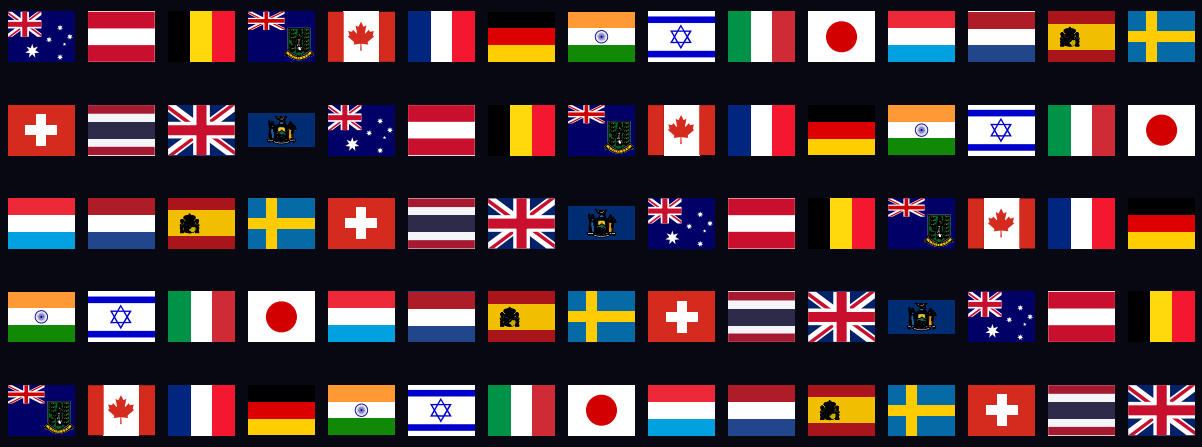
LITIGATION FUNDING

Australia



LEXOLOGY
Getting The Deal Through

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Litigation Funding

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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 and is commonly used in single-party, insolvency-related and class-action litigation.

The High Court of Australia, in Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd (2006) CLR 386 (Fostif), 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).

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 found, 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.

The available statistics about class action filings show that in the period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court of Australia were funded. From 2013 to 2018, the percentage of class actions in the Federal Court that were funded grew to 64 per cent, with the number of funded actions filed in the final year of that period being 78 per cent. However, recent statistics demonstrate a significant decrease in funded class actions in recent years. A significant drop in funded actions was reported in the period from 2019 to 2021, with just 41 per cent of actions being funded. In the year ending 30 June 2022, this had increased slightly to 44 per cent.

The decline in funded class actions around 2019 may have been a result of the uncertainty surrounding the ability for the Court to make a common fund order, arising out of the decision in BMW Australia Limited v Brewster [2019] HCA 45. In recent years, the percentage of funded actions has likely remained lower as a result of actions taken in 2021 by the then-federal coalition government, introducing legislation that required funders to comply with certain regulatory regimes and seeking to introduce legislation that would regulate the amount of commission a funder could receive from a class action. The Labor government, now in power, has indicated it will not be proceeding with the proposed legislation, and the new approach by the Labor government may ultimately lead to a rise in funded class actions as greater certainty returns to the funded class action landscape. A further reason for the likely decline in the use of limitation funding in class actions is the increased use of the group-costs order regime in the Victorian Supreme Court. This regime provides law firms with the ability to charge contingency fees, with the result that plaintiff firms have increasingly opted to pursue class action litigation without the involvement of a litigation funder.

Law stated - 26 September 2022

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 there have been calls for limitations to be placed on funding commissions or for a guaranteed statutory minimum return to class members. If a statutory minimum was imposed, fees and interest that funders can charge would obviously be impacted. While in the past 12 months draft legislation has been put forward that would impose a statutory minimum return, that legislation was not introduced and there is presently no indication that any such regulation will be put forward by the current Labor government.

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 constitutes an equitable fraud, in the sense that it involves 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, the 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.

When it comes to the calculation of the funder's fee, generally the Court will either make a 'common fund order' or a 'funding equalisation order'.

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 to equalise the distribution of damages such that unfunded claimants must also contribute to the costs of the claim, including the funder's fee. In 2019, the High Court in BMW Australia Limited v Brewster [2019] HCA 45 (Brewster) held that common fund orders made prior to a settlement are invalid, however, the decision left open the question of whether such an order could be made on settlement or judgment. Since Brewster, while some judges have declined to make common fund orders at settlement based on the reasoning in Brewster (see, eg, Cantor v Audi Australia Pty Limited (No. 5) [2020] FCA 637) many common fund orders have been made in the context of a settlement approval (see Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) [2020] FCA 1885; McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No. 3) [2020] FCA 461).

Following the varying views expressed by different judges, the issue of whether the Court has power to order a

common fund order at settlement or judgment was considered by both the Full Court of the Federal Court and the NSW Court of Appeal. In Davaria Pty Ltd v 7-Eleven Stores Pty Ltd [2020] FCAFC 183 and Brewster v BMW Australia Ltd [2020] NSWCA 272, both the Full Court and the Court of Appeal declined to answer those questions formally, as each concluded it was inappropriate to answer the questions when they were hypothetical (rather than an actual settlement being put to the Court for determination). That being so, both Courts gave indications that, in the right circumstances, and would involve an analysis of the orders sought, the settlement proposed to be entered into, and most centrally, the impact that this would have on group members. 7-Eleven Stores Pty Ltd sought special leave to appeal the Full Court's decision to the High Court, but that application was dismissed. A 2019 report from Professor Vince Morabito stated that in the period from 1992 to 2018, the average percentage of settlement funds applied towards a funding commission in all funded settled class actions (which settlement was approved by the Court) was 26.87 per cent. Professor Morabito reported that the median percentage of settlement sums consumed by funding fees in all funded cases during the review period was 25 per cent.

There have also been some instances where the Court has declined to make a common fund order, but rather has made a funding equalisation order, which is an alternative method for distributing a funder's commission among group members. A funding equalisation order provides for deductions to be made from the amounts payable to group members who did not enter funding agreements to spread the burden of the funding commission across the group members, and thereby ensure that group members receive proportionately equal shares of the settlement or judgment whether or not they agreed to the terms of the funding agreement. In the Crown Resorts class action (Zanran Pty Limited v Crown Resorts Limited), the funder sought a 25 per cent common fund order. Justice Beach instead imposed a funding equalisation order, as his Honour considered the funder would be adequately rewarded while being more beneficial to the group members. In the Estia Health class action (Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited [2021] FCA 475) a funding equalisation order was sought and approved, and as a result, the funding commission was to be distributed pro rata across all participating group members.

Law stated - 26 September 2022

Specific rules for litigation funding

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

In 2009, the High Court in Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (2009) 260 ALR 643 (Brookfield) held that in certain circumstances, a litigation funding scheme may constitute a managed investment scheme (MIS) . Following this decision, in 2012, the federal Labor 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.

Subsequently, on 22 August 2020, the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (Regulations) were introduced that had the effect of requiring third-party litigation funders in Australia to hold an Australian Financial Services Licence (AFSL) and comply with the MIS regime under the Corporations Act 2001 (Cth) if they advise about, deal in or operate a litigation funding scheme. This meant that when funding class actions and multi-plaintiff actions, third-party litigation funders were required to hold an AFSL or be an authorised representative of an AFSL holder. The AFSL and MIS regimes are overseen by the Australian Securities and Investments Commission (ASIC).

In October 2021, Justice Beach of the Federal Court of Australia held in Stanwell Corporation v LCM and Stillwater Pastoral Company [2021] FCA 1430 (Stanwell), that the Regulations do not apply to litigation funding schemes entered into before they came into effect on 22 August 2020, and the funding scheme in question was exempt from the amendments brought in by the Regulations and the MIS requirements. In the proceeding, Stanwell Corporation brought an application alleging that the litigation funding scheme relating to the class action constituted a financial product for

the purposes of the Corporations Act 2001 (Cth), and was an unregistered MIS. The funder, LCM, brought a cross-claim seeking declarations that the Scheme did not have the features of an MIS and that LCM and Stillwater Pastoral Company had not operated a scheme with the MIS features. LCM also sought a referral to the Full Court of the Federal Court to challenge Brookfield . However, with the substantive issue of the proceeding already determined, Beach J did not make the declarations sought by the funder, declined to make the referral to the Full Court and, considering himself bound by the majority decision in Brookfield, dismissed the funder's cross-claim. The funder appealed the decision to the Full Court of the Federal Court, arguing that Beach J ought to have made the declarations sought in the funder's cross-claim. The appeal was considered to be a 'convenient vehicle' to review the Brookfield decision. In June 2022, the Full Court of the Federal Court unanimously held that litigation funding schemes are not MIS' within the meaning of section 9 of the Corporations Act 2001 (Cth) and that the decision in Brookfield was 'plainly wrong'.

The implications of this decision are that funded class actions do not need to comply with the MIS provisions of Chapter 5C of the Corporations Act 2001 (Cth). However, Parliament has yet to amend the Regulations to remove the classification of a 'litigation funding scheme' as a financial product. In September 2022, the federal Labor government announced the draft version of the Corporations Amendment (Litigation Funding) Regulations 2022 (2022 Amendment Bill) that proposes to provide litigation funding schemes with an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of the Corporations Act 2001 (Cth).

However, until the 2022 Amendment Bill is implemented, litigation funders remain required to hold an AFSL to carry on the business of dealing in or providing financial product advice in relation to a litigation funding scheme the requirements in Chapter 7.9 of the Corporation Act 2001 (Cth) will apply to 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 regime 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 was said to be 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.

Separately, the 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 New South Wales, Queensland and Victoria.

Law stated - 26 September 2022

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. However, 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.

While not explicitly required by legislation, it is increasingly common that lead applicants are provided with (or at least offered the opportunity to obtain) independent advice on the terms and effect of funding agreements, as well as to group members generally in the class action context in respect of the terms of funding agreements, prior to the commencement of any litigation. This can help to avoid any suggestion of conflict between the legal practitioner's duties.

In addition, the conduct of lawyers and third-party litigation funders has become increasingly scrutinised, and issues usually come to light in the context of applications for settlement of class actions. The legislation requires that any settlement of a class action must be approved by the court. Those powers provide a level of discretion in the courts to moderate the legal and other professional costs incurred in the 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 arose in relation to 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 class member, the Court embarked on a wide-ranging enquiry into the integrity of the barristers, solicitors, client and funder relationships and the professional fees rendered.

Justice Dixon ultimately found that the funder, the barristers and the solicitors acting for the class members all engaged in egregious conduct in connection with a fraudulent scheme designed to significantly inflate legal costs and overcharge their clients. Dixon J considered that their conduct corrupted the proper administration of justice, misled the Court and damaged confidence in legal professionals and the expectation that they will act honestly. As a result of Dixon J's judgment, the funder, barristers and solicitors were ordered to pay damages to the class members of A$11.7 million plus costs of over A$10 million. Dixon J also ordered that the barristers be removed from the roll of persons admitted to the legal profession and, that the solicitors show cause as to why they were still fit and proper to remain on the roll. Dixon J also referred his findings to the Director of Public Prosecutions for any potential criminal investigation.

A feature of the Banksia Securities class action, which is also reflected in other recent cases, is the willingness of the court to appoint contradictors and independent counsel to represent the interests of class members in the settlement approval process. Further, the contradictor in the Banksia Securities class action took a more active role in the settlement approval trial including by cross-examining various witnesses.

The Banskia Securities matter received widespread publicity and was often cited by proponents of the Regulations as the reason why there needed to be greater oversight on the litigation funding landscape. Dixon J's judgment has undoubtedly increased the scrutiny placed on lawyers, barristers and funders to act honestly and ethically in litigating the claims of the clients they represent. It also exposes the court's willingness to protect the sanctity of the solicitor-client relationship by insisting on a clear delineation between the funder, the lawyers retained and the interests of the representative client and group members.

Law stated - 26 September 2022

Regulators

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

ASIC, the Federal Court and state courts and the federal government all have an interest in and (or) oversight of third-party litigation funding, as do industry bodies such as the Association of Litigation Funders Australia (ALFA).

Until the 2022 Amendment Bill is enacted and the requirement for third-party litigation funders in Australia to hold an AFSL to carry on the business of dealing in or providing financial product advice in relation to a litigation funding scheme is removed, ASIC will continue to have a particular interest in and oversight of the third-party litigation funding space.

The courts maintain important supervisory roles in the case management of class actions, and in turn, third-party litigation funding where it is involved. For example, under the Federal Court's GPN-CN (and the state-court analogues), at or prior to the initial case management conference parties are required to 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.

Additionally, 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.

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.

ALFA is comprised of litigation funder members and law firms who regularly operate in third-party funded litigation in Australia and together engage with government, legislators, regulators and other policymakers in relation to the regulatory environment for litigation funding in Australia. ALFA has produced guidelines representing a best practice framework for standards and behaviour to be observed by its members.

Law stated - 26 September 2022

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 - 26 September 2022

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Yes. It is a permissible and indeed common for a 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, 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. 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 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 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's interests may be at odds with those of the group members.

In addition, a funder may be required to have some input into interlocutory steps in the proceeding, such as what information is included in notices to group members. For example, it is important that group members are notified of a funder's intention to seek a common fund order before one is sought. In a recent settlement approval application in Norman Leslie Wills and Jane Anne Danaher (as Trustees for the Minty Tin Superannuation Fund) v Woolworths Group Ltd, (known as the Woolworths Class Action), Justice Beach rejected the funder's application for a common fund order as notice had not been provided to group members of the funder's intention to seek such an order. While his Honour noted that he had no difficulty with making a common fund order at settlement, given there was no notification to group members earlier in the proceeding, Beach J declined to make the order.

Funders must be careful, however, not to use notices issued to group members as an opportunity to drum up registrations. 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 - 26 September 2022

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 - 26 September 2022

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 or, a material change to the legal merits or 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 Litigation Management Pty Ltd) 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 - 26 September 2022

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 common for funders to play an active role in the litigation process, and the various obligations of the funder in this respect are usually set out in the litigation funding agreement. The funder is generally required to give day-to-day instructions to the lawyers running the proceeding and provide support to resolve the claims. In addition, the funder is often required to participate in strategy discussions, identify service providers, and negotiate budgets.

In a number of cases where the court has considered a common fund order or other 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 is often seen in the context of settlement approval applications, where funders retain their own counsel to represent their interests.

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.

Law stated - 26 September 2022

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, although 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 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 (GCO). The remaining jurisdictions in Australia are yet to implement an equivalent scheme.

The first successful GCO was made in Allen v G8 Education Ltd [2022] VSC 32. In that case, Nichols J approved the GCO proposed by the plaintiff, which fixed the fees of the plaintiff's law firm at 27.5 per cent of the total award or settlement amount. In this case, the plaintiff had initially entered into a 'no win no fee' arrangement pending the application for a GCO, with the intention being that third-party litigation funding would be sought in the event the application for a GCO was rejected.

In approving the GCO, Nichols J considered it relevant that the GCO would cap the costs of the law firm and mitigate against the risk of having to pay adverse costs. Nichols J considered that because the GCO would mean the plaintiff and group members would receive no less than 72.5 per cent of any final award or settlement amount, it would provide the plaintiff and group members with a sense of certainty about their return. This was compared to the risk presented by the case being funded by a litigation funder, the risk being that the plaintiff and group members would be left with little return in the event legal costs were high and the amount of the settlement was low. Nichols J also considered that granting the GCO would avoid the delay and costs to the plaintiff and group members in having to search for third-party litigation funding. Importantly, Nichols J noted that at the conclusion of the litigation, the plaintiff and their lawyers would need to show that the fixed rate of recovery by the lawyers was reasonable, and ultimately that the amount could be adjusted.

As can be seen from Nichols J's judgment, the central focus on the enquiry in respect of whether to grant a GCO is what would best promote the interests of the plaintiff and group members in the circumstances. More recently in Nelson v Beach Energy; Sanders v Beach Energy [2022] VSC 424, Nichols J granted a GCO fixing the lawyer's recovery at 24.5 per cent, again noting the benefit to the plaintiff and group members of being provided with more certainty regarding their return, and noting that alternative funding arrangements would not be likely to result in a better outcome for them.

In contrast to the above cases, an application for a GCO was rejected in Fox v Westpac; Crawford v ANZ [2021] VSC 573. In that case, Nichols J viewed that a no win no fee arrangement was a legitimate alternative to the GCO, and considered that in the circumstances the evidence was too uncertain to conclude that a GCO would secure a better result for the plaintiff and group members than the no win no fee arrangement. However, her Honour's orders did facilitate the ability for the plaintiff and law firm to reassess their position and reapply for such an order under section 33ZDA at a later time.

The availability of GCOs and the recent successful applications will likely see the Supreme Court of Victoria become a more commonly used forum for the commencement of class actions for firms who wish to run class actions without the backing of a litigation funder, at least until other jurisdictions implement a similar scheme.

Contingency-style payments to law firms have also been considered in the context of settlement approval hearings outside of Victoria. 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 - 26 September 2022

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 (ATE) insurance, 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 which 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.

Individuals (and, in some instances, lawyers and law firms) have also started utilising crowdfunding to facilitate actions, in particular class actions. Examples of litigation using crowdfunding include class actions arising out of the covid-19 pandemic regarding vaccination programmes and mandatory lockdowns. Australian online news website Crikey reported that more than A$1 million was raised across several campaigns listed on crowdfunding platforms for class actions or test cases against vaccine mandates or lockdown orders. There are, however, issues with this kind of funding, including that there is very little transparency about how the money that is raised is spent.

Law stated - 26 September 2022

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 the monitoring of the courts' caseloads to provide timely and comprehensive information to judges and court officers managing cases.

The Productivity Commission's report into Government Services 2022 sets out the clearance rates for Australian courts for 2020–2021. A clearance rate measures whether a court's caseload has increased or decreased over the period of measurement, through comparing the number of cases lodged with the number of cases finalised. A figure of over 100 per cent means that more cases were finalised than were lodged during the period of measurement, and a figure of under 100 per cent means the opposite. The clearance rate for the Supreme Courts of each state and territory and the Federal Court (including appeals) for 2020–2021 was 101.2 per cent, indicating that these courts are maintaining steady caseloads.

As stated in the Federal Court of Australia's 2020–2021 Annual Report, the Federal Court has a benchmark of 85 per cent of cases (excluding native title cases) relating to major causes of action (which includes bankruptcy, corporations and consumer law matters), being completed within 18 months of commencement. Of the cases completed in the 2020–2021 reporting period (including appeals and excluding native title actions), 82.3 per cent of them were completed within 18 months, while 17.7 per cent of cases were completed in a period greater than 18 months. In the previous reporting period, being 2019–2020, these figures were 89.4 per cent and 10.6 per cent respectively, reflecting an increase in the time taken to complete matters.

Further, from 1 July 2016 to 30 June 2021, a total of 24,325 matters (excluding native title matters) were completed in the Federal Court. Some 67.1 per cent of these matters were completed in less than six months, 17.1 per cent took six to 12 months to complete, 7.1 per cent took 12 to 18 months to complete and 3.4 per cent took 18 to 24 months to complete. Only 5.3 per cent of cases took longer than 24 months to complete.

For complex commercial matters, it can often take several years for the litigation to be finalised.

Law stated - 26 September 2022

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 are 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 2020–2021, 1,057 appellate cases were filed in the Federal Court, with 871 being substantive appeals and related actions (the remaining being cross-appeals and interlocutory applications such as applications for security of costs in respect of an appeal). This represents an overall decrease in the number of appeals filed from the previous year, with 1,263 appellate cases being filed in 2019–2020 (1,031 being substantive appeals and related actions).

The Federal Court of Australia 2019–20 Annual Report (Annual Report) attributes this trend to the 27 per cent decrease in the number of migration matters filed. The Annual Report also notes there were decreases in the areas of taxation, administrative law, constitutional law and human rights law, but that these decreases were offset by increases in the areas of intellectual property, native title, federal crime and other federal jurisdictional matters.

The Annual Report also states that 654 substantive appeals and related actions were finalised in the 2020–2021 reporting period, with 207 of these being matters filed in the same period. Further, as of 30 June 2021, there were 1,021 appeals before the Federal Court. Some 33.1 per cent of which had been on foot for a period of less than six months, 29.9 per cent had been on foot for a period of between six and 12 months, 21 per cent had been on foot for a period of between 12 and 18 months, 12.8 per cent had been on foot for a period of between 18 and 24 months and 3.2 per cent had been on foot for a period of over 24 months.

The above statistics show that in the Federal Court it is very rare for an appeal to take more than 24 months to be resolved, and most are resolved in less time than that.

Law stated - 26 September 2022

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.

While there are ways in which a judgment can be enforced in Australia, the enforcement of judgments can be a complex, expensive and time-consuming process. It is also futile to pursue a judgment debtor if they lack assets or funds to pay the judgment sum. Accordingly, lawyers commonly seek examination notices or orders following judgment to ascertain whether a defendant or respondent in a matter has the funds or assets to pay a judgment debt.

Relatedly, lawyers often undertake investigations prior to commencing claims to ensure that the defendant in a matter will be able to pay a judgment debt. In a situation where a corporation is the proposed defendant, this would involve considering the corporation's assets. Taking this preliminary step helps to avoid a scenario where following years of litigation and large amounts of legal costs, a judgment sum cannot be paid, or paid in full.

Law stated - 26 September 2022

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 and it is well-accepted that litigation funders play an important role in providing access to justice.

In 1993, the Australian Parliament amended the Federal Court of Australia Act 1976 (Cth) to include a new Part IVA on representative proceedings. Since that time, New South Wales, Queensland, Tasmania and Victoria have implemented legislative class action regimes.

Western Australia is introducing its own class action regime, with the Civil Procedure (Representative Proceedings) Bill 2021 (WA), passing its second reading in WA's Legislative Council in August 2022.

The past financial year saw 54 class actions filed in Australia.

Law stated - 26 September 2022

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 - 26 September 2022

Liability for costs

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

Yes. The power for the court to 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 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, being 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 - 26 September 2022

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 (PJC) made reference to a submission by Dr Peter Cashman, which stated 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, after-the-event 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 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 tranches by reference to identified phases in the litigation.

Law stated - 26 September 2022

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

If a 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 'Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders' released in December 2018 (ALRC Report) also made a recommendation that there be a statutory presumption that a litigation funder will provide security for costs.

Law stated - 26 September 2022

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.

Judicial views on the acceptability of ATE insurance as a form of security 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 , the Court accepted a deed of indemnity proffered by an overseas-based ATE insurer as adequate security. In Capic v Ford Motor Company of Australia Ltd, the court ordered that security for costs be 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 if the defendant's case was successful.

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 the court by the applicant could be replaced by the aforementioned deeds of indemnity and a lesser amount paid to the 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.

In Queensland, the issue was considered in Equititrust Limited v Tucker [2020] QSC 269 (Equititrust), 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.

In the more recent decision of Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd [2021] QCA 198, the Queensland Court of Appeal upheld Applegarth J's decision at first instance that the litigation funder's offer of security in the form of ATE insurance provided by AmTrust Limited was not an appropriate method for payment of security, as AmTrust held no assets in the jurisdiction. The Court adopted the reasoning in Equitritrust that there is no freestanding right or entitlement for the plaintiff to provide security in the form least disadvantageous to it; the ordinary forms of security (namely, payment into the court or a bank guarantee) must pose a discernible disadvantage to the plaintiff to justify the court ordering an alternative form of security.

Whether the ATE insurance premium can be recovered by the funder from any settlement or judgment has had varying treatment by the court. 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 funder's commission from 25 per cent to 13.7 per cent.

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 a matter for the funder but, in my view, it is not a cost that ought to 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 - 26 September 2022

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 of Australia and certain of the state courts, claimants are required to disclose the litigation funding agreement subject to redactions to conceal information that might reasonably be expected to confer a tactical advantage to another party.

The GPN-CA 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 GPN-CA 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 GPN-CA 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 GPN-CA.

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, which included some of the commercial terms of the litigation funding agreement. The Court stipulated, however, that its approval of certain redactions only applied to that certain point in the litigation, and that those terms may lose their confidentiality at a later point in the litigation, such as where a judgment occurred or a settlement was entered into.

Similar procedures are covered in the State Supreme Court practice notes. For instance, Practice Note SC Gen 10, which relates to class actions commenced in the Supreme Court of Victoria, provides that prior to the first case management conference, the plaintiff's solicitor must disclose to the Court and to the other parties copies of the litigation funding agreement, if applicable. However, it notes that where it is considered that disclosure may give rise to material prejudice or is inconsistent with the maintenance of client legal privilege, they may propose sensile redactions or object to the disclosure. In both instances, this needs to be raised with the court so that the Court can determine the merits. The plaintiff's solicitor must still provide an unredacted copy to the Court.

In relation to the Supreme Court of New South Wales, Practice Note SC Gen 17 deals with class actions. It is not as descriptive as the applicable practice note in the Supreme Court of Victoria, but similarly provides that at or before the initial case management conference each party is expected to disclose any litigation funding agreement, but that this can be redacted to conceal information that might reasonably be expected to confer a tactical advantage on the other party.

In respect of the Supreme Courts of the remaining States and Territories, the practice note applicable to class actions in the Supreme Court of Queensland (Practice Direction No. 2 of 2017) mirrors the practice note applicable in New South Wales in so far as disclosure and redactions to a litigation funding agreement is concerned.

Law stated - 26 September 2022

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.

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.

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 Holdings Ltd. IOOF Holdings Ltd 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 - 26 September 2022

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.

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.

In 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 of the funding agreement. The Court dismissed the litigant's claim and determined that the funder, LCM, was not obliged to satisfy the remaining stages of the order.

In Caason Investments Pty Limited v Cao (No 3) [2020] FCA 91, a judgment 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 the funding agreement. The funder argued that Caason Investments' costs were unreasonable, and denied liability. 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 application.

In September 2020 it was reported that a dispute has arisen between the funder, the lawyers and the lead applicant in the Montara Oil Class Action (Daniel Aristabulus Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (ACN 004 210 164). Harbour Litigation Funding has brought proceedings against the law firm running the action, Maurice Blackburn, the barrister and the lead applicant. The lead applicant has separately filed a proceeding against the law firm. Both proceedings are subject to suppression orders, and no details about the cases are publicly available.

Law stated - 26 September 2022

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 Regulations that came into force on 22 August 2020 and removed the previous safe harbour for litigation funding schemes from the AFSL and managed investment scheme (MIS) regimes, the impact of the Stanwell decision, and of the proposed amendments to those Regulations.

Following the enactment of the Regulations, the Full Court of the Federal Court held in Stanwell that litigation funding schemes are not managed investment schemes within the meaning of section 9 of the Corporations Act 2001 (Cth). The effect of Stanwell is that while the litigation funders are still required to hold an AFSL, funded class actions are no longer required to comply with the MIS obligations arising out of Chapter 5C of the Corporations Act 2001 (Cth).

In September 2022, the government announced the Corporations Amendment (Litigation Funding) Regulations 2022 Bill (2022 Amendment Bill) that proposes to provide litigation funding schemes with an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking regimes.

Until the 2022 Amendment Bill is enacted, 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. Following the introduction of the Regulations, the Australian Securities and Investments Commission (ASIC) 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 regime (as well as for the MIS regime, which no longer applies after the Stanwell decision) that would otherwise be unsuitable for the structure of a litigation funding scheme.

In March 2021, the High Court of Australia handed down its judgment in Wigmans v AMP Limited & Ors [2021] HCA 7 (Wigmans) . 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.

In March 2022, the Full Court of the Federal Court of Australia (FCAFC) unanimously held in Parkin v Boral Limited (Class Closure) [2022] FCAFC 47 that the Court has the power to allow notices to be sent to group members prior to mediation informing them of the plaintiff's intention to seek soft class closure if the matter settles at mediation. Practitioners should consider whether their representative proceedings satisfy the circumstances for a soft class closure order and evaluate whether seeking such an order would be in the interests of their clients.

Law stated - 26 September 2022

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 include:

- the ability of the court to make a common fund order at settlement;
- the first instance of an interim payout to the funder from a settlement;
- the developments in relation to consolidated proceedings, and the increase in the prevalence of multiple firms becoming joint solicitors on the record; and
- the significant shareholder class action decisions in Bonham v Iluka Resources and the appeal of Crowley v Worley.

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

Class closure orders prior to settlement

Class closure orders prior to mediation were historically 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, although 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 (namely, 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 April 2020, the New South Wales Court of Appeal in Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2020] NSWCA 66 (Haselhurst) 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 that were of similar effect.

Importantly, 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). 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. For example, in Parkin v Boral Limited (Class Closure) [2022] FCAFC 47, the Full Court of the Federal Court held that the Court has the power to allow notices to be sent to group members prior to mediation informing them of the plaintiff's intention to seek soft class closure if the matter settles at mediation.

It is also worth noting that this area may be the subject of legislative development in light of the PJC's 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 of the Federal Court of Australia Act 1976 (Cth) be amended to include an express power to make class closure orders.

Interim payouts from settlement

In two franchisee class actions against 7-Eleven Stores, a judge granted the litigation funder an interim payment from the settlement to cover its costs before deciding how much it will be awarded from the settlement.

In his June judgment (Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 12) [2022] FCA 699), Justice O'Callaghan rejected the funder's application for an interim distribution of A$16.6 million to cover its legal costs, however, awarded an amount of A$10 million as being the appropriate amount following submissions from a contradictor. His Honour held that section 33V(2) of the Federal Court Act confers power on the court to make such an interim distribution and that in light of the circumstances, including the burden of the interest charges paid by the funder, an interim payment to the funder was appropriate.

In those case, the funder is seeking a Common Fund Order for 25 per cent; however, as of September 2022, the application has not yet been approved by the court.

Multiplicity, carriage motions and consolidation of class actions

In Wigmans , 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 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.

In August 2022, the Victorian Supreme Court resolved a carriage motion between two firms that were both seeking to run a class action against Beach Energy, both proposing to seek a Group Costs Order. Slater & Gordon were seeking a Group Costs Order of 24.5 per cent, and Shine was seeking a Group Costs Order of 24.5 per cent up to A$100 million, 18 per cent between A$100 million and A$150 million, and 15 per cent above A$150 million. In her decision, Justice Nichols found that Shine's sliding scale of legal costs was 'mere window dressing'. The Court ultimately awarded sole carriage of the class action to Slater & Gordon and permanently stayed the competing Shine class action. The court then awarded a Group Costs Order to Slater & Gordon.

In granting the Group Costs Order, the Court held that it would give group members a tangible benefit of being guaranteed at least 75.5 per cent of any compensation recovered, and that it was likely the group members would obtain a worse outcome if third-party funding was obtained. Her Honour noted that while the 24.5 per cent rate would 'likely warrant revisiting', it did not prevent her from making the order.

It is also becoming recently more common for actions to be consolidated, with two law firms running the action as joint solicitors on the record. A recent example of this is the AMP Commissions and Insurance Class Action (Nigel Peter Stack & Ors v AMP Financial Planning Pty Limited (ACN 051 208 327) & Ors (VID489/2020) run jointly by Piper Alderman and Shine. To ensure the group members' interests were protected, the Court ordered that the firms establish

a litigation committee for the making of decisions and appointed an independent costs referee to enquire and report on the costs incurred. Another example of this is the Nuix Class Action, which involved three competing class actions. Two of the firms running the actions, Shine and Phi Finney McDonald (PFM), put forward a proposal that they would run the proceeding jointly, with Shine being named as solicitors on the record and PFM retained as agents, funded jointly by Woodsford and Litigation Lending Services. This proposal was up against a proposal from another firm, Banton Group; however, Justice Nichols found the evidence given by the funder behind Banton Group's case 'left significant gaps and opacities' and that the funder did not put on sufficient evidence to establish that they had the means to fulfil their obligations when they could have. Justice Nichols ultimately awarded carriage to Shine and PFM, requiring the law firms to comply with a cooperation protocol.

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 ALRC Report recommended that Part IVA of the Federal Court of Australia Act 1976 (Cth) 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.

Latest shareholder class action decisions

In 2022, two shareholder class actions decisions were delivered: Bonham v Iluka Resources Ltd [2022] FCA 71 (Iluka) and Crowley v Worley Limited [2022] FCAFC 33 (Crowley appeal). As there had only been two prior shareholder class action judgments (TPT Patrol v Myer Holdings and the first instance decision in Crowley v Worley Limited), the decisions are significant to litigation funders running shareholder class actions.

In Iluka , the Court found that Iluka's sales forecast announcements to the market, which included qualifications and disclaimers, meant that the representations that allegedly amounted to misleading and deceptive conduct, were not made. Instead, the Court found that an ordinary and reasonable reader would have understood that the announcements did not provide an expectation of sales and that they represented that no such expectation could be accurately provided. Even if the Court found that the alleged representations were made, the Court remarked that Mr Bonham did not rely on the representations.

Further, the Court considered that Iluka had reasonable grounds for the forecasts and it therefore could not have been aware of the contrary information alleged to have been required to be disclosed pursuant to its continuous disclosure obligations. The Court concluded that the applicant did not establish any contraventions and the matter was decided in favour of the respondent.

In the Crowley appeal , the Full Court of the Federal Court allowed the applicant's appeal to set aside the first instance decision that dismissed the plaintiff's claim, and remitted the matter back to a single judge of the Federal Court. Notably, the Court found that where representations have been made by a company regarding a future matter, the company as a whole must have knowledge of facts that provide a reasonable basis for making the representations. If senior officers had knowledge of facts that contradict the board's conclusion, this may amount to misleading and deceptive conduct. Further, where officers of the company had or ought reasonably to have had information that they do not disclose, the company may be in breach of its continuous disclosure obligations.

Law stated - 26 September 2022

Jurisdictions

Australia	Piper Alderman
Austria	Nivalion AG
Belgium	Nivalion AG
British Virgin Islands	Martin Kenney & Co
Canada	Omni Bridgeway
France	Nivalion AG
Germany	Omni Bridgeway
India	Khaitan & Co
Israel	Woodsford
Italy	Fideal S.R.L
Japan	Miura & Partners
Luxembourg	Nivalion AG
Netherlands	De Brauw Blackstone Westbroek
Spain	PLA Litigation Funding
Sweden	Nivalion AG
Switzerland	Nivalion AG
Thailand	Rajah & Tann Asia
United Kingdom - England & Wales	Woodsford
USA - New York	Liston Abramson LLP