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LITIGATION FUNDING

Australia

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Litigation Funding

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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. ***Fostif*** did not, however, consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished (being at the time Queensland, Western Australia, Tasmania and the Northern Territory). The torts of maintenance and champerty prohibit an unrelated third-party from litigation funding or profiting from litigation in which they have no interest. The torts are intended to protect against interference in the litigation process for gain.

In relation to Queensland, in ***Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No. 4)*** [2019] QSC 228, Justice Crow 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. In relation to Western Australia, the Civil Procedure (Representative Proceedings) Act 2022 (WA), abolished the torts of maintenance and champerty. In Tasmania, the torts were abolished by the Justice and Related Legislation (Miscellaneous Amendments) Act 2015 (Tas) which introduced section 28E(ba) and (bb) into the Civil Liability Act 2002(Tas) abolishing maintenance and champerty as tortious actions at common law. The purpose was so that uniform national rules could be introduced in relation to litigation funders. In the Northern Territory, no legislation has been passed to abolish the torts of maintenance and champerty and as such, they remain on foot.

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. This increased substantially in the years following, with the percentage of funded class actions in the year ending 30 June 2018 growing to 74.1 per cent. However, recent statistics demonstrate a drop in funded class actions, with the number of funded class actions in the year ending 30 June 2023 decreasing to 41.5 per cent.

The overall decrease in the number of funded class actions since 2018 may be the result of the numerous regulatory changes introduced regarding third-party litigation funding in recent years and the uncertainty regarding the Court's ability to make common fund orders, arising out of the decisions in ***BMW Australia Limited v Brewster*** (2019) 269 CLR 574, ***Davaria Pty Limited v 7-Eleven Stores Pty Ltd*** (2020) 281 FCR 501 and ***Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)*** [2023] FCA 84. A further reason for the overall decline is likely the arrival of

the group costs order (GCO) regime in the Supreme Court of Victoria, which allows law firms to be paid a contingency fee pursuant to a court order, meaning that some plaintiff firms have opted to pursue class action litigation without the involvement of a litigation funder. This shift is represented in the location of filing of new class actions, with 35.8 per cent of all new class actions filed in the year ending 30 June 2023 being filed in the Supreme Court of Victoria, almost doubling from the previous year (19.6 per cent).

Law stated - 27 September 2024

Restrictions on funding fees

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

There is presently no legislation in Australia that limits the fees that funders can charge as a remuneration for the risks undertaken in funding the litigation. While in the past there have been calls for the regulation of funding commissions, including through a draft bill proposed by the former Liberal government in 2021 to impose a statutory minimum return for group members, the bill failed to pass the Senate before the 2022 federal election. The impact of such a reform on a funders' fees and interest would have been significant. No efforts have been made to reignite the bill since the ascension of the Labor government to power following the 2022 federal election, and it would seem unlikely given the general policy of the Labor government to roll back other changes introduced by the Coalition regarding the legislative regulation of litigation funding.

Outside of government regulation, the courts have a supervisory role in the approval of funded class action settlements (including the amounts allocated for the payment of a funder's fee). The applicable legal costs or litigation funding charges in class actions must be disclosed to group members (often at the time of the opt out notice) and the court. The lead plaintiff is also required to disclose a copy of applicable costs agreements or a litigation funding agreement (or both) to the other parties, which may be redacted to the extent the respective agreement contains information that might reasonably be expected to confer a tactical advantage, such as war chest information.

According to the High Court in ***Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd*** (2006) CLR 386, contract law considerations such as illegality, unconscionability and public policy may arise, but there is no objective standard against which the fairness of litigation funding agreements may be measured. Accordingly, whether a clause in a litigation funding agreement contravenes public policy is to be answered with regard to the circumstances of each particular case.

Australian courts can exercise equitable jurisdiction to set aside litigation funding agreements. For example, 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. Bargains may be set aside where terms are harsh, unfair or unconscionable. Funded litigants may also rely on prohibitions against unconscionable and misleading or deceptive conduct in their dealings with litigation funders by virtue of the general consumer protection provisions in the Competition and Consumer Act 2010 (Cth) and provisions in the Australian Securities and Investment Commission Act 2001 (Cth).

When it comes to the quantum of the funder's commission, generally Australian courts will either make a 'common fund order' (CFO), or a 'funding equalisation order' (FEO). Pursuant to a CFO, the quantum of a litigation funder's remuneration is fixed as a proportion of any amount ultimately recovered in the proceeding, for which all group members bear a proportionate share of that liability. Thus, a CFO 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. In contrast, an FEO requires unfunded group members to contribute to the total commission payable by the funded group members under their funding agreements. This means all group members (both funded and unfunded) contribute equally to the commission, but the funder receives the same commission as if they had fully recovered under the funding agreements with only funded group members.

The purpose of both CFOs and FEOs is the equitable distribution of the costs of prosecuting the claim on behalf of the group, such that unfunded group members 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; Westpac Banking Corp v Lenthall*** (2019) 269 CLR 574 (***Brewster***) held that there is no power to make CFOs prior to a settlement, however, the decision left open the question of whether a CFO could be made on settlement or judgment. While some judges have declined to make CFOs at settlement based on the reasoning in ***Brewster*** (see, eg, ***Cantor v Audi Australia Pty Limited (No. 5)*** [2020] FCA 637 and ***Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)*** [2023] FCA 84) many common fund orders have been made since ***Brewster*** in the context of a settlement approval (see, eg, ***Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)*** (2020) 385 ALR 625; ***McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No. 3)*** [2020] FCA 461).

In ***Elliott-Carde & Anor v McDonald's Australia Ltd*** (2023) 301 FCR 1 and ***Galactic Seven Eleven Litigation Holdings LLC v Davaria*** (2024) 302 FCR 493, the Full Court of the Federal Court confirmed that there is power pursuant to section 33V(2) of the Federal Court of Australia Act 1976 (Cth) to make a common fund order at settlement.

Since then, special leave applications to the High Court have been filed by the respondents in ***R&B Investments Pty Ltd atf the R&B Pension Fund & David Furniss v Blue Sky Alternative Investments & Ors (Blue Sky).*** Former Blue Sky director Robert Shand and Blue Sky's auditor, Ernst & Young, are seeking to set aside a decision of the Full Federal Court (***R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)*** [2024] FCAFC 89), which found that the Federal Court has power to make an order that solicitors be granted a percentage of the proceeds of a class action at the point of settlement or judgment, known as a 'solicitors' CFO'. The special leave application asks the High Court to determine whether the Federal Court has power to make a common fund order on settlement or judgment at all, as well as whether that power extends to solicitors' CFOs. The appeal has not yet been listed for hearing, but the outcome will likely have significant ramifications for the funding industry.

Examples of where FEOs in lieu of CFOs have been ordered include ***Zantran Pty Limited v Crown Resorts Limited (No 4)*** [2022] FCA 500 (***Zantran***)and ***Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited*** [2021] FCA 475 (***Estia Health***). In ***Zantran***, despite thefunder seeking a 25 per cent CFO, his Honour Justice Beach considered the funder would be adequately rewarded by an FEO, which would also be more beneficial to the group members. It should be noted however that the FEO still equated to 25.16 per cent of the settlement monies. In ***Estia Health***, an FEO was sought and approved, resulting in the contractually agreed funding commission being distributed pro rata across all group members who participated in the settlement.

Law stated - 27 September 2024

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) 180 FCR 11 (***Brookfield***) held that in certain circumstances, a litigation funding scheme may constitute a managed investment scheme (MIS) within the meaning of section 9 of the Corporations Act 2001 (Cth). 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.

In August 2020, regulations were introduced that had the effect of removing this exemption, meaning third-party litigation funders were required to hold an Australian Financial Services Licence (AFSL) or be an authorised representative of an AFSL holder.

In June 2022, in ***LCM Funding Pty Ltd v Stanwell Corporation Limited*** (2022) 292 FCR 169, the Full Court of the Federal Court unanimously held that litigation funding schemes are not MIS's within the meaning of section 9 of the Corporations Act 2001 (Cth) and that the decision in ***Brookfield*** was 'plainly wrong'.

In December 2022, the federal government announced the commencement of the new litigation funding regulations, the Corporations Amendment (Litigation Funding) Regulations 2022(2022 Regulations). The 2022 Regulations provide litigation funding schemes with an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of the Corporations Act 2001 (Cth). The Australian Securities and Investment Commission (ASIC) also extended relief to litigation funding schemes until January 2026 in relation to two matters not addressed by the 2022 Regulations. Specifically, the ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37 provides relief from the application of the National Credit Code in Schedule 1 to the National Consumer Credit Protection Act 2009 (Cth) to litigation funding arrangements and proof of debt arrangements, while the ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 provides relief from the requirements in Chapters 5C (MIS) and 7 (AFSL and disclosure) of theCorporations Act 2001(Cth) to litigation funding arrangements where the members wholly or substantially fund their legal costs under a conditional costs agreement.
As providers of financial services, litigation funders are also required to manage any conflicts of interest. ASIC's Regulatory Guide 248 sets out ways in which funders can meet their conflict management obligations.

Separately, the Federal Court of Australia's Class Actions Practice Note (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 plaintiffs, the group members, the plaintiff's lawyers and any litigation funder. Similar practice notes operate in New South Wales, Queensland, Victoria and Western Australia.

Law stated - 27 September 2024

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 judgment 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 their client and their primary duty as an officer of the court.

While not explicitly required by legislation, it is increasingly common that lead plaintiffs in a funded class action are provided with (or at least offered the opportunity to obtain) independent legal advice on the terms and effect 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, both federal and state class action regimes require that any settlement of a class action must be approved by the court. These legislative powers provide a level of discretion to 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. In this context, the conduct of lawyers and third-party litigation funders has become increasingly scrutinised with any issues usually coming to light during applications for settlement.

An example of how the settlement approval process can expose ethical violations and professional misconduct arose in relation to the approval of the settlement of a class action in ***Bolitho v Banskia Securities Ltd (No 18) (remitter)*** [2021] VSC 666 (***Banskia Securities***). At the instigation of a group 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.

Describing the situation as 'one of the darkest chapters in the legal history of this State', Justice Dixon found that the funder, the barristers and the solicitors acting for the group 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 group 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 as independent counsel to represent the interests of group members in the settlement approval process. Contradictors have also increasingly taken on a more active role in the settlement approval process, with examples including the contradictor in ***Banksia Securities***, who cross-examined various witnesses, and in ***Gill v Ethicon Sal (No 12)*** [2023] FCA 902, where the contradictor opposed the class action lawyers recovering the full amount of the legal costs sought on the grounds the amount was not fair and reasonable to group members.

Law stated - 27 September 2024

Regulators

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

Regulators including the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) have an interest in or oversight over third-party litigation funding. Both ASIC and the ACCC regulate the conduct of Australian companies, including litigation funders. Industry and professional bodies also play a part, such as the Association of Litigation Funders Australia (AALF) and International Legal Finance Association (ILFA).

Litigation funders are subject to ASIC regulatory oversight, with penalties attached to instances of non-compliance. In July 2021, ASIC released a Consultation Paper on Litigation funding schemes: Guidance and relief (CP 345) that proposed to:

- provide definitional guidance for key terms in the managed investment scheme (MIS) regulatory regime as they apply to litigation funding schemes;
- grant relief from the equal treatment duty in relation to distributions of a settlement or judgment sum obtained in connection with a litigation funding scheme;
- extend relief from the dollar disclosure provisions in relation to certain commercially sensitive information; and
- not remake pre-August 2020 relief instruments, which were due to expire in January 2023.

In April 2022, ASIC extended the relief from certain dollar disclosures in product disclosure statements for litigation funding schemes inASIC Corporations (Disclosure in Dollars) Instrument 2016/767until 1 October 2026. The existing relief was due to expire on 28 April 2022. In December 2022, the federal government announced the commencement of the new litigation funding regulations, theCorporations Amendment (Litigation Funding) Regulations 2022(2022 Regulations). The 2022 Regulations provide litigation funding schemes with an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of theCorporations Act 2001 (Cth).

The ACCC deals with allegations involving litigation funders breaching the Australian Consumer Law by engaging in misleading or deceptive conduct, or unconscionable conduct, for example when promoting class actions to potential clients or in relation to the operation of the funding agreements clients are required to sign.

AALF 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. AALF has produced guidelines representing a best practice framework for standards and behaviour to be observed by its members. ILFA represents the global commercial legal finance community, including third-party litigation funders.

Law stated - 27 September 2024

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 - 27 September 2024

Participation in proceedings
May funders attend or participate in hearings and settlement proceedings?

Yes. It is 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 *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 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 in the proceeding, including the reasonableness of the funder's commission, will be subject to court approval. The Federal Court of Australia's Class Actions

Practice Note (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 for settlement approval. This is because in the course of the settlement approval application, the lead plaintiff will usually be seeking orders providing that a certain percentage of the recovery be paid to the funder to reimburse it for the costs expended, and its fee for funding the proceeding. This requires input from the funder as the courts 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, as this leads to unique conflicts of interest.

In ***Ellis v Commonwealth of Australia*** (2023) 411 ALR 578, the litigation funder obtained independent counsel for the settlement application. The funder was granted leave to intervene to be heard and sought approval for costs to be deducted from the settlement sum. The litigation funding agreement was tendered as evidence, and an affidavit by the litigation funder's CEO was read. The litigation funder's deductions represented 12.8 per cent of the total settlement amount. The Court was satisfied that the amounts sought by the litigation funder were reasonable given the significant risk assumed, and the costs of disbursements and adverse costs insurance premiums it funded. The case followed the decision in ***Williamson v Sydney Olympic Park Authority*** [2022] NSWSC 1618.

In ***Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd*** [2024] FCA 386**,** the funder of a competing proceeding, which had been stayed two years earlier following a carriage motion, intervened to recover a portion of their costs under section 33V(2) of theFederal Court of Australia Act 1976 (Cth). In that case, Justice Thawley allowed the funder to recover a portion of its claimed costs after finding it was 'just' for group members to bear these costs.

Concurrent proceedings have also led to independent funder intervention. In recent case management hearings regarding a settlement approval in ***Excel Texel Pty Ltd (As Trustee For The Mandex Family Trust) & Anor v Frank Cullity Wilson*** (Federal Court of Australia proceeding NSD1983/2017) (***Excel Texel***) the settled claims against the respondents included claims adopted from a separate class action which was heard concurrently with ***Excel Texel***. The funder of the rival action intervened independently in order to seek costs from the settlement sum on the basis that it had funded the work carried out from the claim adopted by the applicants in ***Excel Texel***.

Outside of a settlement context, 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 settlement approval application in ***Wills v Woolworths Group Ltd*** [2022] FCA 1545**,** 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, Justice Beach 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*** (Supreme Court of New South Wales proceeding 2019/00193556)**,** Justice Hammerschlag considered that the opt-out

notice was being used by the funder to procure group 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 - 27 September 2024

Veto of settlements

Do funders have veto rights in respect of settlements?

In class actions, it is usual for litigation funding agreements to prevent a funder from vetoing a settlement and any differences of opinion between a funder and a representative plaintiff 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 the terms of the funding agreement.

Law stated - 27 September 2024

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. More recently, funding agreements have contained termination clauses that reflect developments in the class action landscape, such as clauses allowing the funder a right of termination if a group costs order was not made in the proceeding. 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 will generally also apply.

It is also usual that the litigation funder will have responsibility to pay adverse costs and provide security for 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 (LCMLitigation Management Pty Ltd) terminated a litigation funding agreement that obliged LCM to satisfy orders for security for costs. Justice Beach 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.

A recent example of a litigation funder terminating funding was in ***Laith & Fadi Investments Pty Ltd v Fogo Brazilia Holdings Pty Limited*** NSWSC 2021/00245787, where Galactic, a New York-Based funder, terminated the litigation funding agreement. No information is available as to the basis of Galactic's decision to terminate funding. The class action is set to continue with the law firm, Levitt Robinson, running the action on a 'no win, no fee' basis.

Law stated - 27 September 2024

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. Decisions of Australian courts, especially in the class action context, follow *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 in being philosophically supportive of the role that lawyers and third-party funders have in the identification and management of claims.

Accordingly, 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. For example, the funder is generally permitted to give day-to-day instructions to the lawyers running the proceeding and provide support to resolve the claims. In addition, the funder will often participate in other activities such as:

- strategic discussions;
- identifying and engaging service providers including counsel and experts;
- negotiating security for costs; and
- monitoring legal costs to ensure they are proportionate to the claimed amount in the action.

In a number of cases where the courts have 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 to make submissions. This is often seen in the context of settlement approval applications, where funders retain their own counsel to represent their interests.

This was evident in *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd (No 2)* [2023] FCA 643, where the claimed legal and funding costs were brought into question by Justice Rares. As the legal and funding costs sought would have substantially diminished the already limited settlement funds available for group members, the Court approved the settlement, but did not approve the costs, instead fixing the matter for a further hearing. At the further hearing the funder obtained independent counsel. The funder and the solicitors each put forward reduced cost figures, increasing funds available to group members, which were approved by the Court.

In recent years, there has been an increase in competing class actions being filed. Where a competing class action is filed, it is common for the parties to confer (and the courts often order they do so) in relation to whether consolidation or some other arrangement can be reached for the conduct of the proceedings, for example for one law firm to have carriage of the case but that firm be funded by each of the litigation funders. Given their vested interest in the outcome of this conferral, litigation funders are often involved in the discussions with the other firms and the other litigation funders providing funding to the competing cases, to try to come to a resolution.

Litigation funders may also take a proactive role with respect to the choice of lead plaintiffs and solicitors running the action. In the *Westconnex Resumption* class action (*Darren Mitchell v Roads and Maritime Services (now known as Transport for New South Wales*)

(Supreme Court of New South Wales proceeding 2021/88654), a dispute arose between the funder of the action and the lead plaintiffs and solicitors, with the funder seeking to replace the solicitors and the plaintiffs. A similar dispute occurred in the ***Sydney Light Rail*** class action (***Hunt Leather Pty Ltd v Transport for New South Wales)*** (Supreme Court of New South Wales proceeding 2018/263841) in which the law firm on record for the class action was replaced with another law firm running the case together with same following a reported breakdown in the relationship between the on-record law firm and the litigation funder.

Law stated - 27 September 2024

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. Under a 'no win, no fee' conditional costs agreement 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.

Victorian legislation permits contingency fees to be paid to plaintiff law firms in class action proceedings commenced in the Supreme Court of Victoria under 'group costs orders'. On 30 June 2020, the ***Justice Legislation Miscellaneous Amendments Act 2020*** (Vic) introduced a section 33ZDA to the ***Supreme Court Act 1986*** (Vic). Section 33ZDA provides that the legal costs payable to the law firm representing the group be calculated as a percentage of the amount of any award or settlement in the proceeding, and 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 first successful GCO was made in***Allen v G8 Education Ltd*** [2022] VSC 32. In that case, Justice Nichols approved the GCO, which fixed the fees of the plaintiff's law firm at 27.5 per cent of the total award or settlement amount. In approving the GCO, Justice Nichols considered it relevant that the GCO would cap the costs of the law firm and mitigate against the risk for the plaintiffs of having to pay adverse costs. Justice Nichols considered that because the GCO would mean the plaintiffs and group members would receive no less than 72.5 per cent of any final award or settlement amount, it would provide the plaintiffs and group members with certainty about their return. Justice Nichols compared this to if the case was funded by a litigation funder, where there is the risk that the plaintiffs and group members would be left with little return in the event legal costs were high and the amount of the settlement was low. Justice Nichols also opined that granting the GCO would avoid the delay and costs to the plaintiffs and group members in having to search for third-party litigation funding. Importantly, Justice Nichols noted that at the conclusion of the litigation, the plaintiffs 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.

On 28 August 2024, in handing down a judgment approving a A$46.5 million settlement of that proceeding, Justice Watson confirmed the 27.5 per cent GCO, noting that there was

no reason to reduce or otherwise vary the rate as it was reasonable when considering the effort and risk involved in bringing the case. This is the first judgment in Australia allowing a law firm to earn a contingency fee since GCOs were introduced in 2020. Justice Watson also noted that this GCO would provide the plaintiffs and group members greater certainty regarding money received when compared to a matter that proceeded to judgment or was supported by third-party litigation funders.

As can be seen from the commentary by Justices Nichols and Watson, the central consideration regarding a GCO is what would best promote the interests of the plaintiffs and group members in the circumstances.

Similar reasons were given by Justice Nichols in 2022 in ***Nelson v Beach Energy; Sanders v Beach Energy*** [2022] VSC 424, where a GCO was granted fixing the plaintiff's law firm's recovery at 24.5 per cent. Again in 2023, Justice Nichols granted a GCO at 14 per cent in a carriage dispute among four law firms regarding a shareholder class action against Star Entertainment Group (***DA Lynch Pty Ltd v Star Entertainment Group Ltd*** [2023] VSC 561). Justice Nichols noted that the competition of the carriage dispute drove the percentage down.

In contrast, in 2021 an application for a GCO was rejected in ***Fox v Westpac; Crawford v ANZ*** (2021) 69 VR 487. In that case, Justice Nichols 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 plaintiffs and group members than the 'no win, no fee' arrangement. However, her Honour's orders provided the ability for the plaintiffs and law firm to reassess their position and reapply for such an order under section 33ZDASupreme Court Act 1986 (Vic) at a later time. Two years later, following a new application, the Court approved a GCO at 24.5 per cent in ***Fox v Westpac Banking Corporation (No 2)*** [2023] VSC 95.

The availability of GCOs and the successful applications for those orders have seen 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.

Outside of the Supreme Court of Victoria, the Federal Court of Australia has been considering 'solicitors' common fund orders' (solicitors' CFOs) where it is the plaintiff's firm, rather than the litigation funder, who is remunerated for costs and risk for funding the class action. In October 2023, the availability of a solicitors' CFO was considered by Justice Lee in ***Greentree v Jaguar Land Rover Australia Pty Ltd*** [2023] FCA 1209, where his Honour did not explicitly confirm whether the Federal Court of Australia has the power to grant a solicitors' CFO, but noted there is nothing in Part IVA of the Federal Court of Australia Act 1976(Cth) that precludes the possibility of a solicitors' CFO where such an order is 'just' in the circumstances.

On 5 July 2024, in ***R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)*** [2024] FCAFC 89, the Full Federal Court unanimously held that the Federal Court of Australia has the power to grant a solicitors' CFO. This judgment was strictly with respect to whether the Federal Court has the power to make the solicitors' CFO as, their Honours were not asked to, nor did they address, the question as to what specific circumstances would warrant a solicitors' CFO. The respondents are appealing that decision to the High Court. The appeal has not yet been listed for hearing. If that decision is affirmed by the High Court, that may

make the Federal Court more desirable for plaintiff firms for commencing class action litigation, decreasing the filings in the Supreme Court of Victoria.

Law stated - 27 September 2024

Other funding options

What other funding options are available to litigants?

There are a range of funding options 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. In one of the ***pelvic mesh*** class actions, ***Gill v Ethicon Sàrl*** (No 12) [2023] FCA 902 (***Gill***), Shine Lawyers (which was running the case on a 'no win, no fee' basis) obtained funding for its disbursements through two disbursement funding facilities.

Whether the interest payable on these funding facilities is able to be recovered by the plaintiff firms from any settlement or from the respondent to the proceedings is another matter. In ***Gill***, Justice Lee declined to order that interest on a loan obtained to fund the law firm's fees be reimbursed to Shine Lawyers from the settlement monies, however, in obiter, his Honour commented that the argument that such sums are recoverable from the respondents had 'real merit' and the Court has power under Part IVA of the Federal Court of Australia Act 1976 (Cth) to make such an order, if it is in the interests of justice to do so.

Portfolio funding is an alternative to case-specific litigation funding that 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 can be purchased after a dispute has arisen or a proceeding is contemplated, and covers a claimant's liability to pay adverse costs 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 utilised 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. A

website for a class action in the Federal Court of Australia, ***Anthony Leith Rose & Ors v The Secretary Of The Department Of Health Aged Care, Brendan Murphy & Ors,*** seeks donations from the public to cover the costs of the class action. However there are potential issues with this form of funding, including that there may be very little transparency about how the money is spent.

Law stated - 27 September 2024

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 precisely 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.

Courts' caseloads are also monitored to provide timely and comprehensive information to judges and court officers managing cases. The Productivity Commission's report into Government Services 2023 sets out the clearance rates for Australian courts for 2021–2022. A clearance rate measures whether a court's caseload has increased or decreased over the reporting period, 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 reporting period, 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 2021–2022 was 94.0 per cent, which is the lowest since pre-2012–2013, meaning the case load is increasing and either cases are taking longer to be finalised or more cases are being filed.

The Federal Court of Australia 2022–2023 Annual Report includes information about the Federal Court's general operations and performance. The Annual Report provides that the Federal Court has a benchmark of 85 per cent of cases (excluding native title cases) relating to major causes of action (which include bankruptcy, corporations and consumer law matters) being completed within 18 months of commencement. Of the cases completed in the 2022–2023 reporting period (including appeals and excluding native title actions), 77.2 per cent of them were completed within 18 months, while 22 per cent of cases were completed in a period greater than 18 months. In the previous reporting period, being 2021–2022, these figures were 79.8 per cent and 20.1 per cent respectively, reflecting an increase in the time taken to complete matters.

Further, from 1 July 2018 to 30 June 2023, a total of 19,483 matters (excluding native title matters) were completed in the Federal Court. Some 56.1 per cent of these matters were completed in less than six months, 20.8 per cent took six to 12 months to complete, 9.1 per cent took 12 to 18 months to complete and 5.3 per cent took 18 to 24 months to complete. Only 8.5 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 - 27 September 2024

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 courts.

The Federal Court of Australia 2022–2023 Annual Report provided that in 2022–2023, 750 appellate cases were filed in the Federal Court, with 560 being appeals and related actions (the remaining being cross-appeals and interlocutory applications such as applications for an injunction). This represents an overall decrease in the number of appeals filed from the previous year, with 907 appellate cases being filed in 2021–2022 (695 being appeals and related actions). The Annual Report attributes this decrease to a 24 per cent decrease in migration appeals, and also decreases in the Commercial and Corporations and Native Title practice areas.

The Annual Report also states that 691 appeals and related actions were finalised, with 172 of these being matters filed and finalised in the same period. Further, as at 30 June 2023, there were 793 appeals before the Federal Court, some 25.2 per cent of which had been on foot for a period of less than six months, 23 per cent had been on foot for a period of six to 12 months, 13.5 per cent had been on foot for a period of 12 to 18 months, 11.1 per cent had been on foot for a period of 18 to 24 months, and 27.2 per cent had been on foot for a period of over 24 months (a significant increase from the previous reporting period, where only 18.9 per cent of appeals took more than 24 months to be resolved).

The above statistics show that there has been an increase in the time it takes for an appeal in the Federal Court to be resolved and it is far more common that an appeal can take more than two years to be finalised.

Law stated - 27 September 2024

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 - 27 September 2024

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.

In 1992, 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, Victoria and Western Australia have implemented legislative class action regimes, the most recent of these being Western Australia, with the ***Civil Procedure*** (Representative Proceedings) Act 2022 (WA) receiving Royal Assent on 14 September 2022.

Regarding third-party funding, as held in ***Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd*** (2006) 229 CLR 386**,** class actions can be funded by third parties and it is not an abuse of process or contrary to public policy. In this regard, it is well-accepted in Australia that litigation funders play an important role in providing access to justice. As at the year ending 30 June 2023, there were 53 class actions filed, with 41.5 per cent of these being funded by a third-party litigation funder. This is a five-year low as a percentage of class actions matters funded by a third-party, a cause of which may be the rise of class actions filed in the Supreme Court of Victoria, being the only court which currently has the power to grant a group costs order. Group costs orders are orders that allow a plaintiff law firm to receive a percentage

of any award or settlement for its legal fees and expenses of the class action as well the risks undertaken in funding the litigation, with liability for payment shared among the group members in the class action.

Law stated - 27 September 2024

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. 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.

The amount that may be recovered pursuant to any costs order varies from court to court and 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 funder's commission.

In *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140, the plaintiffs sought to recover the litigation funder's commission of 40 per cent as damages (the Court agreeing that they were not costs within the meaning of section 19 of the Civil Procedure Act 2005 (NSW)). The plaintiffs submitted that the litigation funding costs (ie, the commission) were caused by the nuisance alleged against the defendant, and that they formed part of the reasonably foreseeable consequences of such nuisance. The plaintiffs argued that it was reasonably foreseeable that it would be uneconomic for individuals and businesses impacted by the nuisance to bring claims against the defendant individually as they would be unwilling to take on the substantial adverse costs and risks involved in bringing proceedings against the defendant, and therefore it was reasonably foreseeable that any proceedings would likely be brought by way of a class action, which would be funded by a litigation funder.

While finding in favour for the plaintiffs in respect of liability, Justice Cavanagh held that the plaintiffs could only recover their 'actual loss', which did not include the funder's commission. His Honour noted that the plaintiffs were entitled to be put back in the position they would have been but for the tortious conduct, however the funder's commission arose because they entered into a third-party agreement to enable them to recover their loss. The funder's commission was the result of steps taken by the plaintiffs independently of anything done by the defendant and as such, had the effect of breaking any chain of causation between the defendant's conduct and that loss. Transport for NSW appealed Justice Cavanagh's finding that it was liable for the group's loss. By cross-appeal, the plaintiffs' solicitors, Banton Group, submitted that the funding commission was a loss for which damages for nuisance should account. In *Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW* [2024] NSWCA 227, the Court of Appeal upheld Justice Cavanagh's finding in this respect, finding there was 'no doubt' that group members acted voluntarily when entering the

funding agreement and the funder's fee was not to be regarded as a foreseeable loss caused by the defendant's nuisance, but instead as the voluntary act of the particular plaintiff.

There has been some commentary from judges that suggests such orders may be made. In some instances, plaintiff law firms running claims on a 'no win, no fee' basis will take out loans to support the funding of disbursements. In the settlement approval application in one of the ***pelvic mesh*** class actions, ***Gill v Ethicon Sàrl (No 12)*** [2023] FCA 902, Shine Lawyers (which was running the case on a 'no win, no fee' basis) sought to have the interest that had accrued on two disbursement funding facilities entered into by Shine deducted from the settlement monies. In the judgment handed down in August 2023, Justice Lee declined to make such an order, however in obiter his Honour commented that while the argument that such sums are recoverable from the respondents is a novel one, it had 'real merit' and the Court has power under Part IVA of the Federal Court of Australia Act 1976 (Cth) to make such an order, if it is in the interests of justice to do so. In light of these comments, we may see more attempts by plaintiffs to seek to recover the costs of the litigation funding from unsuccessful respondents.

Law stated - 27 September 2024

Liability for costs

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

Yes. The power 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 ***Knight***, Chief Justice Mason and Justice Deane 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, ***Knight*** was cited in ***Gore v Justice Corp Pty Ltd*** (2002) 119 FCR 429, where the Full Federal Court held that Justice Corp, the litigation funder of the proceedings, was liable to pay the appellants' costs in the 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) 341 ALR 154, the Court of Appeal of the Supreme Court of Victoria upheld a non-party costs order against litigation funder Global Litigation Funding Pty Ltd (Global), Global's sole director, company secretary 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. The argument that making a costs order against the company director was 'piercing the corporate veil' was 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. A court may also rely on section 43 of the Federal Court of Australia Act 1976 (Cth) when issuing costs orders against non-parties. 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) 366 ALR 594**,** five competing class actions were 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 ultimately resolved in favour of the representative plaintiff 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 costs order against the Federal Court plaintiffs. Justice Stevenson 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, each of the funders should pay the costs in circumstances where the applications had failed.

In ***Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd (No. 2)*** [2021] NSWSC 1202, Justice Stevenson ordered that a litigation funder be jointly and severally liable for the costs incurred by a defendant. In coming to this decision, Justice Stevenson 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.

In ***Hardingham v RP Data Pty Limited (Third Party Costs)*** [2023] FCA 480 (***Hardingham)***, the Court affirmed ***Knight*** and held that a costs order can be made against a non-party under section 43 of theFederal Court of Australia Act1976(Cth) in circumstances where a non-party has a connection to the litigation that is sufficient to warrant exercise of the power. Justice Thawley noted that it is not exceptional to order costs against a litigation funder who facilitates litigation for their own commercial gain. In ***Hardingham***, RP Data made an application for costs against a third-party litigation funder, Court House Capital Pty Ltd, after being successful in the underlying proceedings. The parties had entered into a funding agreement that did not contain an indemnity in favour of the plaintiffs for any adverse costs order. However, his Honour did not accept that the lack of indemnity prevented an order for costs against the funder.

Hardingham was upheld on appeal in ***Court House Capital Pty Ltd v RP Data Pty Ltd*** [2023] FCAFC 192**.** The Full Court considered whether the primary judge's exercise of discretion miscarried when costs were awarded against a commercial litigation funder. The Full Court held that the primary judge was correct in holding that the power to order costs against a non-party will only be exercised in circumstances where the non-party has a connection to the litigation that is sufficient to warrant the exercise of power. The Full Court remarked that there is no rigid checklist of factors that may be taken into account, and that this

is particularly so given that the determination of the nature and extent of the relevant connection will be informed by the character of the non-party.

Law stated - 27 September 2024

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 courts have the power to order a plaintiff to provide security for the defendant's cost of defending the plaintiff's claim. Such an order is, in its essential and usual character, an order compliance with which is a condition of the relevant proceeding not being stayed or dismissed (***Augusta Ventures Limited v Mt Arthur Coal Pty Limited*** (2020) 283 FCR 123 (***Mt Arthur Coal***)). 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 in funded litigation 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 contractual 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.

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, but the courts acknowledge that security for the defendant's costs is not intended to be a complete estimate or indemnity. In complex claims, it is usual that security orders will be given in tranches by reference to identified phases in the litigation.

There are various means by which litigation funders may provide security for costs, the most traditional being payment into court or by way of a bank guarantee, as per ***DIF III Global Co-Investment Fund LP v BBLP LLC*** [2016] VSC 401 (***DIF III***). In ***DIF III***, Justice Hargrave said that the 'central inquiry' to be undertaken where security is not put forward in such traditional ways is 'whether the proposed form of security is adequate to achieve its object as security; namely to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff'. In this regard, a common form of security for costs

is an after-the-event (ATE) insurance policy, which, per ***DIF III***, must be readily enforceable to be adequate security. This approach has been widely adopted by the courts (***Re Tiaro Coal Ltd (in liq)*** [2018] NSWSC 746; ***Firexpress Australia Pty Ltd v Imago Exchange Pty Ltd*** [2022] FCA 129;***APFC No.1 Corporation v Insurance Australia Limited*** [2024] NSWSC 534).

In ***Turner v Tesa Mining (NSW) Pty Ltd*** (2019) 290 IR 388, one of two representative proceedings relating to the underpayment of mining employees brought pursuant to the ***Fair Work Act 2009*** (Cth) (FWA), the plaintiffs' litigation funder, Augusta Ventures Limited, was ordered to provide security for the respondents' costs. The applicants opposed the ordering of security on the basis that section 570 of the FWA prevents costs orders being made against a party, except in limited circumstances. In ordering that the funder provide security for the respondents' costs, Justice Lee found that there was no compelling reason for the costs protection in the FWA to extend to non-party funders using such claims to obtain some commercial advantage or gain.

This decision was appealed by the funder in ***Mt Arthur Coal***. The Full Federal Court allowed the appeal and set aside the orders made by Justice Lee on the basis that making an order for security for costs, even where it is the third-party funder providing the security, undermines the purpose of the section 570 of the FWA. The Full Federal Court considered that it would not be just if the proceedings were stayed or dismissed due to the funder's failure to comply with the orders in circumstances where the applicant could not be held to be responsible for the respondent's costs (unless a section 570 exception applied). In summary, it is unlikely in employment class actions brought pursuant to the FWA that the court will order a funder to provide security for costs.

Law stated - 27 September 2024

Security for costs

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). The exception being class actions brought under the ***Fair Work Act 2009*** (Cth), where section 570 provides that each party is liable for its own costs (***Augusta Ventures Limited v Mt Arthur Coal Pty Limited*** (2020) 283 FCR 123).

In the case of ***Perera v Getswift Limited*** (2018) 263 FCR 1, 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 also recommended that there be a statutory presumption that a litigation funder will provide security for costs.

Law stated - 27 September 2024

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. The court has an unfettered discretion as to the form that payment of security may take. The form is ultimately 'immaterial so long as it is adequate to achieve its object as a security' (***Yara Australia Pty Ltd v Oswal*** (2013) 41 VR 245 cited in ***DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors*** [2016] VSC 401 (***DIF III***).

Nonetheless, judicial views on the acceptability of ATE insurance as a form of security have been varied.

In ***DIF III***, 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*** (2021) 154 ACSR 235**,** 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, Justice Perram accepted that the particular deed of indemnity proffered as security for costs was sufficient. Although the insurers did not have assets in the jurisdiction, the plaintiff 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 for costs previously paid to the Court by the plaintiff could be replaced by the aforementioned deeds of indemnity and a lesser amount paid into Court, Justice Perram found against the plaintiffs. Justice Perram 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 Justice Bond held that security in the form of a deed of indemnity from its ATE insurer posed an 'unacceptable disadvantage' to the defendants. Earlier in the proceedings, Justice Bowskill also rejected the plaintiff's application to provide a deed of indemnity as a form of security, finding that the plaintiff had failed to establish that a deed of indemnity was adequate.

In ***Adeva Home Solutions Pty Ltd v Queensland Motorways Management Pty Ltd*** (2021) 9 QR 141, the Queensland Court of Appeal upheld Justice Applegarth'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 ***Equititrust*** 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 ordering an alternative form of security.

In ***APFC No. 1 Corporation v Insurance Australia Ltd*** [2024] NSWSC 534, Justice Nixon held that the ATE policy proffered by the plaintiffs did not meet the relevant benchmark, being 'to provide a fund or asset against which a successful defendant can readily enforce an order for

costs against the plaintiff'. Citing ***DIF III***, the Court held that the plaintiff must satisfy it 'that the proposed security will not impose an 'unacceptable disadvantage' on the defendant'. The Court also noted that the 'fact that some delay may be involved in accessing that security is, while relevant, not decisive'. Justice Nixon also held that dealing with an overseas insurance provider and having to enforce the judgment overseas will not put the defendant 'at an unreasonable disadvantage' if the party against which the judgment will be enforced 'has sufficient assets in the overseas jurisdiction and judgment can be enforced there'. Justice Nixon, borrowing from Justice Gleeson in ***Re Tiaro Coal Ltd (in liq)*** [2018] NSWSC 746, highlighted that the question to be asked is not whether there is 'relative adequacy' when the ATE security proposal is compared with other forms of security, but rather 'whether the security put forward is adequate to achieve the object of providing a fund or asset against which a successful defendant can readily enforce an order for costs'.

Whether the premium for an ATE insurance policy taken out by a funder can be recovered by the funder from any settlement or judgment has been controversial, and litigation funders are facing increased scrutiny where the costs of ATE insurance premiums are 'passed on' to group members. In ***Peterson Superannuation Fund Pty Ltd v Bank of Queensland Limited (No. 3)*** (2018) 132 ACSR 258, the 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) 385 ALR 625, a litigation funder sought reimbursement of ATE insurance premiums, on top of commission by way of a CFO. Justice Lee 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 addition to the CFO. In May 2023, the funder for the plaintiff in ***Spozac Pty Limited as Trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd*** [2023] FCA 643 sought 70 per cent of the up-front payment for acquiring ATE insurance. Justice Rares was of the view that ATE costs are ordinary costs of running funded litigation, and indicated it was not 'just or fair' that the group bear the risk.

Law stated - 27 September 2024

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 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 Federal Court of Australia's Class Actions Practice Note (GPN-CA) is the governing practice note for the class actions commenced in the Federal Court of Australia. The GPN-CA requires that prior to the first case management hearing, a plaintiff'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 plaintiff'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 plaintiff'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 (***Coffs Harbour City Council***) provides examples of terms that may be redacted, which included some of the commercial terms of the litigation funding agreement. Justice Rares 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 solicitors 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 sensible redactions or object to the disclosure. In both instances, this needs to be raised with the Court so that it can determine the merits. The plaintiff's solicitors 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. ***Coffs Harbour City Council*** was recently affirmed in ***Metro Environmental Logistics Pty Ltd v Newcastle Port Corp (No 4)*** [2024] NSWSC 657, which applied Practice Note SC Gen 17, and examined whether disclosure of a redacted litigation funding agreement would confer a tactical advantage on the defendant.

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 are concerned.

For the Supreme Court of Western Australia, class action proceedings are governed by Consolidated Practice Directions 9.19, 'Proceedings commenced under the ***Civil Procedure (Representative Proceedings) Act 2022'***. Section 9.19 is the same as the GPN-CA, whereby the representative party's legal practitioners must provide unredacted copies of the cost agreement and any litigation funding agreement to the Court no later than seven days prior to the first case management hearing. The representative party's legal practitioner must also serve copies on all other parties, and the agreement can be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding.

Law stated - 27 September 2024

Privileged communications

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

Some, but not all, communications between litigants 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. Without prejudice 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 ***Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd*** [2006] NSWSC 234***,*** Justice Bergin considered whether communications between the plaintiff's lawyers and a third-party funder (including communications enclosing advice given to the plaintiff, and documents prepared for meetings attended by the funder) were privileged. Her Honour held that the collaborative and supportive aspects of the relationship between the funder and the plaintiff, the nature of the meetings attended, the documents provided and the abovementioned purpose were matters from which it was appropriate to imply that when the information at the meetings and the contents of the documents were disclosed to the funder, it had an obligation not to disclose their contents. As such, her Honour was satisfied that the communications with the funder were confidential communications. Her Honour held that common interest privilege subsisted such that there was no waiver. Her Honour held that even if there was no common interest privilege, privilege had not been waived as the documents were provided to the funder in the course of a confidential communication.

In ***IOOF Holdings Ltd v Maurice Blackburn Pty Ltd*** [2016] VSC 311, the Court held that certain documents prepared during investigation stages of a class action were subject to legal professional privilege, despite those documents being created prior to the receipt of instructions from a client. In this case, IOOF obtained orders for discovery from law firm Maurice Blackburn and litigation funder Harbour Litigation Funding Ltd of certain documents relating to Maurice Blackburn's initial investigations into IOOF and the potential

class action against it. Maurice Blackburn and Harbour resisted discovery on the basis that the documents were subject to legal professional privilege.

The Supreme Court of Victoria found that certain of the documents created by Maurice Blackburn during the investigative process were privileged as they had been created for the dominant purpose of obtaining legal advice as to the prospects of success of any potential action. Documents created prior to the existence of any intention to give or receive legal advice, however, were precluded from privileged protection.

Harbour also claimed privilege over certain communications with Maurice Blackburn. The Court accepted that where Harbour sought legal advice from Maurice Blackburn, privilege could be claimed despite Maurice Blackburn not being formally retained to provide that advice. Harbour was, however, ordered to produce communications with Maurice Blackburn relating to the proposed funding agreements for the prospective class action, as these were found to be 'commercial negotiations' and not created for the dominant purpose of a lawyer providing legal advice.

Similarly, in ***Hastie Group Ltd (in Liq) v Moore*** (2016) 339 ALR 635, 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 - 27 September 2024

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 on disputes between plaintiffs and their funders.

In ***International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)*** (2012) 246 CLR 455, 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 obliged to satisfy orders for security for costs made prior to the termination date but not after the termination date.

In *Caason Investments Pty Limited v Cao (No 3)* [2020] FCA 91, a judgment in the *Arasor* class action,one of the representative plaintiffs, 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 July 2024, it was reported that a dispute arose in the *Westconnex Resumption* class action (*Darren Mitchell v Roads and Maritime Services (now known as Transport for New South Wales*)) between the funder of the proceedings, WCX Pty Ltd (the Funder) and the solicitors, Ironbridge Legal (the fifth law firm to have carriage of the case). The dispute first arose over the conduct of the proceedings, including the Funder's desire to terminate the retainer of senior counsel, the Funder's objection to the use of particular experts and the Funder's statement of the directions to be sought at the directions hearing on 19 April 2024. The Funder sought to terminate the funding agreement an demanded that funds which had been deposited into Ironbridge's trust account be returned to it.

The plaintiffs made an application seeking orders that the Funder be joined as a defendant to the proceedings and for an order pursuant to section 183 of the Civil Procedure Act 2005 (NSW) (CPA) that funds which had been deposited into Ironbridge's trust account were held for the benefit of the plaintiffs to be applied towards their legal costs incurred as lead plaintiffs in the proceedings. The Funder sought to stay the plaintiffs' application and sought to replace the lead plaintiffs, and their solicitors, and indicated that it would only continue funding if new plaintiffs and legal representatives were appointed. On 13 September 2024, Justice McGrath handed down judgment, finding that the Funder could be joined as a defendant to the proceedings to allow for declaratory relief that the funds held in Ironbridge's trust account was for the benefit of plaintiffs and could not be rescinded, and rejecting the Funder's bid to replace the plaintiffs and solicitors on the basis that there was no evidence before the Court that a new representative plaintiff and law firm was willing to take over the conduct of the proceedings.

Law stated - 27 September 2024

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 updates to the regulatory landscape regarding litigation funding schemes in the last year and in particular, the impact of the ***LCM Funding Pty Ltd v Stanwell Corporation Limited*** (2022) 292 FCR 169 (***Stanwell***) decision and the commencement of the Corporations Amendment (Litigation Funding) Regulations 2022 (2022 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*** and the 2022 Regulations is that litigation funding schemes have an explicit exemption from the MIS, AFSL, product disclosure and anti-hawking provisions of the Corporations Act 2001(Cth).

In March 2021, the High Court of Australia handed down its judgment in ***Wigmans v AMP Limited & Ors*** (2021) 270 CLR 623 (***Wigmans***). The High Court, in dismissing the appeal, held that the Supreme Court of New South Wales 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. The High Court affirmed the primary judge's (Ward CJ) list of factors that the Court will take into account, namely:

- the competing funding proposals, cost estimates and net hypothetical return to group members;
- proposals for security;
- the nature and scope of the causes of action advanced (and relevant case theories);
- the size of the respective classes;
- the extent of any book build;
- the experience of the legal practitioners (and funders) and availability of resources;
- the state of progress of the proceedings; and
- the conduct of the representative plaintiffs to date.

Law practitioners should be aware of the rules and requirements under section 8 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) that relate to competing class actions. Competing class actions are increasingly common in the Australian landscape, with more than 17 competing class actions filed in 2023 alone.

With the increasing numbers of competing class actions being filed in Australia, law firms must be well prepared when considering whether to file a competing proceeding. As noted in the joint judgment of Chief Justice Kiefel and Justice Keane J in Wigmans, multiplicity of proceedings and competing representative proceedings must not to be encouraged as they are inimical to the administration of justice. Should a party seek to file a class action that will cause a carriage dispute, they ought to do so on reasonable grounds that they consider they will be successful in any carriage dispute.

This principle was most recently emphasised in the judgments in ***Bain v International Capital Markets Pty Ltd*** (No 2) [2024] FCA 847 and ***Vingrys v International Capital Markets Pty Ltd*** [2024] VSC 455, which concerned a multiplicity dispute between lead applicants in competing representative proceedings run by three law firms. The multiplicity dispute was cross-jurisdictional as the applicants in two proceedings had filed in the Federal

Court of Australia(***Wyer v International Capital Markets Pty Ltd and Anor*** (proceeding VID88/2024) (the ***Wyer*** proceedings); ***Bain v International Capital Markets Pty Ltd and Anor*** (proceeding VID1088/2023) (the ***Bain*** proceedings)) and thereafter agreed to consolidate their proceedings, while the third applicant had filed proceedings in the Supreme Court of Victoria (***Vingrys v International Capital Markets Pty Ltd*** (proceeding S ECI 2024 01169) (the ***Vingrys*** proceedings)).

All three proceedings were set down for a joint hearing before his Honour Justice O'Bryan of the Federal Court of Australia and his Honour Justice Delany of the Supreme Court of Victoria to determine the carriage dispute. The Courts ultimately determined that the consolidation of the ***Bain*** and ***Wyer*** proceedings was reasonable and that the consolidated proceeding should be awarded carriage over the ***Vingrys*** proceeding. In coming to this decision, the Courts took into account the respective law firms' experience, both historically in large consumer law class actions, and specifically regarding the subject matter of the representative proceedings.

The Courts also focused on the independent investigations undertaken by the Federal Court applicants' law firms in preparing their respective claims and the estimated returns to group members in the competing proposals. As to the former, both Courts focused on the preparation of the respective pleadings, with Justice Delaney accepting the Federal Court applicants' submission that 'first-hand knowledge of the investigations, research and forensic decisions underlying the preparation of such pleadings' was relevant to a practitioner's position to run the case. As to the latter, notwithstanding that the funding commission proposed to be sought by way of common fund order in the consolidated proceeding was at a higher percentage rate in comparison to the ***Vingrys*** proceeding, Justice O'Bryan held that the funding proposals favoured the consolidated proceeding including because the differences were not large and the funding proposal in the consolidated proceeding provided greater certainty that sufficient resources will be available to conduct the proceeding. Justice Delany also considered the return to group members, stating that while the ***Vingrys*** carriage proposal was superior on price it was not a significant factor in favour of the ***Vingrys*** proceeding.

Law stated - 27 September 2024

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:

- updates in respect of the court's power to make soft closure orders;
- the development of the solicitors' common fund order;
- consolidation of competing class actions resulting in firms running cases jointly;
- cross-jurisdictional multiplicity issues; and
- data breach and privacy actions.

Soft closure orders

Class actions in Australia operate on an 'opt-out' basis, meaning group members are automatically included in a class action unless they decide to 'opt-out' of the proceedings. In some cases, this can cause difficulties when trying to quantify the size and composition of the class for the purposes of settlement negotiations.

Australian courts have attempted to address this issue by granting class closure orders, whereby group members are required to take an active step to participate in the proceedings. There are two types of class closure orders, 'hard' class closure and 'soft' class closure. A hard class closure extinguishes an unregistered class member's rights to share in the fruits of any subsequent judgment or settlement. This is contrasted with a soft class closure, where group members who do not register are excluded for a period of time, usually until after a mediation, but remain bound upon a successful outcome. If no settlement is reached at mediation, group members who have not registered can still continue to participate in the class action – that is, the class re-opens.

While the courts are in agreement that hard class closure orders are wholly inappropriate given they have the effect of permanently extinguishing non-registering group members' claims (***Gill v Ethicon Sàrl*** (No. 2) (2019) 134 ACSR 649), the courts are currently split as to whether they have the power to make soft class closure orders.

In ***Haselhurst v Toyota Motor Corporation Australia Ltd*** (2020) 101 NSWLR 890, the NSW Court of Appeal held the Court did not have power to make soft class closure orders under section 183 of the Civil Procedure Act 2005 (NSW), which mirrors the equivalent provision in the Federal Court of Australia Act 1976 (Cth) under section 33ZF. In ***Wigmans v AMP Ltd*** (2020) 102 NSWLR 199 (***Wigmans 1***), the NSW Court of Appeal refused to make an order to issue pre-mediation notices, stating that if a group member did not register, their claim would be extinguished, as an order of this kind was contrary to the 'fundamental precept' of the class action regime for group members to do nothing up until the point of settlement or judgment. However, in a 2022 decision in ***Parkin v Boral Ltd*** (2022) 291 FCR 116, the Full Federal Court held that the decision in ***Wigmans 1*** was 'plainly wrong' and that the Court has a 'broad and unqualified' power to make an order that a notice be issued to group members informing them of the plaintiff's intention to seek soft class closure if the matter is settled at mediation. The Full Federal Court held that contrary to ***Wigmans 1***, group members can also be required to act prior to settlement.

In a recent decision of the NSW Court of Appeal in ***David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd*** [2024] NSWCA 83 (***Lendlease***), the Court did not follow the Full Federal Court's finding in ***Parkin***, again finding soft class closure orders cannot be made in class actions commenced in the Supreme Court of NSW. The decision in Lendlease is on appeal before the High Court and is set to resolve the division on the question of the Court's power to make class closure orders that exclude unregistered group members from any settlement.

Despite the Supreme Court of Victoria and the Federal Court of Australia having power to issue soft class closure orders, there are cases in these forums where the Courts have declined to exercise that power. In the ***Medibank*** Class Action (***Robert Laird Kilah v Medibank Private Limited***, Supreme Court of Victoria proceeding S ECI 2023 01227), the Supreme Court of Victoria ruled it was 'not appropriate' to exclude group members from any form

of settlement shortly before trial. Similarly, in ***Alford v AMP Superannuation Limited*** (No. 2) [2024] FCA 423, the Federal Court dismissed an application by the respondent seeking soft class closure orders before mediation. The Federal Court found that such order was not necessary to facilitate settlement as the respondents could ascertain the population of group members from their own records and accordingly make a reasonable estimate as to quantum. The Federal Court also considered the 'substantial cost' the applicants would incur in conducting a registration process for a class of two million group members and the fact that it would divert resources away from preparing for mediation and trial.

Ultimately, whether it is appropriate for soft closure orders to be made will depend on the context and facts of the case.

Solicitors' common fund orders

Since October 2023, the Federal Court of Australia has been considering whether the Federal Court has the power to order 'solicitors' common fund orders' (solicitors' CFOs). A solicitors' CFO is a common fund order that allows the plaintiff's firm, rather than the litigation funder, to be remunerated for costs and risk from funding the class action.

In ***Greentree v Jaguar Land Rover Australia Pty Ltd*** [2023] FCA 1209, Justice Lee did not explicitly confirm whether the Federal Court of Australia has the power to grant a solicitors' CFO, but said there was nothing preventing the Court from making such an order should the proposed payment be 'just' when having regard to all of the circumstances.

On 5 July 2024, in ***R&B Investments Pty Ltd (Trustee) v Blue Sky*** (Reserved Question) [2024] FCAFC 89 (***Blue Sky***), the Full Federal Court unanimously held that the Federal Court of Australia has the power to grant a solicitors' CFO. This judgment was strictly with respect to whether the Federal Court has the power to make the solicitors' CFO; their Honours were not asked to, and did not address, the question as to what specified circumstances would warrant a solicitors' CFO. Special leave applications to the High Court were subsequently filed by the respondents in ***Blue Sky***, asking the Court to determine whether the Federal Court has power to make a common fund order on settlement or judgment at all, as well whether that power extends to solicitors' CFOs. The appeal has not yet been listed for hearing, but the outcome will have significant ramifications for the funding industry.

Carriage motions and consolidation of class actions

In ***Wigmans v AMP Limited & Ors*** (2021) 270 CLR 623 (***Wigmans 2***), 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 book build;
- 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. This multifactorial approach is now well established in competing class actions within Australia.

In June 2023, there was a carriage contest in the ***Star Entertainment*** class action between four firms. Three firms sought a GCO of varying rates, and one firm proposed a 'no win, no fee' basis, with a 25 per cent uplift. Criticism was made by the competing firms against the firm with the lowest proposed GCO rate of 14 per cent on the basis that it would not be capable of properly litigating the class action due to lack of resourcing and could lead to a misalignment of incentives. These submissions were rejected by a court-appointed contradictor, who noted that the lower GCO rate was a result of market forces, and was not a negative. Justice Nichols put great emphasis on 'the competing funding proposals, costs estimates and net hypothetical return to group members' factor identified at the High Court in ***Wigmans 2***. In the end, Slater and Gordon's 14 per cent GCO took home the win.

On 27 September 2023, judgment was handed down by his Honour Justice Delany in ***Lidgett v Downer EDI Ltd*** [2023] VSC 574 (***Downer***). This case involved four competing class actions. Three of the proceedings agreed to orders consolidating their proceedings such that two out of the three firms would continue to represent the plaintiffs cooperatively as the solicitors on record, to be jointly funded by Maurice Blackburn and CASL Funder Pty Ltd (Consolidated Proceeding). The Court then considered the Consolidated Proceeding proposal against the fourth competing proposal for carriage, where both competing proposals sought a GCO of 21 per cent. His Honour ultimately determined that it was in the best interest of the group members for the Consolidated Proceeding to proceed, staying the fourth proceeding. His Honour held that the GCO rate of 21 per cent was reasonable and praised the parties in the Consolidated Proceeding for acting in good faith and in a manner consistent with the facilitation of the efficient and cost-effective resolution of the issues in dispute. His Honour opined that consolidating the three proceedings was consistent with the overarching purpose of the Civil Procedure Act 2010 (Vic), that significant efficiencies are achieved through consolidation, and that the consolidation would enhance the prospects of resolution through negotiation or mediation.

Firms should keep this in mind when engaging in carriage dispute, as courts may act favourably to parties that can demonstrate that they have acted in a manner that assists the court in its pursuit to facilitate efficient, timely and cost-effective resolution of the real issues in dispute.

This was most recently emphasised in the judgments in ***Bain v International Capital Markets Pty Ltd*** [2024] FCA 847 and ***Vingrys v International Capital Markets Pty Ltd*** [2024] VSC 455. The judgments related to a carriage dispute between three law firms, two of which had agreed to consolidate.

Consolidation – solicitor acting as agent

Firms facing a carriage dispute can agree to work together to avoid a contested hearing. Procedurally this may involve either a consolidation of the two proceedings or the continuance of one proceeding and the stay of the other. In both cases, the firms may also agree to there being joint solicitors on the record (ie, one from each firm) or that one firm will be on the record while the other will act as that firm's agent. Further, in either scenario it is common for the two firms to enter into a cooperative litigation protocol that formalises the practicality of the work arrangement, avoiding duplication of work and costs. The firms are also usually required to provide a periodic billing report to an appointed cost referee to ensure fair and reasonable costs are incurred without duplication by the respective firms. This also provides the court and group members reassurance as to the reasonableness of such costs.

Cross-jurisdictional multiplicity issues

Issues also arise where multiple class action proceedings are commenced in more than one jurisdiction, and the courts have been asked to determine which proceeding should go forward and in what jurisdiction. The issue first arose in ***Wigmans v AMP Ltd*** (No. 3) (2019) 366 ALR 594 (***Wigmans No. 3***), where five competing class actions were commenced; four in the Federal Court and one in the Supreme Court of New South Wales. AMP Ltd sought to transfer the four Federal Court proceedings to the Supreme Court of New South Wales, while the applicants in each of the Federal Court actions filed applications in the Supreme Court of NSW to transfer that proceeding to the Federal Court. The Full Federal Court ultimately ordered that the Federal Court actions be transferred to the Supreme Court of NSW, following which the plaintiff in each proceeding brought an application to stay each other's proceeding.

Shortly following the issues faced in ***Wigmans No. 3***, the Federal Court of Australia agreed protocols for communication and cooperation with the Supreme Court of Victoria (dated 5 June 2019) and Supreme Court of New South Wales (dated 1 November 2018) to facilitate the efficiency and effectiveness of class action proceedings where multiple proceedings are brought in competing courts across more than one jurisdiction (the Protocols). The Protocols provide that once the Court becomes aware of the existence of the competing class action, it may be appropriate for there to be a joint case management hearing before a judge of each court to determine how the cases should proceed.

This approach was adopted in ***Downer***, in which three proceedings were commenced in the Federal Court of Australia, and one was commenced in the Supreme Court of Victoria. The competing proceedings were jointly case managed by the two courts, following which all three of the Federal Court proceedings agreed to transfer proceedings to the Supreme Court of Victoria. In making orders giving effect to the transfer, Justice Halley stated that the transfer of all three Federal Court class actions was consistent with the Protocol and would 'facilitate a more expeditious and less complicated resolution of the multiplicity issue and avoid any possible inconsistencies that might arise in the court of a joint determination of the issues between the courts'.

In the class actions filed against ***International Capital Markets Pty Ltd***, the ***Vingrys*** proceeding was filed in the Supreme Court of Victoria and the ***Bain*** and ***Wyer*** proceedings were filed in the Federal Court of Australia. In this instance, neither party consented to the proceeding being

transferred to the other jurisdiction. Unlike in ***Wigmans No. 3*** where the transfer application was heard before the carriage application, here the Courts did not determine the transfer application before the carriage motion was heard.

With the agreement of the parties, the carriage motion was heard in a concurrent sitting before Justice Delany of the Supreme Court of Victoria and Justice O'Bryan of the Federal Court of Australia. Each applicant sought orders that the competing proceeding be stayed or alternatively that the proceeding be transferred.

Those transfer applications were not ultimately pressed at the hearing and, as noted by Justice O'Bryan in his judgment, as multiplicity was able to be addressed through a concurrent sitting of the courts to hear the stay applications, the transfer applications ultimately served no useful purpose. Justice O'Bryan considered that the juridical and procedural advantages put forward by each applicant in support of their proposed forum were better addressed as part of the resolution of the multiplicity issue, rather than as a preliminary transfer issue divorced from the multiplicity issue.

As noted above, Justices Delany and O'Bryan ultimately delivered two separate judgments however their Honours reached the same conclusion, finding that the consolidated ***Bain*** and ***Wyer*** proceedings should continue and the ***Vingrys*** proceeding be permanently stayed.

While in this instance both judges were in agreement as to the appropriate orders, the question of how the courts will deal with this situation where there is a difference of opinion in a joint sitting remains unknown.

Data breaches, privacy claims and artificial intelligence

In 2023 there was a large surge of personal data breach class actions, with multiple class actions filed in the Federal Court of Australia and Supreme Court of Victoria, the most prominent being against Medibank (***Robert Kilah & Brendan Sinnamon v Medibank Private Limited*** (S ECI 2023 01227)) and Optus (***Peter Robertson & Anor V Singtel Optus Pty Limited ACN 052 833 208 & Ors*** (VID256/2023)). However, no new data breach class actions have yet been filed in 2024.

In the wake of the data breaches in 2022, the Australian government was quick to amend the Privacy Act 1988 (Cth) (Privacy Act), increasing the maximum penalty for serious or repeated interference with privacy from A$2.5 million to A$50 million, three times the value of the benefit obtained, or, where the court is unable to determine the value of the benefit, 30 per cent of the company's adjusted turnover for the relevant period.

Most recently on 12 September 2024, the Privacy and Other Legislation Amended Bill 2024 was first read in the Legislative Assembly (Lower House), following the Attorney-General's Privacy Act Review Report of February 2023 and the government's response to that report in September 2023. The bill introduces a new statutory tort for serious invasions of privacy, and targeted criminal offences to respond to doxing (the malicious publication of an individual's personal information). The introduction of this bill may give rise to new class actions arising out of data breaches, particularly as the Office of the Australian Information Commissioner has reported that data breaches are the highest they have been in three-and-a-half years.

In June 2023 and July 2023 in the United States, multiple class actions were filed against providers of artificial intelligence (AI) technologies. These types of class actions have not yet been replicated in Australia. There is currently no specific law regulating the use of AI in

Australia, but on 21 June 2024, the Australian government released its National Framework for the Assurance of Artificial Intelligence in Government. This framework in based on Australia's AI Ethics Principles 2019, and establishes cornerstones and practices of AI assurance.

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