CAPN, the Australian Securities and Investments Commission has provided certain relief in relation to fee disclosure in the PDS, as it recognises that disclosing specific details of the funding arrangement in a public document could be detrimental to claimants.

Law stated - 18 November 2021

Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

Some but not all communications between a litigant or their lawyers and a funder may be protected by privilege.

A claim of privilege can be made to object to the production of, or access to, documents in response to a subpoena to produce, notice to produce or order to give discovery. In addition, privilege can be claimed to object to answering interrogatories.

Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation. Professional confidential relationship privilege protects communications to preserve the confidential nature of certain relationships that could be undermined by disclosure. Settlement negotiations privilege protects communications or documents created in connection with an attempt to settle a dispute. A common interest privilege may arise if two parties with a common interest exchange information and advice relating to that interest, the documents containing that information may be privileged from production in the hands of each party.

With the exception of the common interest privilege, each of these privileges was derived from the common law but is now given a statutory basis in the Uniform Evidence legislation.

In IOOF Holdings Ltd v Maurice Blackburn Pty Ltd [2016] VSC 311, the claimant commenced proceedings against law firm Maurice Blackburn and litigation funder Harbour Litigation Funding Ltd, seeking production of certain documents obtained during investigations in anticipation of representative proceedings against IOOF. IOOF claimed that the documents contained confidential information about it and sought to restrain the law firm and litigation funders' use of that information. The Supreme Court of Victoria found that certain documents created by Maurice Blackburn and Harbour in their investigative process were subject to privilege, given that their dominant purpose was legal advice. Documents that were produced by Maurice Blackburn for the purposes of receiving advice from its counsel on issues of confidentiality and prospects of success in pursuing a representative action were protected by privilege, as the firm was effectively a client seeking legal advice. Documents created prior to the existence of any intention to give or receive legal advice were precluded from privileged protection. Similarly, Harbour was a client of counsel and also of Maurice Blackburn in some capacity, to the extent that both counsel and the firm gave Harbour legal advice. However, there were also certain communications with Maurice Blackburn that Harbour was required to produce, relating to proposed funding agreements for the prospective class action, as these were found to be 'commercial negotiations' and not documents created for the dominant purpose of legal advice. In this sense, Harbour could not claim litigation privilege in its own right.

Similarly, in Hastie Group Ltd (in Liq) v Moore [2016] NSWCA 305, the Court of Appeal considered whether an expert report provided to a litigation funder in connection with attempts to secure litigation funding was privileged. At issue was whether the expert report was prepared in connection with anticipated proceedings to be brought by the liquidators of the Hastie Group, or whether its dominant purpose was to aid the litigation funder in deciding whether to

fund the prospective proceedings. Further, if the expert report was subject to privilege, it was contended that privilege was waived in circumstances where the liquidators relied on the fact that it was seeking litigation funding to obtain extensions to the time for service of the pleadings.

In circumstances where both parties accepted that the letter of engagement sent to the expert was privileged, and in light of evidence of the nature of and manner in which the report was prepared, the Court of Appeal was satisfied that the report itself was also privileged. As to the issue of waiver, the Court of Appeal was satisfied that the contents of the expert report were not relied on when seeking an extension for service, and in any event the expert report was disclosed to the litigation funder on a confidential basis and in connection with anticipated proceedings.

Law stated - 18 November 2021

DISPUTES AND OTHER ISSUES

Disputes with funders

Have there been any reported disputes between litigants and their funders?

There are numerous decisions involving challenges to the funding relationship brought by defendants to the funded litigation, but very few reported decisions in disputes between plaintiffs and their funders.

The two reported cases arose in the context of the termination of a litigation funding agreement.

In International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed) [2012] HCA 45, the funder sought payment of an early termination fee that arose as a result of a change in control transaction by the litigant. The litigant resisted the payment of the early termination fee on the basis that it had a statutory right of rescission due to the funder's failure to hold an Australian Financial Services Licence (AFSL). The Court held that the funder was not required to hold an AFSL and the litigant could not avoid the financial consequences under the funding agreement.

Trafalgar West Investments Pty Ltd v LCM Litigation Management Pty Ltd [2016] WASC 159, the Court considered whether a litigation funder was obligated to satisfy a staged security for costs order made prior to termination. The Court dismissed the litigant's claim and determined that LCM was not obliged to satisfy the remaining stages of the order.

The Banksia Class Action settlement approval process is an example of disputation between a funder and funded class members. In that matter the litigation funder along with the applicant's counsel team are alleged to have engaged in a fraudulent scheme to enrich themselves at class members' expense. Issues were first raised by a class member, which resulted in the Court appointing a contradictor to investigate points of dispute between the funder, lawyers and the funded parties. It is alleged that the funder and counsel breached their duty of care, skill and diligence owed to class members by seeking to deduct excessive fees from the settlement.The matter was heard in August 2020 with judgment reserved. During the hearing the counsel team abandoned their defences and consented to judgment being made against them.

In the Arasor Class Action , one of the representative applicants, Caason Investments, sought legal, administrative and accounting costs that it claimed it was owed under a variation to the funding agreement. The Court ruled that Caason Investments should be paid a small percentage of its claim for out-of-pocket costs but reflecting the outcome was ordered to pay the funder's costs of the proceeding.

Law stated - 18 November 2021

Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

Practitioners should be aware of the recent enactment of the Corporations Amendment (Litigation Funding) Regulations 2020 , which require litigation funders to hold an AFSL. On 22 August 2020, the Regulations came into force, removing the previous safe harbour for litigation funding schemes from the AFSL and managed investment scheme (MIS) regimes, meaning that third-party litigation funders funding class actions and multi-plaintiff actions may be required to hold, or be an authorised representative of, an AFSL. AFSL holders are required to abide by their licence conditions and the general conduct obligations under section 912A of the Corporations Act 2001 (Cth) . AFSL holders authorised to provide financial services to retail clients are also required to become a member of an external dispute resolution scheme. The Australian Securities and Investments Commission (ASIC) has made the ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 to manage the transition to the new regulatory regime by providing relief in a number of areas of the AFSL and MIS regimes that would otherwise be unsuitable for the structure of a litigation funding scheme.

In December 2020, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) released the report of its inquiry into litigation funding and the regulation of the class action industry. The report included a number of recommendations regarding the class action regime, and indicated support for the government's decision to remove the exemptions for litigation funding schemes from the managed investment scheme (MIS) regime and the requirement to hold an AFSL. The report did, however, note that a number of parties had expressed concerns around the suitability of the MIS regime as a mechanism for the regulation of funded class actions in Australia. The PJC recommended that the government legislate a fit-for-purpose MIS regime, tailored for litigation funders.

In this regard, Justice Beach of the Federal Court observed, during a procedural hearing in a proceeding challenging the Queensland Energy Class Action proceeding outside the MIS regime, that it was difficult to reconcile the new regulations with the class action regime. Questioning the need for a responsible entity overseeing the class action, his Honour noted that it is the representative applicant which has this role in a class action proceeding, in addition to the court's supervisory role.

In March 2021, the High Court of Australia handed down its judgment in Wigmans v AMP Limited. The High Court, in dismissing the appeal, held that the Supreme Court had the power to grant a stay of a competing representative proceeding, and that power was not confined by a rule or presumption that the proceeding filed first in time is to be preferred. The High Court noted that litigation funding arrangements, while not a mandatory consideration in determining competing class actions, were not irrelevant.

Law stated - 18 November 2021

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

The developments and trends in the Australian class actions and litigation funding space over the past 12 months have been extensive. The developments that ought to be noted include:

- changes to continuous disclosure requirements considering the covid-19 pandemic, and the subsequent impacts on securities claims;
- the ramifications of the decision of the NSW Court of Appeal, which held that the Supreme Court of New South

Wales is not empowered under section 183 of the Civil Procedure Act 2005 (NSW) to make an order 'closing' the class in a representative proceeding prior to settlement;
- the Victorian Supreme Court's approach to group costs orders; and
- the outcome of the judgment in Wigmans v AMP, certifying the court's power in relation to competing class actions.

The approach of the courts to each of these topics effects how litigation funders conduct themselves in Australia, especially when funding class actions.

Changes to continuous disclosure requirements

The Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth) makes permanent once-temporary amendments to the Australian continuous disclosure regime. The continuous disclosure obligations in the Corporations Act 2001 (Cth) that apply to Australian listed entities require that those entities disclose price-sensitive information on a continuous basis. Prior to the temporary amendments, a listed entity would contravene its continuous disclosure obligations if it:

- had information that was not generally available;
- the information was such that a reasonable person would expect it to have a material effect on the price or value of the entity's securities if it were generally available; and
- the entity failed to notify the market operator or the Australian Securities and Investments Commission (ASIC) of the information.

The now permanent changes require that the state of mind of the disclosing entity be taken into account when determining whether it contravened the continuous disclosure obligations, adding an additional element: ' the entity knows, or is reckless or negligent with respect to whether the information would have a material effect on the price or value of the entity's enhanced disclosure securities'.

The effects of the additional 'knowledge' element to continuous disclosure on securities class actions have not yet materialised.

Class closure orders prior to settlement

Class closure orders prior to mediation have historically been a useful tool in the context of settling large, open class actions. Generally, class closure orders limit the settlement entitlement to only those group members who have registered their interests to receive a settlement sum, though they are binding on all group members. Class closure orders allow the parties to negotiate on behalf of a defined class of group members and, in particular, assist defendants in providing certainty as to who will be bound by any settlement that is reached.

There then developed a distinction between 'hard ' class closure orders, meaning that failing to register extinguished a group member's rights for the remainder of the proceeding (ie, until conclusion of the matter at trial), and 'soft' class closure orders, meaning the group member is excluded for a certain period of time such as until mediation, but if no settlement is reached at mediation will again be allowed to participate in the proceedings (and receive any benefit arising out of a judgment or any future settlement).

In the 2019 decision of Gill v Ethicon Sarl (No. 2) [2019] FCA 177, Justice Lee described hard class closure orders as 'wholly inappropriate'; however, his Honour considered that soft class closure orders could be adapted to facilitate

settlements.

In April 2020, the New South Wales Court of Appeal in Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2020] NSWCA 66 ruled that class closure orders that extinguish unregistered group members' rights cannot be made under section 183 of the Civil Procedure Act 2005 (NSW) prior to a court-approved settlement or judgment. The Court held that extinguishing the group members' rights was inconsistent with the legislative framework and was not appropriate or necessary to ensure that justice was done.

Haselhurst was followed by a number of Federal Court of Australia decisions which were of similar effect. In Owners – Strata Plan No. 87231 v 3A Composites GmbH (No. 3) [2020] FCA 748, Justice Wigney held that the Court did not have power under section 33ZF of the Federal Court of Australia Act 1976 (Cth) to make such an order, particularly in light of the High Court decision in Brewster. The Court of Appeal in Wigmans v AMP again found that the Court lacked the power to make class closure orders in contemplation of settlement discussions, finding that this was contrary to the essence of Australia's opt-out regime. Most recently, in the On The Run class action, Furnell & Ors v Shahin Enterprises Pty Ltd , the Federal Court rejected an application by the lead applicants for soft class closure orders, finding that the Court did not have the power to make the orders sought, and relied upon the recent authorities.

These decisions do not appear to impact the Court's power to make class closure orders after a settlement pursuant to sections 33V and 33ZB of the Federal Court of Australia Act 1976 (Cth) (FCAA). It must also be noted that this decision does not place a limit on every type of procedural tool available that affects class composition, but does raise difficulties for defendants as there is less certainty regarding the number of group members and the amount of their claims before settlement or judgment.

It is also worth noting that this area may be the subject of legislative development in light of the Parliamentary Joint Committee on Corporations and Financial Services (PJC) recommendations in its 2020 report. The PJC concluded that class closure orders are 'integral to facilitating settlements in open class proceedings', and recommended that Part IVA be amended to include an express power to make class closure orders.

Contingency arrangements and group costs orders

Group costs orders are only available in Victoria. While the first application for a group costs order in Fox v Westpac; Crawford v ANZ [2021] VSC 573 was unsuccessful, guidance can be taken from the decision.

First, the provision was considered to be comparable to section 33ZF of the FCAA in that the widest possible power is conferred on courts to do what is appropriate to achieve justice, as enunciated by Nettle J in the Brewster High Court decision . However, unlike section 33ZF, the provision is not a supplementary or gap-filling power.

Second, Nichols J considered the factors contemplated by courts when determining applications for common fund orders to be instructive, notwithstanding that not all would apply. In the context of common fund orders, the Federal Court has taken into account:

- the litigation risks of funding, assessed avoiding hindsight bias and recognising that the funder took on those risks at the commencement of the proceeding;
- the quantum of adverse costs exposure that the funder assumed at the commencement of the proceeding;
- the legal costs expended, and the security for costs provided;
- a comparison of the funding commission with commissions in other group proceedings and the market;
- pre-existing funding arrangements, including group members' likelihood to make a recovery; and
- the quantum of any settlement or judgment.

Third, Nichols J was careful to emphasise that, while determining what was 'appropriate and necessary' to see justice

in these proceedings was whether the group members would be financially 'better off' with a group costs order in place, this will not be the relevant enquiry in all section 33ZDA applications.

Predictive modelling was employed to compare the outcomes under different funding arrangements. It was thus relevant to identify in each proceeding the 'tipping point', being the settlement or judgment amount at which the outcome to the group would be the same under a group costs order or alternate funding arrangement, and below which it would be better off with the proposed group costs order.

However, the relevant comparator was in dispute. The contradictor submitted that the relevant comparator was, collectively, the 'no win, no fee' funding arrangements that, properly construed, were not made on an interim basis. The plaintiffs submitted that the existing arrangements included a 'contractual fall-back' facilitated by the opportunity to negotiate third-party litigation funding, being the relevant comparator.

Notably, the plaintiffs observed that the practical effect of accepting the contradictor's submission would be commercially unworkable for plaintiffs, law practices and litigation funders, and contrary to the policy behind section 33ZDA. In effect, applications for group costs orders would only be successful if:

- retainers between law practices and plaintiffs were conditional and terminated in the event that a group costs order was unsuccessful; or
- plaintiffs, law practices and litigation funders spent considerable time and resources negotiating short-lived funding agreements that would become redundant upon the making of a group costs order.

Further, it would not be practicable to inform a potential representative plaintiff that a law practice is prepared to act on their behalf, but that it would cease acting if a group costs order is not obtained. Few, if any, individuals would take on the burden of being a representative plaintiff in such circumstances.

The appropriate comparator was the 'no win, no fee' arrangement. Nichols J acknowledged that while the broad policy considerations enunciated by the plaintiffs had some attraction, the difficulties of accommodating a genuinely interim arrangement in contractual terms may have been overstated. Accordingly, Fox v Westpac; Crawford v ANZ serves as a cautionary tale to plaintiff law firms and funders to give careful consideration to their funding arrangements early on, as the availability of a group costs order may heavily rely upon it.

Fourth, and finally, the application for a group costs order in Fox v Westpac; Crawford v ANZ ultimately failed due to the lack of evidence available to determine which funding arrangement was preferable to group members, including as to the prospects of success, quantum of any award or settlement, legal fees and returns to group members. The lack of evidence was attributed to the very early stage of the proceedings. This may be problematic, given that Nichols J considered there to be 'clear contextual indicators' that a section 33ZDA application be made at an early stage of proceedings.

It remains to be seen whether Nichols J's interpretation of section 33ZDA will be applied in subsequent applications for group costs orders. Further, whether other Australian jurisdictions will introduce a similar statutory power remains uncertain at this stage.

Competing class actions

In Wigmans v AMP Limited [2021] HCA 7, the High Court dismissed an appeal from the NSW Court of Appeal (by a three-to-two majority) concerning the power and methodology of a court dealing with competing class actions. The High Court ruled that the 'multi-factorial' approach endorsed by the NSW Supreme Court was a valid method to determine whether a/which competing action be stayed indefinitely. In a multi-factorial approach, the following factors are taken into account:

- the competing funding proposals, costs estimates and net hypothetical return to group members;
- the proposals for security for costs;
- the nature and scope of the causes of action advanced;
- the size of the respective classes;
- the extent of any bookbuild;
- the experience of the legal practitioners and availability of legal resources;
- the state of progress of the proceedings; and
- the conduct of the representative plaintiffs to date.

Further, in considering a court's discretion to quell controversy surrounding competing class actions, the High Court ruled that there is no 'first in time' rule that an earlier-filed class action ought to prevail over proceedings commenced later unless those proceedings offer some sort of 'juridical advantage'. Multiplicity of proceedings may be dealt with by numerous case management tools in addition to, or in the alternative to, staying all but one proceeding. There is no 'one size fits all' approach.

The High Court also provided a recommendation that appointed referees or contradictors are possible ways in which conflicts of interest may be managed during a 'beauty parade'.

Relevantly, the High Court found that while consideration of litigation funding arrangements is not mandatory, examining each proceeding's funding in light of group members' best interests may be relevant to deciding issues arising from competing class actions.

Reflecting some level of concern with substantive rights being determined through the use of procedural case management powers, to address complexities associated with competing class actions, the Australian Law Reform Commission (ALRC) report 'Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders' has recommended that Part IVA of the FCAA should be amended to give the Court an express statutory power to resolve competing class actions. Practically speaking, unless and until the ALRC's recommendation is adopted, the courts will continue to manage issues arising from competing class actions through existing case management powers.

Regulation of litigation funders

On 9 July 2021, ASIC released Consultation Paper 'Litigation funding schemes: Guidance and relief' (CP 345), which outlines ASIC's proposed changes aimed at providing greater clarity on the meaning of key provisions in the Corporations Act and their application to litigation funding schemes. CP 345 also sets out ASIC's position in relation to various relief instruments that currently apply to funded class actions. As at the date of writing, no response has been provided by ASIC following submissions by industry.

On 30 September 2021, the government released draft legislation to amend Chapter 5C of the Corporations Act to implement recommendations contained in the PJC's December 2020 Report and the Corporations Regulations to include new conditions on Australian Financial Services Licence (AFSL) holders.

In summary, issues which might arise under the draft legislation include that:

- the definition of 'managed investment scheme' contained in section 9 of the Corporations Act will be amended to confirm that class action litigation funding schemes are managed investment schemes;
- there be a presumption that a fair and reasonable minimum return to group members is not less than 70 per cent of the total claim proceeds;
- the Court does not have power to make orders that extend the funder's commission to group members who are not members of the litigation funding scheme, meaning the Court will not have the power to make a common

fund order. In essence, this will require class actions to be run as closed class actions;

- the Court must have regard to the report of a fee consultant and a contradictor representing the interests of the scheme's general members, the fees of which are to be met by the funder;
- lawyers providing services in relation to class action litigation funding schemes must ensure they do not have a material financial interest in the scheme. It is a condition of an AFSL licensee that if a lawyer providing services for the scheme does have or obtains a financial interest in the scheme, then the AFSL holder must ensure the lawyer stops providing services or relinquishes that interest.

The Explanatory Memorandum accompanying the draft legislation notes that the measures are aimed at ensuring the distribution of proceeds arising from a class action is fair and reasonable, and that group members provide consent to become members of a class action litigation funding scheme before a funder can impose a fee or commission on them.

The government provided stakeholders with the opportunity to provide submissions on the draft legislation.

On 27 October 2021, the government introduced the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 into Parliament. On 28 October 2021, the House of Representatives referred an inquiry into the Bill to the PJC for report by 19 November 2021. The PJC held a public hearing about the Bill on 12 November 2021.

Common fund orders

By majority ruling of five to two, the High Court of Australia found in BMW v Brewster [2019] HCA 45 that the Federal Court and the Supreme Court of New South Wales had no power to make a common fund order in a representative proceeding. A common fund order is usually made at an early stage in a class action and it provides for the litigation funder's remuneration to be a fixed sum of the total amount received by the group members at the conclusion of a proceeding or settlement. The majority held that, on their proper interpretation, neither section 33ZF of the Federal Court of Australia Act 1976 (Cth) nor section 183 of the Civil Procedure Act 2005 (NSW) empowered a court to make a common fund order, because after taking into account 'text, context and purpose', a conclusion arises that it is inappropriate and unnecessary to ensure that justice is done in a proceeding for a court to make a common fund order.

However, it remains to be seen whether common fund orders can be made at the conclusion of proceedings in the Federal Court (Davaria Pty Limited v 7-Eleven Stores Pty Ltd [2020] 384 ALR 650) and Supreme Court of New South Wales (Brewster v BMW Australia Ltd [2020] NSWCA 272).

Law stated - 18 November 2021

Jurisdictions

Australia	Piper Alderman
Austria	Nivalion AG
Belgium	Nivalion AG
Canada	Omni Bridgeway
France	Nivalion AG
Germany	Omni Bridgeway
Hong Kong	Herbert Smith Freehills LLP
India	Khaitan & Co
Israel	Woodsford
Italy	Fideal S.R.L
Japan	Miura & Partners
Luxembourg	Nivalion AG
Netherlands	De Brauw Blackstone Westbroek
New Zealand	Thorn Law Limited
Russia	Aperio Intelligence
South Korea	KL Partners
Spain	Procurator Litigation Advisors
Sweden	Nivalion AG
Switzerland	Nivalion AG
Thailand	Rajah & Tann Asia
United Kingdom - England & Wales	Woodsford
USA - New York	Liston Abramson LLP