



# Litigation Funding in Australia

Presented by Matthew Curll

+61 2 9265 3245  
matthew.curll@mct-syd.com.au

Lloyds of London Library  
Tuesday 7 April 2009

McCabe Terrill Lawyers Pty Limited  
ACN 238 282 667  
520 Collins Street (Level 14)  
Melbourne VIC 3000  
T +61 3 9629 3700  
F +61 3 9626 3734  
W [www.mccabeterill.com.au](http://www.mccabeterill.com.au)

McCabe Terrill Lawyers Pty Limited  
ACN 122 850 033  
130 Elizabeth Street (Level 14)  
Sydney NSW 2000  
T +61 2 9261 1211  
F +61 2 9261 2336  
W [www.mccabeterill.com.au](http://www.mccabeterill.com.au)

# Table of Contents

---

<b>1.</b>	<b>History</b>	<b>3</b>
<b>2.</b>	<b>Practicalities</b>	<b>3</b>
<b>3.</b>	<b>“Access to Justice” justifications – class action context</b>	<b>4</b>
<b>4.</b>	<b>Monitoring the “Access to Justice” mandate</b>	<b>4</b>
<b>5.</b>	<b>Similarities between litigation funders and insurers</b>	<b>5</b>
<b>6.</b>	<b>Litigation funders obtaining insurance</b>	<b>5</b>
<b>7.</b>	<b>Litigation funders funding the insurers?</b>	<b>6</b>
<b>8.</b>	<b>Other aspects relating to litigated funders</b>	<b>6</b>
<b>9.</b>	<b>Reform and disclosure affecting both litigation funders and insurers alike</b>	<b>6</b>

# Litigation Funding

## 1. History

Historically, Australian courts have held that third party litigation funding was impermissible on the basis of maintenance (being support of litigation) or champerty (support of litigation for a share of potential profits by settlement of judgment).

Insurers, the largest “*litigation funding*” sector in recovery actions, were never considered to be involved in maintenance and champerty.

Litigation funding emanated from the insolvency market whereby external controllers and trustees in bankruptcy used funding in order to fulfil their obligations to recover from directors or associated parties generally for insolvent trading (usually pursued by a Trade Practices or ASIC claim).

This insolvency litigation was considered an exception to the maintenance and champerty rules as the courts would not prohibit that which was permitted.

*Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] HCA 41 is the High Court’s first decision which permitted litigation funding in a case where it was previously not permitted. In essence it decided that:

- (a) there is no longer a public policy against litigation funding;
- (b) a funder’s control of proceedings will not, by merely being the funder, amount to an abuse of process; and
- (c) champerty and maintenance are no longer considered tortious acts.

The main effects of *Fostif’s* case are:

- (a) funded proceedings will no longer be subject to abuse of process claims; and
- (b) funder involvement in the Australian legal system will increase.

The High Court in *Fostif’s* case detailed how such an arrangement can in fact allow ordinarily impecunious claimants “*access to justice*”.

In essence it is evidence that litigation funding is here to stay!

## 2. Practicalities

For the funding circumstances to arise it is necessary for a funding company, as a commercial entity, to enter into contractual agreements with one or more potential claimant as litigants.

The funder is then responsible to pay the costs of litigation and the burdensome risk involved in litigation; this can and does include the payment of adverse cost orders and applications for security for costs.

In return for the above responsibilities litigation funders in practice take control of all the real decision making in the litigation.

They generally do this through what I consider is a bit of a clever trick. As stated litigation funding agreements will provide that litigation funders are responsible for both

defence costs and adverse cost exposure. However, they reserve the right to terminate funding.. If they were to do so then the claimant parties become responsible for all costs going forward.

Therefore, in practice if an offer is there to accept or reject claimants have a pretty good incentive to go along with the funders' wishes.

In return for the financial support and weight of risk, the funder obviously benefits from a positive settlement or judgment in favour of the plaintiff, by way of a share of the proceeds (usually after reimbursement of legal costs). The share is agreed between funder and litigant as part of the funding agreement and can range from one to two thirds and in some insolvency contexts have been known to reach 75%.

### **3. “Access to Justice” justifications – class action context**

Litigation funding ensures access to justice for merit worthy claims which would otherwise have been abandoned for an array of reasons. This is particularly the case in the class action context, where the expense is too great when weighed against any one claimant.

In serving justice, litigation funding also provides a level playing field for impecunious litigants when facing a wealthy defendant or well funded (insured) opponent.

In *Jameson v Professional Investment Services Pty Ltd* [2009] NSWCA 28 the Court of Appeal handed down a decision on 25 February 2009 defeating the defendant's attempt to split up and destroy the class action.

In the course of his decision Justice Spigelman noted the amounts invested ranged from \$50,000 to \$550,000 with 38 investors claiming \$130,000 or less. Justice Spigelman said:

*“... On these figures the majority of the proposed group members would, in my opinion, find great difficulty in justifying the risks of separate litigation”.*

That is, that Courts will be motivated to keep the class intact so that the litigation funder will be more tempted to be involved.

### **4. Monitoring the “Access to Justice” mandate**

Recently, questions have been asked in relation to litigation funding agreements involving liquidators and a potential need to have such agreements screened by the courts.

These questions arose in *Hall v Poolman* [2007] NSWSC 1330. The collapse of a financial group allowed the liquidators to pursue possible claims against former directors and the Australian Tax Office. The liquidator was without funds. A litigation funder and funding agreement were arranged to commence such proceedings.

The amounts sought totalled approximately \$9.6 million (whilst unpaid creditors totalled approximately \$130 million).

The litigation, although successful came at a huge cost. In the end there was proposed to be only an estimated return of only less than three cents in the dollar to creditors.

Justice Palmer who reviewed the proposed settlement commented:

*“... a mammoth piece of litigation can be instigated, perhaps to the ruin of the defendant, with negligible ‘access to justice’ for those who have suffered a wrong but with a lucrative reward for those who make a business of investing in law suits ...”*

In allowing the liquidator’s claim, Justice Palmer ordered an inquiry into the liquidators conduct with reference to the following:

- (a) was the liquidator aware, when entering into the funding agreement, that there was a substantial risk that the creditors would receive no, or very little dividend;
- (b) permitting costs to amount excessively; and
- (c) failing to obtain directions of the Court before proceeding.

According to Justice Palmer, liquidators, before entering into funding agreements with litigation funders, should approach the court for directions.

Justice Palmer expressed genuine concern at the extent, duration and cost of the litigation particular with the potential return to creditors being so minimal.

There is no statutory requirement that funding agreements be approved by the court prior to commencement of litigation. However, Justice Palmer advocates that liquidators should always obtain court approval of litigation funding agreements prior to the commencement of litigation.

This would ensure that the “*justice*” justifications are served whilst providing additional protection against subsequent claims against liquidators for breach of duty.

Similarly, under the Federal Court class action regime the court has authority under section 33N of the Federal Court Act to order that proceedings not continue as representative proceedings by application from a respondent or of the courts own motion if the court is satisfied that it is in the interest of justice to do so be for reasons such as costs would become excessive (33N(1)(a)); or the relief sought can be obtained by other means (33N(1)(b)).

## **5. Similarities between litigation funders and insurers**

Insurance against risk has enormous advantages to society. By the typical insurance contact, the insurer agrees to fund any litigation in relation to the risk and the insured agrees to give over complete control of the litigation to the insurer.

Insurance has been compared to litigation funding. For example, in *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139 it was stated:

*“... in terms of risk of abuse, there may be no difference between a litigation funder with an eye to maximising profits and an insurance company with an eye to minimising losses ...”*

## **6. Litigation funders obtaining insurance**

It is an irony for those outside the immediate insurance industry, although it is understandable, that on the one hand insurers are paying out class action claims yet on the other there is actually a live market for litigation funders obtaining insurance protection against adverse cost orders.

## 7. Litigation funders funding the insurers?

An equally intriguing question for the future is whether insurers will utilise litigation funding to fund large recovery actions in return for litigation funders obtaining a slice of the recovery pie. This would need to be managed where there is an insured and an uninsured component to the recovery.

## 8. Other aspects relating to litigated funders

IMF Australia Limited is a public company listed on the Australian Stock Exchange. As a public company it has continuous disclosure obligations.

If you go to IMF's website ([www.imf.com.au](http://www.imf.com.au)) you will see that IMF lists all the cases it has funded and the profit it has obtained from each case. Therefore, insurers are able to ascertain how much of their settlement payment has gone into the pockets of IMF.

Similarly IMF publish to a degree expected profit for existing cases. I have been informed recently by one insurer that the figures for a particular case can change from time to time. The insurer can track this information for their own purposes.

## 9. Reform and disclosure affecting both litigation funders and insurers alike

A recent report from the Law Reform Commission (**LRC**) refers directly to the issue of disclosure of funders and/or insurers.

The report states:

*“Given that our recommended overriding obligations extend to litigation funders who exercise any control or influence over the funded party in litigation, there is a need for disclosure of the existence of litigation funding arrangements.*

*Similarly, the proposed overriding obligations extend to insurers who exercise control or influence over the insured party in the course of the proceedings. Accordingly, there is a corresponding need for disclosure of the existence of insurance arrangements...”*

The report also made reference to the English authority *Harcourt v FEF Griffin* [2007] EWHC 1500 (QB) which held that disclosure of insurance details may be ordered where a claimant is able to demonstrate some real basis for suggesting that the disclosure is necessary.

Finally the LRC report recommended that:

- (a) the parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or funded party in the course of the proceedings; and
- (b) the court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.

Litigation funding companies are generally in support of this view.