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# AUSTRALIA


## Law and Practice

**Contributed by:**
Susanna Taylor, Lina Kolomoitseva, Helene Roins and Siba Diqer
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**Litigation Capital Management**

**Litigation Capital Management** (LCM) is a leading international provider of dispute finance solutions. LCM provides funding across multiple jurisdictions and sectors. LCM lends its financial support to litigants seeking single-case financing and portfolio funding, and in relation to class actions, commercial claims, international arbitration and claims arising out of insolvency. LCM has an unparalleled track record, driven by effective project selection, active project management and robust risk management. Its capability stems from being a pioneer of the industry with more than 25 years of disputes finance experience. Headquartered in Sydney, with offices in London, Singapore, Brisbane and Melbourne, LCM is listed on AIM (at the London Stock Exchange), trading under the ticker LIT. LCM was ranked in Band 1 in the 2023 Australia Litigation Funding guide by Chambers and Partners.

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**Susanna Taylor** is head of investments, APAC, at LCM. Susanna has been in the litigation funding industry since 2014 and is at the forefront of the changing face of regulation of litigation funding in Australia, giving evidence to the Parliamentary Inquiry into Litigation Funding and Class Actions in 2020 and, in 2022, being involved in the full court decision in LCM Funding v Stanwell, which reversed the position requiring funded class actions to be registered as managed investment schemes. Susanna's Chambers profile describes her as "one of the top operators in the industry", and as "an extremely impressive litigation funder with a strong ability to cut to the commercial reality of claims."

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**Helene Roins** is an investment manager at LCM. Helene is a highly experienced operator in disputes finance, and is responsible for sourcing, conducting due diligence and managing claims at LCM. Helene has been part of the litigation funding industry since 2018 and has been with LCM since 2020. She works closely with LCM's funded clients and their legal teams to ensure each claim's efficient and effective progress to a positive resolution. Helene's portfolio of claims consists of commercial disputes, class actions, intellectual property and insolvency claims.

**Siba Diqer** is an investment manager at LCM. Siba utilises her litigation experience to help litigants achieve successful results in dispute resolution. A strategic thinker, she works closely with clients and advisers to provide bespoke financing solutions. Siba joined LCM in 2018. In this role, she sources and assesses funding opportunities, as well as structures, documents and manages multiple multi-million dollar disputes finance investments for LCM. She is also a member of the funding applications review committee, which reviews and approves investments to be presented to the investment committee. Siba forms strong trusted client relationships through excellent communication skills and working in a timely and commercially focused manner.

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# 1. Legal and Regulatory Framework for Litigation Funding

## 1.1 Legality of Litigation Funding

### Litigation Funding in Australia

Litigation funding was pioneered in Australia in the 1990s with the funding of liquidators of insolvent companies (see for example Re Movitor Pty Ltd (rec and mgr apptd) (in liq) v Sims (1996) 64 FCR 380). Whilst traditionally the doctrine of maintenance and champerty (which made it unlawful to profit from litigation where the funder did not have a direct interest) applied in Australia, this has been abolished by legislation in all states and territories except in Queensland and the Northern Territory. The abolition does not, however, extinguish rights in respect of the enforceability of contracts that are contrary to public policy or otherwise illegal.

The High Court decision in 2006 of Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386 held that litigation funding was not an abuse of process or contrary to public policy but valid not just in insolvency matters, but across the board, as a policy that promoted access to justice. This decision triggered the significant growth of the industry in Australia, particularly in class actions.

Recently in the decision of Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No.4) [2019] QSC 228, upheld on appeal in Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors [2020] QCA 250, the Queensland Court held that LCM's funding agreement with the plaintiffs and group members in that case was not unenforceable by reason of the torts of maintenance or champerty or otherwise due to public policy. The Court of Appeal found that all funding arrangements for class actions are necessarily champertous but that this will not result in invalidity unless there is some particular abuse of process evident in the arrangement. Special leave to the High Court to appeal from this decision was denied to the defendants and so it is clear that this decision represents the law in Australia.

Today, litigation funding is a sophisticated tool prevalent in all practice areas, including commercial litigation, insolvency, class actions, arbitration and intellectual property.

## 1.2 Rules and Regulations on Litigation Funding

### Regulation of Litigation Funding

The regulation of litigation funding has in recent years come under scrutiny and has been highly politicised in Australia. In 2009, the High Court had held in Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (2009) 260 ALR 643 (Brookfield) that litigation funding schemes were managed investment schemes (MIS) that were required to be registered under Section 9 of the Corporations Act 2001 (Cth) (Corporations Act). This was followed in 2012 by the Labor government providing an exemption for litigation funding schemes from MIS regulation to ensure greater access to justice. In 2020, the Liberal government introduced regulations that required operators of a litigation funding scheme to hold an Australian financial services licence (AFSL) and such schemes were subject to the MIS regime in the Corporations Act.

In June 2022, the Full Court of the Federal Court of Australia in LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC103 unanimously held that litigation funding schemes are not an MIS and that the decision in Brookfield is "plainly wrong". In 2022, there was a change in government with the Labor party gaining power

once again. In December 2022, the Corporations Amendment (Litigation Funding) Regulations 2022 commenced and provided an explicit exemption for litigation funding schemes from the MIS, AFSL, product disclosure and anti-hawking provisions of the Corporations Act. Additionally, the Australian Securities and Investment Commission has provided litigation funding arrangements with relief from the application of the National Credit Code and proof of debt arrangements. However, other protections continue to apply to litigation funding agreements such as the law regarding unconscionable conduct, misleading and deceptive conduct, and unfair contract terms.

Under Corporations Regulations 2001 (Cth), litigation funders are required to have appropriate arrangements to manage any conflicts of interest (failure to do so is an offence) and this requirement is also contained in court practice notes.

The courts in Australia exercise a degree of oversight of litigation funders. In particular, there are disclosure requirements discussed further in **1.6 Disclosure Requirement** and, in respect of class actions, any settlement must be approved by the court. Australian courts also have a discretion to order costs against a non-party which can extend to a litigation funder as discussed further in **2.1 Adverse Costs**.

## 1.3 Non-legal Rules

### Voluntary Guidelines

The Association of Litigation Funders of Australia (ALFA) provides best practice guidelines, which set out standards of practice for its members. However, the guidelines are not mandatory and ALFA is not representative of all litigation funders operating in Australia.

## 1.4 Consumer Protection, etc

There are no other specific additional rules applicable where funding is provided to a specific counterparty.

## 1.5 Unlawful Terms

### Jurisdictional Comparison

As discussed further in **3.1 Alternative Fee Structures**, with the recent exception of group costs orders in class actions in the Supreme Court of Victoria, lawyers in Australia are prohibited from charging contingency fees (ie, where the legal fees are calculated as a proportion of a settlement or judgment sum). If a funding agreement in Australia was an agreement to fund a law firm and that law firm was charging a contingency fee in the form of a damages-based agreement, then that damages-based agreement may be unenforceable. This may render the funding agreement with the law firm unenforceable or at the very least, ineffective as the funder would have secured its interest against the unenforceable damages-based agreement.

## 1.6 Disclosure Requirement

### Disclosure of Funding

There are limited circumstances in which a party to a funding agreement will disclose the arrangement in Australia:

- in an arbitration conducted under the Arbitration Rules of the Australian Centre for International Commercial Arbitration, where under Rule 54 a party must disclose the existence of third-party funding and the identity of the funder (but not the terms of the litigation funding agreement);
- where a liquidator seeks court or creditor approval under Section 477(2B) of the Corporation Act to enter into a litigation funding agreement (because it exceeds three months); the litigation funding agreement is

redacted to maintain confidentiality over certain terms that may provide the defendant(s) with a tactical advantage, such as the legal budget and funder's commission;
- in class action proceedings before the Federal Court of Australia, and the Supreme Courts of Victoria, New South Wales, Queensland, and Western Australia, where the litigation funding agreement must be disclosed to the court and to other parties on a confidential basis; certain commercial terms that may provide another party with a tactical advantage can be redacted (although the version provided to the court must be unredacted), such as the amount of funding received and estimated costs; and
- where it is in the interest of the plaintiff(s) to disclose the fact of funding, for example at mediation to encourage settlement.

## 2. Adverse Costs and Insurance

### 2.1 Adverse Costs

In Australia, a third-party funder ("Funder") can be held liable to meet adverse costs orders in a funded claim brought in court proceedings. Where a funder provides funding for an arbitration in Australia, a tribunal would most likely not have any jurisdiction to make a costs order against the funder being a third party to the arbitration.

#### Power and Discretion to Make Costs Orders Against Third-party Funders

Courts are conferred with broad powers to make costs orders, including against third parties. For example, in New South Wales, Section 98 of the Civil Procedure Act 2005 (NSW) confirms that the court has "full power" to determine "by whom, to whom and to what extent costs are to be paid". In the Federal Court, pursuant to Section 43 of the Federal Court of Australia Act 1976 (Cth), the award of costs is similarly "in the discretion of the Court or Judge".

The court's power to make costs orders against third-party Funders will be exercised "in circumstances where (the Funder) has a connection to the litigation which is sufficient to warrant the exercise of power" (See Court House Capital Pty Ltd v RP Data Pty Limited [2023] FCAFC 192). The Court's discretion to do so is broad and there is no "rigid checklist" (see Court House Capital Pty Ltd v RP Data Pty Limited [2023] FCAFC 192) for when third-party orders will be made. However, each of the following factors is likely to weigh in favour of a costs order against a Funder (See, for example, Gore v Justice Corp Pty Ltd (2002) FCR 429 FCA 354, Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd (No. 2) [2021] NSWSC 1202, FPM Constructions v Council of the City of Blue Mountains [2005] NSWCA 340, Wigmans v AMP Ltd (No 3) [2019] NSWSC 162, Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd–Costs [2020] NSWSC 633, Hardingham v RP Data Pty Limited (Third Party Costs) [2023] FCA 480, Capital Options (Aust) Pty Ltd v Hazratwala, in the matter of Weststate Consortium Pty Ltd (in liq) (No 2) [2023] FCA 775, Court House Capital Pty Ltd v RP Data Pty Limited [2023] FCAFC 192):

- the Funder had an interest in, or an entitlement to a share of, the claim's outcome (particularly if such an interest is substantial and/or equal to or greater than that of the funded party ("Claimant"));
- the Funder was involved in the litigation purely for commercial gain;
- the Claimant is insolvent or is a "person of straw";

- the conduct of the litigation was unreasonable, improper or comprised an abuse of process; or
- the Funder agreed to provide the Claimant with an indemnity for any adverse costs order.

### Costs Orders Against Third-party Funders – in Practice

In practice, cost orders against Funders are not made frequently. This is in part because (i) Funders often provide Claimants with an indemnity for adverse costs orders as part of their funding arrangement, and most reputable Funders then meet their indemnity obligations without needing to be compelled to do so by court order; and (ii) as discussed further below, funded claims (particularly, insolvency claims and class actions) are often the subject of orders for security for costs, which security can then be used to satisfy adverse costs obligations, without the need for third-party costs orders.

A recent example of a costs order against a Funder in Australia can be found in Hardingham v RP Data Pty Limited (Third Party Costs) [2023] FCA 480. The respondent in this case made the application against the applicant's Funder, Court House Capital Pty Ltd ("Court House"), after successfully defending the underlying proceedings and obtaining a costs order which then remained unsatisfied because the funded claimant was impecunious and the funding arrangement with Court House did not include an indemnity for adverse costs.

At first instance, Thawley J did not accept that the lack of indemnity, nor the "partial" nature of the funding provided by Court House, prevented an order for costs being made against the Funder. His Honour made the third-party cost order and noted (at [21]) that:

"When there is a sufficient connection between the litigation and a third party, and the circumstances are such that the making of a costs order is fair in all the circumstances, the making of a third party costs order is normal. Certainly, it is not exceptional to order costs against a litigation funder who facilitates litigation for their own commercial gain. Indeed, this has become increasingly common."

The Funder's appeal against the above decision was unsuccessful (see Court House Capital Pty Ltd v RP Data Pty Limited [2023] FCAFC 192).

### Power and Discretion to Set Method of Calculating Adverse Costs

Courts in Australia have broad discretion with respect to costs, including as to the method of calculating the costs amount to be awarded. For example, in New South Wales, section 98 of the Civil Procedure Act 2005 (NSW) (see also Part 42, Division 1 of Uniform Civil Procedure Rules 2005 (NSW) ("UCPR")) confirms that the Court "may order that costs are to be awarded on the ordinary basis or an indemnity basis" (Sub-section 98(1)(c)) and also that a party may be entitled to "a specified gross sum instead of assessed costs" (sub-section 98(4)(c)). In the Federal Court, Section 43 of the Federal Court of Australia Act 1976 (Cth) (see also Part 40 of the Federal Court Rules 2011(Cth)) confirm that the Court may award "costs in a specified sum" (Sub-section 43(3)(d)) and also that it may "order that costs awarded against a party are to be assessed on an indemnity basis or otherwise" (Sub-section 43(3)(g)).

### Common Method of Calculating Adverse Costs

Despite the breadth of the Courts' power and discretion, in Australia it is most common for costs to be awarded on an "ordinary" or a "party

and party" basis. For example, Rule 42.2 of the UCPR dictates that costs are to be assessed in this way "unless the court orders otherwise or these rules otherwise provide", and Rule 40.01 of the Federal Court Rules dictates that "if an order is made that a party or person pay costs or be paid costs, without any further description of the costs, the costs are to be costs as between party and party".

Although procedures vary between courts and states, the award of costs on an "ordinary" or a "party and party" basis broadly means that the costs payable are to be those costs that have been "fairly and reasonably" incurred in the conduct of the litigation. In some Australian courts, the payable costs are further assessed in accordance with a "scale", being a fixed schedule of fees payable for identified tasks being conducted in the proceeding in the relevant court.

As a "rule of thumb", a recovery of costs on an "ordinary" or "party and party" basis would see a party recovering in the order of 50%-75% of their incurred legal costs (depending on the court and the type of matter being assessed).

## 2.2 New Security for Costs

### Power and Discretion to Order Security for Costs

Australian courts may make orders that a party give security for the payment of costs that may be awarded against them (see, for example, Rule 42.21 of Uniform Civil Procedure Rules 2005 (NSW) ("UCPR")), Section 56 of the Federal Court of Australia Act 1976 (Cth), Section 1335 of the Corporations Act 2001 (Cth)).

The discretion conferred on the court with respect to security is "a broad one, subject only to the limitation that it must be exercised judicially" (see Commissioner of Taxation v Vasiliades [2016] FCAFC 170). Therefore, "because the discretion to be exercised by the Court is a wide one which should remain unfettered, the circumstances in which the discretion should be exercised in favour of making the order cannot and should not be stated exhaustively" (see Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744).

Despite the above, court procedure and a line of authority do offer a guideline for the matters that a court will consider relevant in assessing an application for security. For example:

#### *In New South Wales*

Rule 42.21 of the UCPR describes a number of threshold circumstances for the granting of an application, including that:

- the plaintiff is ordinarily resident outside Australia;
- there is reason to believe that the plaintiff, being a corporation, will be unable to pay the costs of the defendant if ordered to do so;
- the plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so; and
- there is reason to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings.

If one or more of the described threshold factors is present, the rules outline a number of other matters that a court may have regard to in determining whether a security for costs order is appropriate, including:

- the prospects of success or merits of the proceedings;

- whether the plaintiff's impecuniosity is attributable to the defendant's conduct;
- whether an order for security for costs would stifle the proceedings;
- the costs of the proceedings;
- the timing of the application for security for costs; and
- whether an order for costs made against the plaintiff would be enforceable within Australia.

### *In the Federal Court*

The evidence to be presented in support of an application for security must cover the following (see Rule 19.01 of the Federal Court Rules 2011(Cth)):

- whether there is reason to believe that the applicant will be unable to pay the respondent's costs if so ordered;
- whether the applicant is ordinarily resident outside Australia;
- whether the applicant is suing for someone else's benefit; and
- whether the applicant is impecunious.

Decisions addressing the court's discretion have provided further guidance as to the factors that may be considered. For example, in KP Cable Investments Pty Ltd v Meltglow Pty Ltd (1995) 56 FCR 189, the court noted that "[n]otwithstanding the broad unfettered discretion with which the Court approaches an application for security for costs, there are a number of well-established guidelines which the court typically takes into account in determining any such application" and summarised these factors as follows:

- whether a security for costs application has been brought promptly;
- the strength and bona fides of the applicant's case;
- whether the applicant's impecuniosity was caused by the respondent's conduct that is the subject of the claim;
- whether the respondent's application for security is oppressive, in the sense that it is being used merely to deny an impecunious applicant a right to litigate;
- whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security;
- whether the persons standing behind the company have ordered any personal undertaking to be liable for the costs and, if so, the form of any such undertaking; and
- whether the party against whom security is sought is, in substance, a plaintiff, rather than a party that is defending themselves and is thus forced to litigate.

In summary, when considering an application for security, the court will assess "all of the relevant facts, matters and circumstances" and will seek to "achieve a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings" (see Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744).

## Security for Costs in Funded Claims

The existence of a litigation funding arrangement is relevant to the court's consideration of a security application, and is commonly a factor that weighs in favour of security being granted (see, for example, Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744). However, most reputable funders anticipate, and are prepared to meet, security for costs orders in their funded claims and, in fact, may offer a number of different options for the form that this security may

take (eg, cash, bank guarantee, deed of indemnity from the funder and/or from an After-the-Event insurance provider).

### 2.3 Insurance

#### Use of After-the-event insurance in Australia

After-the-event insurance (ATE) has been available in Australia for some time, and its use as a risk mitigation tool is becoming more common.

The prevalence of ATE products is particularly apparent in class actions and in other claims funded by third-party litigation funders. However, ATE is not yet widely used by claimants in other disputes.

The ATE market in Australia is relatively small, with only a handful of available providers, most of which are UK-based. Nevertheless, the market is developing and growing in sophistication, including in its pricing and product offerings.

As the Australian ATE market matures, competition may continue to put downward pressure on pricing, which may well see an increase in the use of ATE products in a broader range of Australian disputes.

## 3. Lawyer Ethics

### 3.1 Alternative Fee Structures

#### General

In Australia, like in many other jurisdictions, time-based billing has been the dominant form of fee arrangement. This involves charging the client by reference to the time taken to complete the work required, multiplied by each lawyer's hourly rate. There are, however, a number of alternatives or variations to time-based billing including:

- fixed fee or flat fee;
- capped fee;
- retainer or subscription fees;
- conditional fees;
- success fee; or
- contingency fees.

#### Alternative Fee Structures

##### *Fixed fee or flat fee*

Under a fixed fee arrangement, the lawyer and their client agree on a predetermined, fixed amount for the entire legal matter or a specific stage of the case. Although this structure provides the client with a degree of cost certainty, it is not always appropriate where the scope of the matter is not predictable, for example litigation.

##### *Capped fee*

Similar to a fixed fee, a capped fee arrangement is where the lawyer and their client agree on an hourly rate but set a maximum limit or cap on the total fees payable for the entire matter. Under this structure, a time-based billing system can be used but the client will have a degree of control over costs. This arrangement is also most suited to matters where the scope is easily identifiable.

##### *Retainer or subscription fees*

Under this structure, the client pays a regular monthly or annual predetermined fee to retain legal services for specified matters. These arrangements are generally suitable for a client who requires ongoing legal support. This arrangement is not suited to litigation and works best when the lawyer and client establish (with as much accuracy as possible), the likely value of the work to be provided.

##### *Conditional fees*

In general, Australian legislation prohibits lawyers from entering into any arrangement to receive a share of the proceeds of litigation, although there is an exception in Victoria where

group costs orders (GCOs) are allowed (see **2.6 Contingency Fees**). Conditional fee agreements or a "no win no fee" agreement is however permitted.

The legal profession legislation in each Australian jurisdiction allows solicitors to enter into conditional costs agreements which generally provide for an "uplift" or "success" fee or a "premium". Under these arrangements, if there is a successful outcome in the litigation, the lawyer can take their usual fee plus an agreed amount or percentage of their usual fee. Under the legal profession legislation, uplift fees must not exceed 25% (excluding disbursements) of the legal fees otherwise payable.

In addition, conditional costs agreements are subject to additional disclosure requirements including:

- the law firm's usual fees or legal costs;
- an estimate of the uplift fee or if that is not reasonably practicable, a range of estimates of the uplift fee;
- the basis of calculation for the uplift fee; and
- an explanation of the major variables that may affect the calculation of the uplift fee.

Depending on the terms of the conditional fee agreement, if the legal action is not successful, the client may only be responsible for payment of disbursements but may have to pay the costs of the other party or parties to the proceedings.

Although historically, conditional billing has been previously associated only with personal injury litigation, it can be used in all types of monetary and non-monetary claims in other forms of litigation. In some jurisdictions, such as New South Wales, lawyers cannot charge on a "no win, no fee" basis in criminal or family law cases.

### *Success fees*

This is similar to a conditional fee arrangement and is where a lawyer and client define a specific outcome that will trigger the payment of the lawyer's fee, which was initially withheld pending the outcome being achieved. This may also involve the payment of an additional fee upon the successful realisation of the specified outcome. Unlike a percentage-based fee tied to the underlying claim, the payment is linked to fees already paid or to a prearranged sum determined by an agreed-upon formula. Consequently, it resembles a conditional fee but offers greater flexibility, enabling a portion of the fee to be earned as the legal matter progresses, and the reward for success can be structured in various ways. This arrangement allows the lawyer to share the risk with the client and creates an incentive for the lawyer to attain the defined outcome.

A combination of conditional fees and a success fee is commonly used in funded litigation. In some cases, third-party funders may agree to pay a portion, say 75% of the lawyer's fees as they fall due but the remaining 25% is carried by the law firm and only becomes payable if there is a "recovery" through settlement or a judgment. A success fee is then also payable where this recovery is achieved. Such success fee is usually calculated as an uplift of 25% on the portion of fees that were carried by the law firm during the course of the litigation.

### *Contingency fees*

Contingency fee agreements are a type of speculative or "no win, no fee" costs agreement that remain prohibited in Australia. Unlike conditional costs agreement with an uplift, legal costs are determined by reference to the value of the settlement or damages awarded. The reason for the prohibition is the concern that allowing lawyers to have a direct financial stake in a matter in

which they act could undermine the lawyers' professional and ethical responsibilities.

Following a consideration of these concerns, the Victorian Law Reform Commission's Report Access to Justice – Litigation Funding and Group Proceedings published in March 2018 (Report) considered removing the prohibition on law practices charging contingency fees in class action proceedings and recommended the amendment of legislation to empower the Supreme Court of Victoria to make GCOs.

Following the Report, the Victorian State Parliament enacted legislation to insert a new Section 33ZDA into the Supreme Court Act 1986 (Vic) (Legislation). Section 33ZDA took effect from 1 July 2020 and introduced Australia's first contingency fee, the GCO. Section 33ZDA provides that, on application by a plaintiff in a class action, the court may make a GCO that allows the legal costs to be calculated as a percentage of an award or settlement and for those costs to be shared between the plaintiff and all group members. The GCO will also specify the percentage of the litigation proceeds to which lawyers will be entitled.

In considering whether to make a GCO, the Victorian Supreme Court (the "Court") needs to be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding and the Court is required to exercise additional supervisory jurisdiction over those bringing and funding the actions.

The Legislation provides that if a GCO is made and the class action is unsuccessful, the plaintiff's law firm is liable to pay any costs of the proceeding awarded to the defendant. The legislation also allows the Court to order that the plaintiff's law firm give security for the defendant's costs on behalf of the plaintiff. The ability of the plaintiff's law firm to meet these extra requirements has been a factor taken into account by the Court when deciding whether to make a GCO.

To date, the Court has approved GCO rates ranging from 14% (DA Lynch Pty Limited v The Star Entertainment Group Ltd) to 40% (Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201).

While the contingency fee introduced is limited to just one state and one form of proceeding, the Federal Court of Australia has provided judicial support for the idea that the Federal Court's power extends to the making of "solicitors' CFO". This is an order that the lead plaintiff's solicitors receive a portion of any settlement proceedings in return for taking on the financial risks of the action. Although there has yet to be an order of this kind made, the separate judgments of Justices Beach and Lee suggest that the Court's power may extend to settlement common fund orders in favour of not just third-party funders, but of solicitors as well (Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited [2019] FCAFC 107.

In a judgment on a carriage motion in Greentree v Jaguar Land Rover Australia Pty Ltd (Carriage Application) [2023] FCA 1209, Justice Lee repeated his view that contingency fees could be ordered as part of a common fund order for the following reasons:

- it would not breach the prohibition on contingency fees because it would not involve a contractual arrangement to pay them; and
- if there is power to make a common fund order in favour of a litigation funder, then there is power to make one in favour of a solicitor

because the basis of the power under Section 33V of the Federal Court of Australia Act does not depend on the existence of a commercial litigation funder.

In addition to the above cases, Justice Lee has most recently referred the question of solicitors' CFOs to the Full Federal Court in R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Reserved Question) [2023] FCA 1499. The question posed by Justice Lee is formulated as follows:

- Is it a licit exercise of power, pursuant to statutory powers conferred within Pt IVA of the Federal Court of Australia Act 1976 (Cth), or otherwise, for the Court, upon the settlement or judgment of a representative proceeding, to make an order (being a "common fund order", as that term is defined in Davaria Pty Ltd v 7-Eleven Stores Pty Ltd [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22]–[30]) which would provide for the distribution of funds or other property to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding?

It is anticipated that a decision from the Full Federal Court will be handed down in the second half of 2024. This is an evolving area and the decision of the Full Federal Court could significantly expand the availability of contingency fee arrangements from the presently exclusive jurisdiction of the Supreme Court of Victoria to the Federal jurisdiction for class actions.

## 3.2 Fee Sharing

There are no rules on fee sharing or splitting of fees in Australia – that is, the sharing of fees between lawyers and third-party funders. This is illustrated in the granting of a GCO in Bogan v The Estate of Peter John Smedley (Deceased) [2022] VSC 201 (see **2.6 Contingency Fees**). In that case, prior to the plaintiffs' GCO application, the proceeding was funded by third-party litigation funding. The plaintiffs submitted that given the complex and expensive nature of the case, the funder would not continue funding on the existing arrangement but would agree to co-funding with the plaintiffs' solicitors if a GCO was obtained at a rate of 40%. Co-funding would involve the plaintiff law practice and the litigation funder entering a costs sharing agreement where the law practice would pay 50% of any payment it received pursuant to the GCO (after certain deductions) to the litigation funder. His Honour rejected any suggestion that the contemplated arrangement was one where the law practice was acting as a "mere front" for a third-party funder, and held at [101]:

"The statutory language does not invoke any inquiry into the means by which the law practice chooses to fund its obligations. A GCO would result in the Funder having no direct agreement with the plaintiffs and group members and [the law practice] would be liable for the costs of the proceeding. Whatever further funding arrangement Banton Group enters into does not change the fundamental inquiry for the court."

## 3.3 Equity Ownership

Australian law firms can have non-lawyer owners and shareholders. Traditionally in Australia, law firms have been structured as sole practices or partnerships with all the "owners" of the law firm holding practising certificates. Under the Legal Profession Uniform Laws in each state and territory across Australia, incorporated legal practices (ILP) are permitted. In an ILP, unlike a partnership, non-lawyers can hold unlimited equity and share fees with lawyers.

A lawyer seeking to establish an ILP must additionally comply with the requirements set out in the respective State and Territory legal profession legislation. A lawyer seeking to establish an ILP must give notice to the relevant law society that they intend to engage in legal practice as an ILP. Upon such notice, at least one lawyer in the ILP must be appointed to be responsible for the management of the legal services provided by the ILP. That person, referred to as an "authorised principal", is authorised by his or her practising certificate to supervise others.

There are also no restrictions on ILPs taking steps to list on the Australian Stock Exchange. The following law firms are presently listed on the ASX:

- Slater & Gordon Limited (ASX:SGH);
- Shine Justice Limited (which owns Shine Lawyers) (ASX:SHJ);
- AF Legal Group Limited (ASX:AFL);
- IPH Limited (ASX:IPH); and
- Quantum Intellectual Property Limited (ASX:QIP).

## 4. Taxes

### 4.1 Taxes on Legal Fees

#### GST on Legal Fees

In Australia, the supply of legal services is a supply on which goods and services tax (GST) is paid. This means that lawyers are required to charge GST on their fees unless the services are specifically exempt. The client is therefore required to pay an additional 10% on top of the legal fees.

While legal services are generally taxable, certain services may be exempt from GST. For example, certain pro bono services or services provided by community legal services may be exempt and legal aid services that are government-funded legal assistance programmes are also usually exempt from GST. Generally, disbursements that fall within the definition of "taxable supply" and are paid by the law practice on behalf of the client are subject to the same GST rules; however, some payments have been exempted from the application of GST, such as court filing fees.

In addition, if the client is based outside of Australia, a supply of a service outside of Australia can be GST-free if the effective use or enjoyment of the service takes place outside Australia. There are exceptions to this rule, and legal service providers should seek specific tax advice relevant to their own circumstances.

#### GST on an Input Tax Credit

A client of a legal firm can claim a credit for any GST paid in respect of legal fees if:

- they have an ABN and are registered for GST;
- the supplier of the service is registered for GST;
- they intend to use the service solely or partly for their business; and
- they have a tax invoice from the supplier of the service.

In circumstances where there is third-party funding of a claim, the law firm supplier generally continues to invoice the client directly and it is the client, not the funder, who receives the benefit of the service and is therefore able to claim the input tax. This is the case even though the funder is paying the invoices on behalf of the client.

### 4.2 Withholding on Payments to Offshore Jurisdictions

We are unaware that withholding tax would apply in these circumstances but note that individual funders should seek specific tax advice relevant to their own circumstances.

# Trends and Developments

**Contributed by:**
Susanna Taylor
**Litigation Capital Management**

**Litigation Capital Management** is a leading international provider of dispute finance solutions. LCM provides funding across multiple jurisdictions and sectors. LCM lends its financial support to litigants seeking single-case financing and portfolio funding, and in relation to class actions, commercial claims, international arbitration and claims arising out of insolvency. LCM has an unparalleled track record, driven by effective project selection, active project management and robust risk management. Its capability stems from being a pioneer of the industry with more than 25 years of disputes finance experience. Headquartered in Sydney, with offices in London, Singapore, Brisbane and Melbourne, LCM is listed on AIM (at the London Stock Exchange), trading under the ticker LIT. LCM was ranked in Band 1 in the 2023 Australia Litigation Funding guide by Chambers and Partners.

## Author

**Susanna Taylor** is head of investments, APAC, at LCM. Susanna has been in the litigation funding industry since 2014 and is at the forefront of the changing face of regulation of litigation funding in Australia, giving evidence to the Parliamentary Inquiry into Litigation Funding and Class Actions in 2020 and, in 2022, being involved in the full court decision in LCM Funding v Stanwell, which reversed the position requiring funded class actions to be registered as managed investment schemes. Susanna's Chambers profile describes her as "one of the top operators in the industry", and as "an extremely impressive litigation funder with a strong ability to cut to the commercial reality of claims".

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### Class Actions: Common Fund Orders Moving Towards Certainty at Last?

Common fund orders or CFOs have been part of the Australian class actions landscape since 2016. The first CFO in a class action was made by the Full Court of the Federal Court on 26 October 2016 in the QBE class action (Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148). A common fund order is an order made in a class action proceeding that both the costs to be reimbursed to a funder and the funding commission payable to that funder be borne equally by all group members regardless of whether such group members have signed a litigation funding agreement.

#### *First CFO made in 2016*

The CFO that was initially made in the QBE class action was what has become known as an "interim common fund order". It was an order made at an early stage of the class action with the effect that if the class action was to produce a successful outcome for group members, those group members would be required to pay a funding commission to the funder (the "Interim CFO"). The amount of that funding commission was not specified in the Interim CFO, but only in a later judgment approving the settlement of the class action, where it was ordered that 23.2% of the gross settlement sum be paid to the funder in the form of a common fund order. This type of order – made after the resolution of a claim and pursuant to Section 33V(2) of the Federal Court of Australia Act 1976 (Cth) (the "FCA Act") – has become known as a "settlement common fund order" ("Settlement CFO").

#### *Interim CFOs: advantages*

There are a number of advantages of an Interim CFO (ie, a CFO made at an early stage of the proceedings).

Generally, an Interim CFO will indicate a maximum commission for the funder. This means an Interim CFO can assist group members in making an informed decision as to whether to participate in the class or opt out knowing the amount of the commission they are likely to pay to a funder.

Further, an Interim CFO gives certainty to a funder that if the class action is successful, all group members will be required to contribute to a funding commission. This certainty avoids the need to "book build" by requiring group members to each individually sign litigation funding

agreements. Book building is an expensive and uncertain exercise, and is arguably contrary to the "opt-out" regime for class actions enshrined by the FCA Act. It leads to closed class actions where there is a risk of concurrent or follow-on class actions rather than one open class proceeding which deals finally with the issues common to the group members. Further, there are some types of class actions where it will be very expensive and difficult to book build to a viable commercial level as the number of group members is large and the amount of compensation for individual group members is low (eg, class actions for overpayment of bank or superannuation fees).

An Interim CFO also gives the court flexibility in relation to setting a funding commission. As the order is an interim one, there is always the ability to alter the amount of the funding commission upon a settlement approval application. This flexibility ensures fair outcomes for group members and is a demonstration of the court exercising its supervisory jurisdiction. If a CFO is not able to be made by the court, the court would be compelled to apply the contractual funding commission and spread that commission equally across group members (a "funding equalisation order"). A funding equalisation order offers less flexibility to the court in setting a funding commission that is in the best interests of group members.

### *Development of CFO jurisprudence*

The jurisprudential journey with respect to common fund orders has not been a smooth one but rather one with many twists and turns. These twists and turns can be attributed to:

- firstly, applications made by defendants seeking to oppose Interim CFOs presumably with the objective that if the Interim CFO is disallowed, a funder will have less commercial comfort in funding the claim and may cease to fund the class action; and
- secondly, discomfort expressed by some members of the judiciary in exercising judicial power to require group members to pay a funding commission to a litigation funder in the absence of any contractual obligation of that group member to do so.

In the period from 2016 to late 2019 following the QBE class action, both Interim and Settlement CFOs were made in a number of class actions both in the Federal Court and a number of the state supreme courts (see Post-Money Max Settlements in Funded Part IVA Proceedings by Professor Vince Morabito 17 December 2020). It seemed that a jurisprudence was developing where the courts were prepared to make Interim CFOs which framed the likely commission for group members determining whether to opt out or stay in the class action (although the amount of this commission could always be altered upon a settlement approval application). An example of this is Pearson v State of Queensland [2017] FCA 1096. Based on this jurisprudence, litigation funders began funding more class actions on an "open basis" and without undertaking any book build; funders began to have comfort that a book build was unnecessary as the court would be likely to make an Interim CFO.

### *Challenges to interim CFOs*

In 2019, however, challenges were brought by defendants to the ability of the court to make an Interim CFO in the Federal Court in Lenthall v Westpac Life Insurance Services Limited and in the Supreme Court of NSW in Brewster v BMW Australia Ltd. Following a joint sitting of the Full Federal Court of Australia (in Lenthall) and the NSW Court of Appeal (in Brewster), both courts found that there was sufficient power for the court

to make an Interim CFO using the general case management power to make orders appropriate or necessary to ensure that justice is done in the proceedings. However, these decisions were overturned by the High Court in the landmark decision of BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45 (BMW v Brewster) handed down in December 2019, in which the High Court held that neither Section 33ZF of the FCA Act nor Section 183 of the Civil Procedure Act 2005 (NSW) empowers a court to make an Interim CFO.

### *Impact of BMW v Brewster*

At the time it was delivered, the decision of BMW v Brewster was considered to be seismic. Much like the recent reactions to the decision of the UK Supreme Court in 2023 in R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023], UKSC 28 commentary was awash with dire predictions of the end of funded class actions in Australia. In reality, the decision has had much less of an impact than was anticipated by some commentators.

The impact of the BMW v Brewster decision has ultimately been limited partly due to the fact that in that decision, what was considered to be beyond power was an interim CFO. The High Court did not directly consider the question of power to make a Settlement CFO as this question was not before it. As such, this question, being the more important one for the future of funded class actions, has been considered by the lower courts in the aftermath of BMW v Brewster.

On 20 December 2019, the Federal Court issued a new class actions practice note (GPN-CA) providing that the Federal Court will still consider appropriate applications for orders sharing the costs of class actions at the conclusion of proceedings of this kind. This was a clear indication by the Federal Court that it was likely that its judges would continue to make Settlement CFOs following BMW v Brewster.

Indeed, since December 2019, both the Federal Court and the state supreme courts of NSW and Victoria have made Settlement CFOs in a number of class actions with the issue of "power" being resolved by reference to Section 33V(1) and/or (2) of the FCA Act (eg, Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) [2020] FCA 1885; 385 ALR 625; Smith v Commonwealth of Australia (No 2) [2020] FCA 837; Haselhurst v Toyota Motor Corporation Australia Ltd [2022] NSWSC 1076).

In the words of Lee J in Davaria Pty Limited v 7-Eleven Stores Pty Ltd [2020] FCAFC 183, "an intermediate court of appeal is required to follow the seriously considered dicta of a majority of the High Court. And no dicta of a majority of judges can be identified in BMW v Brewster for the proposition that there is a want of power to make a Settlement CFO."

### *2023: A bump in the road to CFOs*

A hurdle to the use of Settlement CFOs appeared in February 2023 when Justice O'Callaghan in Davaria Pty Ltd v 7-Eleven stores Pty Ltd (No 13) [2023] FCA 84 agreed with the position put by Foster J in Cantor v Audi Australia Pty Ltd (No 5) [2020] FCA 637 that the effect of BMW v Brewster was that the court did not have power to make a common fund order either as an Interim CFO or in the context of a settlement approval.

The decision of O'Callaghan in Davaria v 7-Eleven caused considerable ripples in the funded class actions space in Australia. The effect of O'Callaghan J's judgment was that a funder

could provide all of the funding for a case and that case could succeed but that the court had no power to make a Settlement CFO. As such, a funder's commission would be limited by the number of persons who had signed funding agreements.

This decision, if applied, would make many existing and prospective class actions unviable from a litigation funding perspective. The decision was also contrary to a number of other decisions handed down post BMW v Brewster where the court had resolved the issue of "power" by distinguishing the High Court decision which dealt only with Interim CFOs.

### *Clarity from the Full Federal Court*

The uncertainty following Davaria v 7- Eleven has been clarified by the decision of the Full Court of the Federal Court of Australia in Elliott-Carde v McDonald's Australia Limited [2023] FCAFC 162 in which the Court unanimously confirmed that it has the power under Section 33V(2) of the FCA Act to make orders for settlement common funds orders. The Federal Court noted the wide judicial discretion conferred by Section 33V(2), finding that "none of the terms used in Section 33V(2) would, as a matter of natural meaning, be read as precluding a settlement CFO."

The appointed contradictor had argued that for a court to set a funding commission by way of a Settlement CFO was outside of the scope of judicial power but the Federal Court rejected this submission, finding that the making of a settlement CFO was simply the exercise of a discretionary power and that courts commonly "set rates of return of interest, calculate economic loss, and fix the remuneration of executors, trustees, liquidators and salvors, which tasks can involve commercial assessments and considerations of risk".

### *The current position*

The position in relation to CFOs would now appear to be somewhat settled in Australian class actions, being that:

- there is no power for the court to make an Interim CFO; and
- there is clear power for the court to make a Settlement CFO.

The inability to obtain an Interim CFO means that group members are required to make their decision as to whether to opt out from a class action without the benefit of an estimate of what proportion of any settlement sum they may be required to pay to a funder.

This uncertainty also exists for litigation funders who currently make their investment decisions for Australian class actions in the absence of knowledge as to what the likely return for their investment may be. This position may be contrasted with the position relating to GCOs made in the Supreme Court of Victoria where orders can be made at an early stage of a class action allowing a plaintiff law firm to charge its fees as a percentage of the amount recovered rather than on a time or scale fee basis. This disparity could be relieved by legislative intervention expressly giving courts the power to make Interim CFOs.

In the meantime, the courts are working to plug this legislative gap. Although constrained by the inability to make Interim CFOs, the decisions granting Settlement CFOs are moving towards a greater degree of consistency and certainty. In the decision approving the settlement reached in Haswell v Commonwealth of Australia (No 3) [2023] FCA 1093, Lee J made a Settlement CFO of 25%, referring to the Settlement CFO of 25% made in three earlier PFAS class actions and noting that "[t]o take such an approach in this

proceeding has the virtue of consistency with the way in which the other, similar class actions have been resolved."

Such a consistent approach should be welcomed both by litigation funders and by group members to class actions as it promotes certainty to litigation funders making investment decisions and to group members making decisions about their involvement in a class action.

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