Litigation Funding 2021

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LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2016
Fifth edition
ISBN 978-1-83862-361-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Litigation Funding
2021

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Canada, France, Russia and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
November 2020

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REGULATION

Overview

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

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

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

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

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

Importantly, *Fostif* did not consider the position in those Australian jurisdictions where the torts of maintenance and champerty had not been abolished. In the recent decision in *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No. 4)* [2019] QSC 228 Crow J ruled, in the context of a third-party funded class action, 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.

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

> *In many cases, litigation funding has proven to be the lifeblood of much of Australia's representative proceeding litigation at federal and state level. Not all cases are funded by third-party litigation funders but a sufficiently large number of class actions have been funded in this manner that it has had a major impact of the sort of cases conducted.*

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

The available statistics about class action filings demonstrate that funded litigation is on the increase in Australia. Between June 1997 and May 2002, funded class actions comprised 1.7 per cent of all class actions. In the period from March 1992 to March 2013, 15 per cent of class action proceedings filed in the Federal Court were funded. From 2013 to 2018, 64 per cent of filed class actions were funded and between March 2017 and 2018, this number increased to 78 per cent. In the year ending 30 June 2020, there were 53 class actions commenced in Australia. This is almost the same number of class action claims as commenced in the previous year. The percentage of those claims that are funded by third-party litigation funding has stabilised at around 75 per cent of all class action claims filed. This is significantly higher than earlier periods both in terms of filings and the percentage of funded claims. The other observable trend in funded class action filings is that the percentage of shareholder lawsuits has fallen and there has been an increase in the number of consumer class actions (arising out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry) and employment actions alleging underpayment of wages. The increase in volume and the proportion of funded class actions had appeared to correlate with the judicial approval of common fund orders that increased the certainty of returns for litigation funders and reduced barriers to entry. In the year in review, the High Court has ruled that that common fund orders made prior to a settlement are invalid.

Restrictions on funding fees

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

There is no legislation or regulation in Australia that limits the fees that funders can charge.

The High Court in *Fostif* held that contract law considerations such as illegality, unconscionability and public policy may still arise

in relation to a litigation funding agreement but there is no objective standard against which the fairness of the agreement may be measured. Accordingly, whether a particular clause in a litigation funding agreement may contravene public policy will be answered having regard to the circumstances of each particular case.

Theoretically, Australian courts could set aside a litigation funding agreement where the funder's interest constituted an equitable fraud in the sense that it involved capturing a bargain by taking surreptitious advantage of a person's inability to judge for him or herself, by reason of weakness, necessity or ignorance.

Australian courts exercising equitable jurisdiction can set aside bargains where terms are harsh or unfair. The High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 restated the principles relating to unconscionable conduct. A court may set aside a bargain as unconscionable if one party, by reason of some condition or circumstance, is placed at a special disadvantage compared to another and the other party takes unfair or unconscientious advantage of that special disadvantage. In those circumstances, the innocent party may be relieved of the consequences of the unconscionable conduct. In *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392 HCA 25, a gambling addict sought to avoid losses with a casino, arguing that the casino had taken unconscionable advantage of his vulnerability. The Court in rejecting his claim ruled that inequality of bargaining power was relevant, but not essential to establish unconscionability and that a party must rely upon standards of personal conduct known as 'the conscience of equity'. The High Court drew a clear distinction between the equitable principles of unconscionable conduct and undue influence.

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

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

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

Prior to the High Court decision in *BMW v Brewster* [2019] HCA 45, it was common practice for courts to make common fund orders, both as part of a class action settlement and also at an early stage of proceedings. A common fund order has the effect of binding all members of the represented group to the terms of a funding agreement, not just those who have executed the agreement. Common fund orders were made pursuant to the statutory protective and supervisory role that the courts are required to assume to do what is appropriate and necessary to ensure justice is done in the class action proceedings. As the common fund order involves the Court imposing on unfunded class members an obligation to contribute to the payment of costs of the litigation without their consent, issues commonly arose as to whether the terms imposed, insofar as is possible, certainty and did not result in any group members being worse off. The purpose of the common fund order was to equalise the distribution of damages so that unfunded claimants must also contribute to the costs of the claim, including the funder's fee. It was observed in *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 FCAFC 148 at [82]:

> *We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.*

However, in the *Brewster* decision the High Court declared that common fund orders made prior to a settlement pursuant to both section 33ZF of the Federal Court of Australia Act 1976 (Cth) and section 183 of the Civil Procedure Act 2005 (NSW) are invalid. It was held by the majority that, on a proper interpretation, neither of these statutory provisions empowered a court to make common fund orders.

While the *Brewster* decision has ended the making of common fund orders early in proceedings and prior to settlement, it has left open the question of whether such orders may be made at the conclusion of proceedings. The question was answered in the negative in a recent Supreme Court of New South Wales decision (*Owen Brewster v BMW Australia Ltd* [2020] NSWSC 1261), which is currently subject to an appeal. The question is also on appeal before the Full Court of the Federal Court, which is considering whether common fund orders may be made at the conclusion of a proceeding under provisions of the Federal Court of Australia Act or in equity (*Davaria Pty Limited v 7-Eleven Stores Pty Ltd & Ors*).

An observable trend has been the increased prevalence of competing overlapping class actions and how the Courts have sought to manage multiplicity through the application of case management principles. A feature of these multiplicity disputes has been the Courts evaluating the hypothetical returns to class members from the competing funding proposals. This increased competition has placed downward pressure on pricing.

In respect of common fund orders, Lee J in *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 said that a percentage cap on a funder's commission under a common fund order may lead to a 'spurious air of authority to the figure, in the sense [of] communicating a default position'. In *Lenthall*, Lee J proposed a funding rate of the lesser of three times the total amount spent on legal costs, disbursements and adverse costs orders, or 25 per cent of the gross recovery upon resolution of the proceedings. Lee J's exercise of discretion in *Lenthall* was upheld on appeal.

In *Brewster v BMW Australia Ltd* [2019] NSWCA 35, the Supreme Court of New South Wales Court of Appeal upheld an order capping the funder's share of the proceeds of litigation to an amount based upon a multiple of the total amount paid by the funder so as to prevent the order from yielding a benefit that is out of all proportion to the capital deployed and the risk assumed by the funder. Their Honours doubted that an interlocutory order 'whereby a funder becomes contingently entitled to a return that might be out of all proportion to the capital deployed and put at risk, is one which is appropriate or necessary to ensure that justice is done'.

While common fund orders are invalidated by *Brewster*, the discussion of these cases is rather on the effect that competing claims have had on dropping funding fees, which was reflected by the levels of commissions sanctioned by the courts through the mechanism of common fund orders. In the wake of the rejection by the High Court of common fund orders the industry commentary was that the decisions would result in the fees and interest charged by funders increasing.

Specific rules for litigation funding

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

In the year in review the Federal Treasurer, Josh Frydenberg, introduced the Corporations Amendment (Litigation Funding) Regulations 2020 (Regulations). The purpose of the Regulations was to give effect to the Commonwealth Government's announcement that litigation funders providing financial assistance in the funding of class actions would be required to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme (MIS) regime. Accordingly, third-party litigation funders in Australia are now required to hold an AFSL and comply with the MIS regime under the Corporations Act 2001 (Cth) if they advise, deal in or operate a litigation funding scheme. The AFSL and MIS regimes are overseen by the Australian Securities and Investments Commission (ASIC). At the time of publication there is a motion to be voted on in the Commonwealth Parliament that if passed would result in the Regulations being disallowed. Disallowance of the Regulations would return the regulatory landscape to one where third-party litigation funders are not required to hold an AFSL or comply with the MIS regime.

In 2012, the federal government provided a safe harbour for persons providing financial services to a litigation scheme from all forms of regulation that apply to providers of financial services and credit facilities. On 22 August 2020, the Regulations came into force, removing the previous safe harbour for litigation funding schemes from the AFSL and MIS regimes, meaning that third-party litigation funders funding class action and multi-plaintiff actions may be required to hold, or be an authorised representative of, an AFSL. As noted at the time of writing, the Regulations are subject to a motion for disallowance in the Senate. The safe harbours for insolvency litigation funding schemes and litigation funding arrangements other than in relation to class actions remain in force. However, it is currently unclear from the definition of an insolvency litigation funding scheme as to whether third-party funded claims are captured by the safe harbour.

The Regulations do not deem litigation funding schemes to be an MIS, they only remove the safe harbour previously in place which deemed them not to be an MIS. Whether a scheme meets the definition of an MIS under the Corporations Act 2001 (Cth) (and therefore requires licensing) requires consideration of the underlying law. The High Court held in *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643 that in certain circumstances a litigation funding scheme may constitute an MIS.

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

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

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

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

The Federal Court Practice Note Class Actions (GPN-CA) requires that 'any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicants, the class members, the applicant's lawyers and any litigation funder.' Similar practice notes operate in Victoria, Queensland and New South Wales.

Legal advice

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

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

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

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

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

The year in review has seen increased scrutiny of the conduct of lawyers and third-party litigation funders. That scrutiny has usually arisen in the context of the courts' supervision of the settlement of class actions. Legislation regulating the conduct of representative proceedings in Australia require courts to approve settlements. Those powers provide a level of discretion in the courts to moderate the legal and other professional costs incurred in conduct of the litigation, the third-party funder fees and interest, and to enquire into the probity of the funding arrangements. An example of how the settlement approval process can expose allegations of ethical violations and professional misconduct has arisen in the approval of the settlement of a class action commenced against Banksia Securities Limited in the Supreme Court of Victoria. At the instigation of a disgruntled class member the Court has embarked on a wide-ranging enquiry into the integrity of the solicitor, client and funder relationships and the professional fees rendered. A feature of that litigation, reflected in other cases in the year in review, is the willingness of the Court to appoint contradictors and independent counsel to represent the interests of class members in the settlement approval process. While the *Banksia Securities* settlement approval litigation is yet to resolve there is a likelihood that the Court will significantly moderate the professional fees that can be deducted from the settlement and that recommendations may be made by the Court that lawyers involved in the conduct of the action face disciplinary action. Another issue exposed by the *Banksia Securities* litigation is the Court's

willingness to protect the sanctity of the solicitor-client relationship by insisting on a clear delineation between the funder entity, the lawyers retained and the representative client's interests.

Regulators

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

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

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

When reviewing a litigation funding agreement for approval, the court takes account of a range of factors, including:

- the liquidator's prospects of success in the litigation;
- the interests of creditors;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action;
- the extent to which the liquidator has canvassed other funding options;
- the level of the funder's premium and other funding terms;
- the liquidator's consultations with creditors; and
- the risks involved in the claim, including the amount of costs likely to be incurred in the proposed litigation and the extent to which the funder is to contribute to those costs, to the costs of the defendant in the event that the action is not successful, or towards any order for security for costs.

The decisions involving approval of funding agreements demonstrate that the courts do not simply 'rubber stamp' a funding proposal put forward by a liquidator. The approval of the court is not intended to be an endorsement of the proposed funding agreement or the proposed claim, but merely a permission for the liquidator to exercise his or her own commercial judgement in the matter.

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

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

FUNDERS' RIGHTS

Choice of counsel

6 | 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.

Participation in proceedings

7 | May funders attend or participate in hearings and settlement proceedings?

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

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

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

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 ASIC's Regulatory Guide 248 is that the difference of opinion is referred to the most senior counsel acting in the matter for advice as to whether the settlement offer is reasonable in all the circumstances, and whether the parties agree to act in accordance with that advice. In the class action context, any settlement reached on behalf of the representative applicants, including the reasonableness of the funder's commission, will be subject to court approval. The Federal Court Practice Note Class Actions (GPN-CA) sets out a range of requirements for parties to satisfy the court that the proposed settlement is fair and reasonable and in the interests of the group members.

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

Veto of settlements

8 | Do funders have veto rights in respect of settlements?

In class actions, a funder cannot veto a settlement and any difference of opinion between a funder and a representative applicant regarding a proposed settlement are dealt with pursuant to certain practice. For other types of funded litigation, the funder's control over a settlement is subject to terms of the funding agreement.

Termination of funding

9 | In what circumstances may a funder terminate funding?

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

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

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

Other permitted activities

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

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

In a number of cases where the court has considered a common fund order, or orders that could affect the funder's interest, the courts have permitted the funder to retain its own representation and appear before the court to make submissions (a recent example of this approach is *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 (18 September 2018)).

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

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

11 | May litigation lawyers enter into conditional or contingency fee agreements?

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

There are prohibitions on legal service providers obtaining a fee calculated by reference to the amount of a settlement or judgment, though Victoria has recently passed legislation allowing contingency fees to be paid to plaintiff law firms in class action proceedings. In the jurisdictions where contingency fee arrangements are prohibited, lawyers are permitted to charge an 'uplift' of up to 25 per cent of 'at risk' fees based on standard hourly rates. The permissible percentage uplift may vary from state to state.

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

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

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

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

On 18 June 2020, the Victorian government passed legislation allowing contingency fees to be paid to plaintiff law firms in class action proceedings. The new legislation provides that the liability for the payment of legal costs must be shared among the plaintiff and group members in the class action, known as a Group Costs Order. This move has garnered mixed reviews from other jurisdictions, and it is not clear whether other jurisdictions will move to introduce comparable legislation.

Contingency style payments to law firms have also been considered in the context of settlement approval hearings. In *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107, notwithstanding that a law firm may not enter into a cost agreement where the amount payable to the law practice is calculated by reference to the amount of any award that may be recovered, Lee J observed that a common fund order incorporating a contingency payment could be made and could be approved in a settlement approval. Lee J's comments did not form part of the ratio of the decision of the Full Court.

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

Other funding options

12 | What other funding options are available to litigants?

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

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

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

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

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

The Productivity Commission's report into Government Services 2020 set out the clearance rates for Australian courts for 2018-19. While this figure encompasses all civil matters – not merely commercial proceedings – the overall picture is that the clearance rate in both lower and superior courts (from which data was available) suggests that the Supreme Courts of each state and the Federal Court are, on average, clearing around 95 per cent of all civil matters listed in a given calendar year. This statistic discloses only that courts are close to disposing of as many proceedings as are commenced in any given calendar year with a very small increase in caseload during the reporting period. However, complex commercial matters are unlikely to be resolved within one year of commencement, for example, according to its 2018–19 Annual Report, 13.3 per cent of the Federal Court's caseload was over 24 months old, and that largely comprised matters where the causes of action are described as corporations, intellectual property, trade practices and taxation. That said, case management is an important component of the administration of justice in Australian courts.

Time frame for appeals

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

Nationally, in 2018-19, 1,658 appellate cases were filed in the Federal Court. Despite variance in completion rates, and accepting that the caseload of the appellate court was preferable to proceedings on appeal that had been on the court lists outside 2018–19, in the reporting year 1,404 appeals and related actions were finalised by the Federal Court. At 30 June 2019 there were 31 matters that were 24 months or older. The clearance rate for Australian court appeals was 95.5 per cent for 2018–19. Accordingly, it is appropriate to conclude that most appeals in Australian courts are determined within 12 months of the filing of a notice of appeal.

In New South Wales, as a further example, the Supreme Court of New South Wales Provisional Statistics (as at 5 June 2020) show that 366 cases were filed in the New South Wales Court of Appeal during the 2019 year, and 339 cases were finalised. Note, where an appeal has been preceded by a grant of leave, this is counted as one continuous case, with a final disposal being counted only when the substantive appeal is finalised. For this reason, the figures for disposals of notices of appeal (and applications for relief) and disposals of applications for leave, combined, exceed the number of final disposals. From these statistics it is difficult to determine the number of appeals not determined within a calendar year.

Enforcement

15 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.

COLLECTIVE ACTIONS

Funding of collective actions

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

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

COSTS AND INSURANCE

Award of costs

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

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

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

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

Liability for costs

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

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

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

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

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

Non-party costs orders are rarely 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.

In *Wigmans v AMP Ltd (No 3)* [2019] NSWSC 162, five competing class actions had been commenced, all with different lawyers and funders; four in the Federal Court, and one in the Supreme Court of New South Wales. There ensued a contest as to whether the litigation would be conducted in the Federal Court or the Supreme Court of New South Wales. Those applications were resolved in favour of the representative applicant in the Supreme Court action and the four Federal Court actions were transferred to the Supreme Court. Under the Civil Procedure Act 2005 (NSW) the Supreme Court did not have power to make a cost order against the Federal Court applicants. Stevenson J ruled that the Court has power to make a costs order against non-parties and held that as each of the funders stood to make a significant profit from the fruits of the litigation, in the circumstances where the applications had failed, each of the funders should pay the costs.

Security for costs

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

The court has the power to order a plaintiff to give security for the defendant's cost of defending the plaintiff's claim. The court can order a stay of proceedings until security is given and if there is persistent non-compliance, the court may dismiss the plaintiff's claim. The power to order security for costs comes both from statutory rules and from the inherent jurisdiction of the court. Security is sought in circumstances where there is a concern that the plaintiff may be unable to satisfy an adverse costs order made against it should the plaintiff's claim fail.

The existence of a litigation funding agreement will be relevant in an application for security for costs. In most instances, the litigation funding agreement would be tendered in any response to an application for security, and consideration will be had to the ability of the funder to meet its indemnity obligations in respect of adverse costs.

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

The amount of security is calculated by reference to the reasonable and necessary costs of defending the action. This will be a matter for evidence. In complex claims, it is usual that security orders will be given in stages by reference to identified phases in the litigation.

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

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

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

The ALRC Report also made a recommendation that there be a statutory presumption that a litigation funder will provide security for costs.

Insurance

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

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

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

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

However, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699, Yates J, while accepting that an appropriately worded ATE policy may be capable of providing sufficient security for an opponent's costs, in the circumstances of that case and based on the terms of the ATE policy before him, rejected an ATE insurance policy from an overseas insurer as providing sufficient security. Yates J reasoned that the ATE policy offered provided less protection than those deemed acceptable as security in comparable United Kingdom cases. Yates J also considered the applicability of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW), which generally grants respondents a direct right to sue the insurer for the sum of insured liability. As the insurer had no presence in Australia, the

Act would not apply, leaving the respondents unable to sue the insurer in the event that coverage under the policy was refused. Yates J also took into account that the respondents may be left unable to access the insurance proceeds should Peterson enter liquidation, leaving them vulnerable to potential competing rights of creditors.

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

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

DISCLOSURE AND PRIVILEGE

Disclosure of funding

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

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

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

The CAPN also covers the level of detail required in the applicant's disclosure to the Court and to other parties (including the respondents).

Privileged communications

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

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

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

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

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

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

Similarly, in *Hastie Group Ltd (in Liq) v Moore* [2016] NSWCA 305, the Court of Appeal considered whether an expert report provided to a litigation funder in connection with attempts to secure litigation funding was privileged. At issue was whether the expert report was prepared in connection with anticipated proceedings to be brought by the liquidators of the Hastie Group, or whether its dominant purpose was to aid the litigation funder in deciding whether to fund the prospective proceedings. Further, if the expert report was subject to privilege, it was contended that privilege was waived in circumstances where the liquidators relied on the fact that it was seeking litigation funding to obtain extensions to the time for service of the pleadings.

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

DISPUTES AND OTHER ISSUES

Disputes with funders

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

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

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

In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45, which is significant for its clarification that a litigation funder did not require an AFSL, 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 AFSL. The Court held that the funder was not required to hold an AFSL and the litigant could not avoid the financial consequences under the funding agreement.

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

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

Other issues

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

Practitioners should be aware of the recent enactment of the Corporations Amendment (Litigation Funding) Regulations 2020, which require Litigation Funders to hold an AFSL. For more information about the impact of the Regulations, please refer to Part 3 of this chapter. The Regulations are subject to a disallowance motion that is to be debated in the Australian Parliament. If the Regulations are disallowed, the regulatory landscape will return to the previous model that did not require litigation funders to hold an AFSL and exempted litigation funding schemes from the MIS regime.

Recently, the Parliamentary Joint Committee on Corporations and Financial Services completed an inquiry into litigation funding and the regulation of the class action industry. While any reports by the members of the inquiry have been pre-empted by the promulgation by the Treasurer of the Regulations, it is expected that the inquiry will hand down its report in late 2020.

Practitioners should also be aware of a case awaiting hearing and judgment in the High Court of Australia, *Wigmans v AMP Limited* (S67/2020), where the legality of courts ordering a permanent stay of competing representative proceedings will be decided.

UPDATE AND TRENDS

Current developments

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

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

- the enactment of the Corporations Amendment (Litigation Funding) Regulations 2020;
- the High Court of Australia declaring common fund orders prior to settlement made under section 33ZF of the Federal Court of Australia Act 1976 (Cth) and section 183 of the Civil Procedure Act 2005 (NSW) invalid;
- the NSW Court of Appeal held that the Supreme Court of New South Wales is not empowered under section 183 of the *Civil Procedure Act 2005* (NSW) to make an order 'closing' the class in a representative proceeding prior to settlement; and
- the appellant in *Wigmans v AMP Limited* [2019] NSWCA 243 was granted special leave to appeal the judgment of the New South Wales Court of Appeal; asking the High Court of Australia to decide whether a permanent stay of a competing representative proceeding is permitted.

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

Regulation of litigation funders

On 24 July 2020, the Regulations commenced and apply to class action litigation funding schemes created on or before 22 August 2020. In short, the Regulations mandate that litigation funders who finance litigation in Australia be required to hold and AFSL and comply with the Corporations Act 2001 (Cth) and its MIS requirements. They also mandate that litigation funding schemes are subject to the product disclosure requirements under Part 7.9 of the Corporations Act 2001 (Cth), among other things.

Common fund orders

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

The prospect of a common fund order being made prior to settlement at the conclusion of a representative proceeding was left open by the High Court of Australia In *Brewster*. However, a recent Supreme Court of New South Wales judgment, *Owen Brewster v BMW Australia Ltd* [2020] NSWSC 1261, has reignited the prospect that in the same way that courts were not empowered to make a common fund order at an early stage of a proceeding, so too are they not empowered to make one at settlement.

Class closure orders prior to settlement

The New South Wales Court of Appeal in *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66 ruled that class closure orders that extinguish unregistered group members' rights cannot be made under section 183 of the Civil Procedure Act 2005 (NSW) prior to a court-approved settlement or judgment. It must be noted, however, that this decision does not place a limit on *every* type of procedural tool available that affects class composition but does raise difficulties for defendants as there is less certainty regarding the number of group members and the amount of their claims before settlement or judgment.

In *Wigmans v AMP Ltd* [2019] NSWCA 243, a five-judge New South Wales Court of Appeal endorsed the judgment of Ward CJ in Eq, which allowed for a 'multi-factorial analysis' to inform a decision as to which competing actions would be permanently stayed. The Court of Appeal endorsed a multi-factorial approach where the following factors were taken into account:

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

Uncertainty remains – and will likely be resolved by the High Court of Australia or by legislation – over the idea that when it comes to competing class actions, there can be no 'one size fits all approach'. This position seems to permeate across the state and federal courts in Australia.

In *Perera v GetSwift Ltd* [2018] FCAFC 202, the Full Court of the Federal Court of Australia provided guidance on how courts deal with multiple competing class action claims against the same defendant. The Full Court concluded that while courts have a general power to consolidate proceedings, an order for consolidation of competing proceedings will seldom be made without conferral between the subject solicitors, funders and applicants to resolve differences in funding models, rates, and progress. Although, there are some concerns that conferral, directed to lessening competition in the market, may contravene laws regulating anticompetitive trade practices.

Factors relevant to whether a funded competing action is stayed or consolidated include, in addition to factors directly bearing on the real issues in dispute, things such as the funder's percentage, the extent of the funder's book-build and the size of the respective classes, the funder's experience and how the funder proposes to meet obligations for security for costs.

Reflecting some level of concern with substantive rights being determined through the use of procedural case management powers, to address complexities associated with competing class actions, the ALRC's report 'Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders' has recommended that Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to give the Court an express statutory power to resolve competing class actions. Practically speaking, unless and until the ALRC's recommendation is adopted, the courts will continue to manage issues arising from competing class actions through existing case management powers. In the year in review the Courts have dealt with multiplicity by variously ordering matters be stayed (see, for example, *Wigmans v AMP Ltd* [2019] NSWSC 603), directing consolidation (see for example *Southernwood v Brambles Limited* [2019] FCA 1021) and directing one action proceed by way of an open class and the other as a closed class (see, for example, *McKay Super Solutions Pty Ltd (trustee) v Bellamy's Australia Ltd* [2017] FCA 947).

The recent decisions in *Tredrea v KPMG Financial advisory Services (Australia) Pty Ltd (No. 3)* [2019] NSWSC 871 and *Kuterba vSirtex Medical Limited (No. 3)* [2019] FCA 1374 involved the approval of class action settlements and the reasonableness of the litigation funder's success fee. Both decisions considered whether the Court ought to appoint a person independent of the funder and the lawyers for the class to act as a 'contradictor' to protect the legal rights of group members. In *Tredrea*, Parker J referenced Dr Kirk SC's paper The Case for Contradictors In Approving Class Action Settlements (2018) 92 *Australian Law Journal* 716 in ruling that a contradictor be tasked with acting as a respondent to the application for settlement approval, to ensure that the legal costs, funding commission and distribution of the settlement sum are all appropriate. In *Sirtex*, Beach J rejected the appointment of a contradictor as a waste of time and expense, preferring instead to rely on the evidence of an independent costs referee and the Court's understanding of the broader dimension of risk borne by litigation funders. In a different context, the Court of Appeal in *Botsman v Bolitho* [2018] VSCA 278 held that a trial judge erred by not appointing a contradictor to safeguard the interests of group members in circumstances where the interests of some group members and the funder were in conflict.

There have been a number of class action settlements approved by the courts in the year in review. The settlement approval process is an important feature in the maintenance of public confidence in the class action regime. *Liverpool City Council v McGraw Hill Financial Inc* [2018] FCA 1289 and *Petersen Superannuation Fund Pty Ltd v Bank of Queensland* [2018] FCA 1842 illustrate the flexibility in the judicial oversight of settlement approvals. In *Liverpool City Council,* a settlement that returned a substantial return to the funder, Lee J appointed an amicus to report on the reasonableness of the returns to the funder, the legal costs incurred and the returns to the class members. Notwithstanding the levels of returns to the funder and the legal costs, after hearing from the amicus, Lee J approved the settlement and warned against the risk of hindsight bias. In *Petersen,* the settlement involved less than 2 per cent of the settlement sum returning to the class members. To achieve a modicum of parity between the class, the funder and lawyers, Murphy J adjusted the settlement by limited the funding commission and reducing the lawyers' costs.

Coronavirus

27 What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Litigation funders may be impacted by certain measures implemented in response to the economic impacts of the covid-19 pandemic, although indirectly. The Coronavirus Economic Response Package Omnibus Act 2020 inserted section 1362A into the Corporations Act 2001 (Cth), an instrument-making power that allows the Minister to exempt classes of persons from, or to modify the operation of, specified provisions of the Act or regulations. The Treasurer has subsequently introduced temporary changes to continuous disclosure provisions for companies. Ordinarily, sections 674 and 675 require companies to disclose non-public information that a reasonable person would expect to have a material effect on the price or value of the entity's securities, leaving entities and their officers subject to civil penalties for failure to do so. The changes introduced under the Corporations (Coronavirus Economic Response)

Determination (No. 4) 2020 mean that entities and their officers will only be liable in civil proceedings for non-disclosure if there is knowledge, recklessness, or negligence with respect to whether the information would have a material effect on the price or value of the entity's securities. The changes have been extended and will remain in effect until 23 March 2021. The amendments aim to provide relief to businesses impacted by the pandemic, given the increasing uncertainty of economic markets and the related challenges with releasing a reliable price forecast. In light of the lower disclosure threshold, the opportunities to run funded class actions for breach of continuous disclosure obligations will likely narrow, indirectly impacting litigation funders.

Insolvency and bankruptcy protections were also introduced by the Coronavirus Economic Response Package Omnibus Act 2020 and will remain in effect until 31 December 2020, per the Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020. Under sections 459E, 459F and 459G of the Corporations Act 2001 (Cth), creditors can issue a statutory demand for a company to pay a debt of $2000, a minimum threshold that has now been increased to $20,000. There is usually a 21-day limitation period in which to satisfy the demand that has now been extended to six months. Further, a moratorium has been placed against the personal liability of directors to prevent insolvent trading, governed by new 'safe harbour' provision, section 588GAAA. These temporary amendments aim to lessen the threat of actions that could lead businesses to insolvency or external administration.

* *The authors would like to thank Millie Byrnes Howe, Thomas Riddell, Chelsea Payne, Matthew Harris and Christina Athanasopoulos for their assistance in the preparation of this chapter and Susanna Khouri and Amir Chowdhury for their contribution to previous editions.*

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ISBN 978-1-83862-361-6