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Litigation Funding Update

Australia – October 2022

This article forms part of our litigation funding series and provides an update on the status of the reforms proposed by the Australian government, discussed in our article on the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Bill).

Australian Litigation Funding Regulations Abandoned

The change in the Australian government brought welcome relief for litigation funders (and their investors), with the Bill and proposed reforms being abandoned. The new government implemented a shift and refocus on undoing some of the measures implemented by the previous government. Those measures include, in particular, the Bill and the Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (Regulations). The Regulations required litigation funders to:

- Hold an Australian financial services licence
- Have their claims registered as managed investment schemes

The Bill and Regulations had the potential to significantly impact the litigation funding industry and impact access to justice for plaintiffs. The new government has opted to abandon the Bill and leave the power and discretion to approve class action settlements with the courts. Our previous articles in this series have examined the increasing use of contradictors in court proceedings, in particular in class action settlements, and other elements of funding.

Funding Revisited

The Regulations were challenged in the Full Federal Court by LCM Funding, which ultimately resulted in the overturning of the court's own 2009 decision in *Brookfield Multiplex*.[1] The court ultimately determined that litigation funding agreements are not managed investment schemes for the purposes of the Corporations Act 2001 (Cth) (Act) and, therefore, not subject to the corresponding regulatory oversight.[2] Following the decision of *Brookfield Multiplex*, the government amended the Act to provide an exemption for litigation funders from the managed investment scheme regime.

The Regulations sought to reimpose the obligation on litigation funders to be registered as a managed investment scheme and, to subject funders to regulatory oversight and obligations under the Act. In addition, the Regulations imposed an obligation on litigation funders to hold an Australian financial services licence.

The court in *LCM Funding v. Stanwell* notably concluded, *inter alia*, that:

- A litigation funder is not able to comply with many provisions within the Act relevant to managed investment schemes, indicating that the intention of Parliament was not to apply those obligations or regulatory requirements to litigation funders[3]
- The decision in *Brookfield Multiplex* was "plainly wrong"[4]

[1] *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.
[2] *LCM Funding Pty Ltd v. Stanwell Corporation Limited* [20022] FCAFC 103 (*LMC Funding v. Stanwell*).
[3] Ibid, [162].
[4] Ibid, [2] and [6].

In considering the decision, the court commented on the regulations sought to be imposed to regulate the litigation funding industry, and noted that:

"Overwhelmingly, litigation resulting from such funding arrangements adopts the form of a class action. At all stages during the currency of such litigation, the court is required to adopt a close protective and supervisory role, to be alive to the interest of group members and to take steps to ensure that any class action is conducted in a way which best facilitates the just resolution of the disputes accordingly to law as quickly, inexpensive and efficiently as possible. Relatedly, the Court is also obliged to protect group members and manage the class action recognising the conflicts of interest, or conflicts of duties and interests, between and among representatives, group members, funders and solicitors can arise. When this is understood and appreciated, any criticism that litigation funding arrangements are 'unregulated' is put into proper context."[5]

As a result of the decision, the Regulations have come into conflict and require reform, during which litigation funders will operate in a transitional period.

Further Reforms

On 2 September 2022, the Corporations Amendment (Litigation Funding) Regulations 2022 (Draft Regulations) were issued for consultation and submissions until 30 September. The proposed reforms seek to reinstate measures to provide exemptions to litigation funders from managed investment scheme obligations under the Act, consistent with the *LCM Funding v. Stanwell* decision.

The basis of the Draft Regulations is to ensure that the regime under the Act for regulating litigation funding is fit for purpose.

Limiting the obligations of regulatory oversight on litigation funders will provide certainty, and encourage and facilitate litigation funders to participate more broadly in the legal market, thereby facilitating greater access to justice. In contrast, the Regulations imposed greater regulatory oversight over litigation funders and increased costs, while the Bill ostensibly sought to impose a statutory mechanism to protect the interests of group members of class actions and ensure a just and equitable outcome to group members.

As was observed by his Honour Justice Lee in *LCM Funding v. Stanwell,* the court adopts a close protective and supervisory role, and is obligated to protect group members in litigation funded proceedings, particularly class actions. With the Bill being scrapped, the role of the court and contradictors to supervise proceedings will be pivotal to ensuring that just and equitable outcomes to group members are to be achieved.

Unfortunately, although the current government is seeking to expedite its reforms, the reality is that if and when the government changes, it is likely that the laws regulating litigation funding will also change. As such, the current reforms might ultimately be short-lived but, nonetheless, welcome in the litigation funding industry.

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[5] Ibid, [22].