A COMPARATIVE ANALYSIS OF LITIGATION FUNDING IN INSOLVENCY CLAIMS AND IN CLASS ACTIONS: ONE COIN, TWO SIDES?

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There is an extensive literature on third party litigation funding ('TPLF') of class actions and a separate literature on the longer-standing use of TPLF in claims by insolvency administrators such as liquidators and bankruptcy trustees. Despite this, there has been little comparative study of TPLF in the two species of litigation. This article seeks to fill that gap and, in so doing, draw some distinctions impacting the issue of appropriate regulation in the two contexts. These include salient differences between repeat playing Australian Securities and Investments Commission-regulated professional insolvency practitioners governed under corporate and personal insolvency regulatory architecture and less experienced, less regulated representative plaintiffs in class actions. Further, the existence of vulnerable class members as silent 'parties' to class action litigation and funding arrangements and the effect of settlement processes affecting non-responsive class members is noted. These are found to raise differences, despite both types of litigation benefitting from substantial court supervision.

I INTRODUCTION

Third party litigation funding ('TPLF') has proven to be a useful mechanism in a variety of contexts to enable the pursuit of recoveries and claims that would not otherwise have been possible due to a lack of funding. In Australia, use of this mechanism developed initially in the context of insolvency proceedings on the basis of an 'insolvency exception' to the common law doctrines against champerty and maintenance that would usually apply to prevent funding of litigation by an outsider.[1] Because of this exception, TPLF enables a liquidator to institute recovery proceedings which may not have been feasible otherwise due to lack of funds in the insolvent estate. In general, there has been fairly scant regulatory attention paid

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1 See below Part III(A).

to this involvement of commercial funders in insolvency proceedings, perhaps partly due to the quasi-regulatory functions of liquidators under the supervision of the courts in this context.[2]

The use of TPLF has subsequently spilled over into the growing class action context,[3] resulting in a marked increase in regulatory interest and activity in this area. Regulatory attempts to date appear to have shown a clear emphasis on issues arising from the use of TPLF in the class action context, rather than in the insolvency context.[4] This is perhaps not surprising, given that some policy concerns and practical issues in relation to the use of TPLF may manifest themselves differently in the class action context, compared to the insolvency context.

In spite of some recognition of this distinction in regulatory attempts,[5] and significant academic commentary on the topic of litigation funding, contributions seem to focus separately on either of funded insolvency proceedings,[6] or funded class action proceedings but not on both.[7] This might be seen as a notable gap in the literature as it does not appear that a comprehensive comparative analysis of the differences between TPLF in the two critically important areas of insolvency litigation and class action litigation has yet been undertaken in the Australian context.

This article aims to make a contribution in that regard and provides an initial analysis of key points of distinction when comparing the use of TPLF in the class action context and in the insolvency context, both in respect of policy considerations and procedural and practical concerns. It is submitted that it is critical that these differences are given consideration should any further attempts again be made at regulation of litigation funding – an industry which still remains largely unregulated in Australia.

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2 See below Part V(C).

3 See below Part III(B).

4 See, eg, Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Final Report, March 2018); Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018) ('*Litigation Funding Inquiry*'); Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) ('*PJCCFS Report 2020*'); Parliamentary Joint Committee on Corporations and Financial Services, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (Report, November 2021). The Bill has since lapsed.

5 See Sulette Lombard and Christopher F Symes, 'Insolvent Litigation Funding and New Regulatory Measures: A Missed Opportunity or Blessing in Disguise?' (2022) 37(2) *Australian Journal of Corporate Law* 185 ('Regulatory Measures') for a more detailed discussion.

6 Sulette Lombard and Christopher F Symes, 'Judicial Guidelines for Insolvent Litigation Funding Agreements' (2020) 28(4) *Insolvency Law Journal* 165 ('Judicial Guidelines'); Lombard and Symes, 'Regulatory Measures' (n 5). See also INSOL International, 'A Cross-jurisdictional Comparison of the Use of Commercial Litigation Funding in Insolvency in Selected Jurisdictions' (Academic Paper, November 2022) ('Cross-jurisdictional Comparison') for a comprehensive comparative study regarding the use of commercial litigation funding in insolvency proceedings.

7 See, eg, Vicki Waye and Vince Morabito, 'Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions' in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2016) 155; Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244. See also *Litigation Funding Inquiry* (n 4); *PJCCFS Report 2020* (n 4).

II WHAT IS THIRD PARTY LITIGATION FUNDING?

TPLF typically involves a commercial funder meeting the legal costs and disbursements of a litigant (usually a claimant) in return for receiving a fixed percentage of any damages recovered by the litigant in a legal proceeding.[8] Though there is currently no compulsion to do so, litigation funders will also usually provide an indemnity to defendants to cover the risk of adverse costs orders (ie, where the court orders the funded party to pay another party's legal costs) in the event that the proceeding is unsuccessful. This will also cover orders made by the court in advance for provision of security for such potential adverse costs (known as 'security for costs' orders).[9]

Litigation funders do not act for the claimant as its legal representative so that lawyers will generally be arranged to act for the claimant in the proceeding. The lawyers may thus contract with and represent the claimant litigant but may also contract with the funder. As such litigation funding usually involves tripartite contractual arrangements between funder, litigant and lawyer.[10]

III THE RISE OF LITIGATION FUNDING

A The Rise of Litigation Funding in Insolvency

Doctrines of maintenance and champerty have long presented a hurdle to the use of commercial litigation funding.[11] 'Maintenance' is described as '[the support of] litigation in which one has no lawful interest',[12] or providing of '[assistance] [to] a party to a lawsuit with which one has no connection by providing financial or other support to enable the party to pursue the matter'.[13] Champerty is a specific form of maintenance that involves supporting a litigant's claim (typically financial support) in exchange for a portion of any damages awarded.[14]

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8 Marco de Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding' (2011) 19(2) *Cardozo Journal of International and Comparative Law* 343, 343.

9 Security for costs is where the court orders the plaintiff claimant to put up monetary security to cover future costs that the plaintiff may be ordered to pay the defendant in the proceeding. See, eg, in the United Kingdom, *Civil Procedure Rules 1998* (UK) sch 1 ord 23; in Australia, *Federal Court Rules 2011* (Cth) r 19.01; in New Zealand, *High Court Rules 2016* (NZ) r 5.45.

10 Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39(1) *University of New South Wales Law Journal* 165, 171 ('Two's Company').

11 Champerty and maintenance were the subject of Imperial statutes dating as far back as the 13th century, and also existed as independent common law torts and crimes: Law Reform Committee, Parliament of South Australia, *Maintenance, Champerty, Embracery and Barratry, Malicious Prosecution and Abuse of Process* (Report No 101, 1987) 1. For an overview of the development of the legal principles regarding maintenance and champerty, see *Martell v Consett Iron Co Ltd* [1955] Ch 363, 375–6 (Danckwerts J); *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 426–32 (Gummow, Hayne and Crennan JJ) ('*Fostif*').

12 *Australian Law Dictionary* (3rd ed, 2018) 'maintenance' <https://doi.org/10.1093/acref/9780190304737.001.0001>.

13 *Webster's New World Law Dictionary* (1st ed, 2006) 'maintenance' (def 3).

14 Ibid 'champerty' (def 1); *Australian Law Dictionary* (n 12) 'champerty'.

In spite of the hurdles to litigation funding due to doctrines of maintenance and champerty, litigation funding became accepted in English law in the 19th century in the context of insolvency on the basis of particular principles of insolvency law.[15] This allowed courts in the United Kingdom ('UK') to adopt a construct in insolvency proceedings that allowed for an 'insolvency exception' to the prohibition on the use of litigation funding.[16] Relevant to this approach was the trustee in bankruptcy's statutory power to sell the 'property' of the bankrupt,[17] and the statutory definition of 'property' of the bankrupt, which provided that 'property' includes choses in action.[18] On the basis of this approach, the trustee in bankruptcy is entitled to assign (or 'sell') a cause of action as 'property' of the bankrupt to an outsider who otherwise had no interest in the litigation (prior to having the cause of action assigned to them). This would occur in the same way that the trustee in bankruptcy is able to sell other property of the bankrupt to outsiders.[19] On a similar basis, the court recognised the statutory power of a liquidator of an insolvent company to sell the company's cause of action as part of the 'property' of the company.[20] However, the insolvency exception applied only in respect of company actions, and not in respect of actions that are regarded as liquidator actions in terms of statute (for example, actions brought in the liquidator's name based on a breach of the UK wrongful trading prohibitions), as any recoveries there would not be regarded as 'property' of the company, but would vest personally in the liquidator.[21]

Australian legislation similarly provides for a statutory power of sale of the insolvency practitioner (whether it be a trustee in bankruptcy,[22] or liquidator in the case of insolvent winding-up of a company[23]) as well as a statutory definition of 'property' that includes causes of action.[24] As a result, Australian courts have been able to permit the use of litigation funding to support insolvency proceedings in the same way that occurred in the UK.

In *Re Movitor Pty Ltd (in liq)* ('*Movitor*'),[25] the first Australian case recognising the insolvency exception, the Court noted that sale of a bare right of action by a liquidator would not offend the rules against champerty and maintenance, as 'a

15 See Adrian Walters, 'Foreshortening the Shadow: Maintenance, Champerty and the Funding of Litigation in Corporate Insolvency' (1996) 17(6) *Company Lawyer* 165, 169 for a brief summary of the developments that led to the recognition of the 'insolvency exception' in the 19th century.

16 *Seear v Lawson* (1880) 15 Ch D 426 ('*Seear*').

17 *Bankruptcy Act 1869*, 32 & 33 Vict, c 71, s 25.

18 Ibid s 4.

19 *Seear* (n 16) 433 (Jessel MR). See also *Guy v Churchill* (1888) 40 Ch D 481.

20 *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234, with reference to the liquidator's statutory power of sale under the *Companies Act 1862*, 26 & 27 Vict, c 89, s 95(3).

21 *Re Oasis Merchandising Services Ltd* [1998] Ch 170, 186 (Gibson LJ for the Court). The effect of this decision was effectively removed by the Court's ruling in *Talbot v Buchler* [2004] 2 AC 298. See Walters (n 15); John Armour and Adrian Walters, 'Funding Liquidation: A Functional View' (2006) 122 (April) *Law Quarterly Review* 295, for a more detailed analysis of relevant case law and subsequent development of legal principles around maintenance, champerty and the insolvency exception in the UK.

22 *Bankruptcy Act 1966* (Cth) s 134(1)(a) ('*Bankruptcy Act*').

23 *Corporations Act 2001* (Cth) s 477(2)(c) ('*Corporations Act*').

24 See section 5 (definition of 'property') of the *Bankruptcy Act* (n 22) in the case of personal insolvency; or section 9 (definition of 'property') of the *Corporations Act* (n 23) in the case of corporate insolvency.

25 (1996) 64 FCR 380 ('*Movitor*').

sale under statutory authority, to do that which Parliament has authorised, either expressly or by necessary implication, cannot involve the doing of anything that is unlawful'.[26] The Court also made it clear that the basis on which the funding agreement was entered into (ie, either assignment of bare cause of action, or an agreement to share the proceeds of a successful action with the funder) would not adversely affect the validity of the litigation funding agreement.[27]

The 'insolvency exception' appears to be doctrinally unrelated to the issue of the status of the old common law crimes and torts of maintenance and champerty, the widespread abolition of which seemingly would later influence the High Court's thinking on litigation funding in class actions in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* ('*Fostif*')[28] – see below. These offences and torts have been abolished by various statutes in Australian jurisdictions, including Victoria where *Movitor* was decided.[29] Cases following *Movitor* appear to indicate that the insolvency exception can apply regardless of whether maintenance and champerty offences and torts are abolished by legislation in that jurisdiction.[30] Thus the insolvency exception appears to be good law even in jurisdictions such as Queensland where champerty and maintenance as torts and offences have not been abolished by legislation.[31]

Further, unlike the position in the UK, Australian courts have not restricted the use of litigation funding under the insolvency exception to 'company actions', but have been able to extend the insolvency exception to what might have been regarded as 'liquidator actions' under Australian provisions. For example, Australian legislation providing for a liquidator action against directors who breach the insolvent trading prohibition[32] indicates that any amount recovered by the liquidator would be recovered as a 'debt *due to the company*'.[33] This formulation has enabled courts to treat such recovery as company 'property' for the purposes of the insolvency exception in respect of litigation funding.[34]

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26 Ibid 391 (Drummond J).

27 Ibid.

28 *Fostif* (n 11).

29 See, in the Australian Capital Territory, section 221(1) of the *Civil Law (Wrongs) Act 2002* (ACT); in New South Wales, the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW); in South Australia, schedule 11 of the *Criminal Law Consolidation Act 1935* (SA), inserted in terms of section 10 of the *Statutes Amendment and Repeal (Public Offences) Act 1992* (SA); and in Victoria, section 32(1) of the *Wrongs Act 1958* (Vic), as amended by section 4 of the *Abolition of Obsolete Offences Act 1969* (Vic). However, such legislation provides that contracts involving champerty and maintenance could still be illegal, insofar as they operate against public policy: *Civil Law Wrongs Act 2002* (ACT) s 221(2); *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 6; *Criminal Law Consolidation Act 1935* (SA) sch 11; *Wrongs Act 1958* (Vic) s 32(2).

30 See, eg, *Re Tosich Construction Pty Ltd; Ex parte Wily* (1997) 73 FCR 219, 233 (Lindgren J) ('*Re Tosich Construction*').

31 *Elfic Ltd v Macks* [2003] 2 Qd R 125, 142 [88] (McMurdo P) ('*Elfic*').

32 *Corporations Act* (n 23) s 588G.

33 Ibid s 588M(2) (emphasis added).

34 See, eg, *Elfic* (n 31) 144 [98] (McMurdo P), 168 [205] (Davies JA, Cullinane J agreeing at 182 [260]). For further discussion, see also Tania Cini, 'Litigation Funding Arrangements in Corporate Insolvencies' (1998) 6(4) *Insolvency Law Journal* 171, 178–9; Lynne Taylor, 'Funding Insolvent Company Claims' (2013) 25(3) *New Zealand Universities Law Review* 587, 597–9.

In addition, section 100-5(1) of schedule 2 (Insolvency Practice Schedule (Corporations)) ('*IPSC*') to the *Corporations Act 2001* (Cth) ('*Corporations Act*'), enacted in 2016, provides for the right of a liquidator to 'assign any right to sue that is conferred on the [liquidator] by [the] Act'. This is subject to the liquidator not having begun the action already,[35] and having given written notice to the creditors of the proposed assignment before assigning any such right.[36] A recent Federal Court decision indicates that the 'right to sue' under section 100-5(1) includes 'any right of the liquidator on his [or her] own behalf or on behalf of [the company] to litigate claims arising out of the liquidation',[37] removing any potential doubt about the ability of a liquidator to assign typical 'liquidator actions' to a funder.

B The Rise of Litigation Funding in Class Actions

1 Class Actions

Class actions allow groups of persons to benefit from findings by the court as to common issues that affect their claims. While in ordinary civil litigation, the plaintiff will have to prosecute and prove each aspect of his or her claim against the defendant, in a class action the representative plaintiff will prosecute the issues and elements common to all plaintiffs' claims (which may be issues of fact or law). The representative plaintiff will do so on their own behalf and on behalf of all the group or class of potential claimants as defined in the particulars of claim. The findings on the group or common issues, whether successful or unsuccessful to the claim, will then bind all group or class members. The group or class members will thus not have to separately prove the matters raised by the common issues (though assuming the common proof is successful, they may still need to later prove elements unique to their own claims).[38]

Class actions bring considerable benefits in court efficiency in that they reduce duplication and multiplicity of actions.[39] They should also tend to reduce legal costs per claim through the mechanism of a group or common finding on issues of fact or law. The resulting lower costs will tend to increase access for plaintiffs to the civil courts (often referred to as the 'access to justice' argument[40]) and this may be enhanced further if the plaintiff class is organised and collectively self-funded or financially backed by a law firm or litigation funder.

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35 *Corporations Act* (n 23) sch 2 ('*IPSC*') s 100-5(2).

36 Ibid s 100-5(3).

37 *Aquisite Pty Ltd v Moss* [2023] FCA 410, [3] (McElwaine J).

38 For instance, group members may be required to prove the differing quantum of their individual losses: *Federal Court of Australia Act 1976* (Cth) s 33Q ('*Federal Court Act*').

39 Although, the very success and profitability of class actions has led to the increasing phenomenon of competing class actions where courts find themselves facing lawyers running competing actions vying for the right to represent the group members (the class): see John Emmerig and Michael Legg, 'The Problem of Competing Class Actions' (2018) 70(6) *Governance Directions* 356; Michael Duffy 'The Conundrum of Competing Class Actions and the Efficiency Question' (2019) 93(4) *Australian Law Journal* 270 <https://doi.org/10.2139/ssrn.3652978> ('Competing Class Actions').

40 As for 'access to justice', see, eg, Deborah L Rhode, 'Access to Justice' (2001) 69(5) *Fordham Law Review* 1785, 1786–7; Wayne Martin, 'Access to Justice' (Speech, University of Notre Dame Australia, 26 February 2014).

Certain forms of common or group action have existed in Australian courts in the past,[41] however the first comprehensive legislation in Australia facilitating class actions was brought in through amendments to the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*') which followed the 1988 Australian Law Reform Commission ('ALRC') report on *Grouped Proceedings in the Federal Court*.[42] There followed the insertion of part IVA into the *Act*, introducing a representative procedure intended to enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources.[43] Section 33C(1) of the *Act* provides that where:

> (a) 7 or more persons have claims against the same person; and
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
> (c) the claims of all those persons give rise to a substantial common issue of law or fact;
> a proceeding may be commenced by one or more of those persons as representing some or all of them.[44]

2 Litigation Funding

Somewhat coincident with these Australian developments in relation to class actions were developments in the UK in the 1990s seeing a more generally relaxed attitude to the prohibitions on maintenance and champerty and a move toward greater toleration of litigation funding. This went beyond the 'insolvency exception' as above referred to and appears to have begun with the 1994 House of Lords decision in *Giles v Thompson*.[45] In that case, a funding company had organised commercial arrangements based upon identification of a gap in compensation for motor vehicle owners who were in accidents, relating to claims for loss of use of their damaged vehicles. Under the arrangements, the funding company pursued the motorists' claims for them at the funding company's expense (using its own solicitors).

On the question of whether these arrangements were unlawful on the basis of maintenance and champerty, Lord Mustill said: 'I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.'[46] Applying these principles to the case, his Honour stated:

> I am unable … to accept that there was anything officious or wanton about the intervention of the hire company in the motorist's litigation. … Is there any realistic possibility that the administration of justice may suffer, in the way in

41 See Peter Cashman, *Class Action Law and Practice* (Federation Press, 2007) 40–60.

42 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) ('*Grouped Proceedings in the Federal Court*').

43 See Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

44 Similar procedural rules for class actions have since been enacted or promulgated in most Australian states. See, eg, *Supreme Court Act 1986* (Vic) pt 4A ('*Vic Supreme Court Act*'); *Civil Procedure Act 2005* (NSW) pt 10.

45 [1994] 1 AC 142.

46 Ibid 164.

> which it undoubtedly suffered centuries ago? None, so far as I can see, or at any rate none with which the skills and coercive powers of the contemporary judge are unable to grapple.[47]

The case reflected a change in judicial mood on maintenance and champerty and, as external funding became more accepted, the debate moved on to other questions such as whether such funders should bear the adverse costs of unsuccessful claims. The notion of access to civil justice also began to appear in such cases.

In Australia, the tentative go-ahead to litigation funding from the High Court came in *Fostif* in 2006. In that case, a class action had been brought by a number of tobacco retailers against licensed wholesalers for the recovery of state licence fees. The retailers had paid licence fees to wholesalers pursuant to state legislation which the High Court had later held was invalid under the *Australian Constitution*. Thus, retailers who had paid such licence fees to wholesalers had a cause of action against the wholesaler to recover, as money *had and received*, the amount paid for the licence fee, which the wholesaler had yet not remitted to the tax authority. A consulting firm (funder) wrote to tobacco retailers seeking to act on their behalf proposing that the firm would receive a 'success fee' of $33^{1}/_{3}$% of any damages. It also offered to indemnify retailers if legal costs were awarded against the retailer. The consulting firm/funder then retained a solicitor to act as 'the project's solicitor'.[48]

The High Court found that the litigation funding arrangement was not an abuse of process nor contrary to public policy as maintenance and champerty. It found that in jurisdictions where maintenance and champerty had been abolished as crimes or torts (such as New South Wales, Victoria, South Australia and the Australian Capital Territory) the proposition that maintaining proceedings was an abuse of process was not valid[49] as the abolition meant that any wider rule of public policy against maintenance and champerty 'lost whatever narrow and insecure footing remained for such a rule'.[50] Further, any asserted rule of public policy argued to survive the abolition would be too uncertain.[51]

Whilst some early major class actions in the late 1990s were funded by law firms themselves on a 'no win, no fee' arrangement, class actions have increasingly been funded from the early 2000s by third party litigation funders, with litigation funding businesses expanding substantially. Probably as a result of this expansion, from 2018 onwards there has been substantial interest by legislators in the area of TPLF, something that will be discussed further below.

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47 Ibid.

48 *Fostif* (n 11) 412–13 [23]–[27] (Gummow, Hayne and Crennan JJ, Gleeson CJ agreeing at 407 [1], Kirby J agreeing at 451 [146]).

49 Ibid 432 [85].

50 Ibid 433 [86].

51 Such asserted rule of public policy would yield a rule no more certain than the 'patchwork of exceptions and qualifications that could be observed to exist in the law of maintenance and champerty at the start of the twentieth century': ibid.

IV THE POLICY DEBATE ON LITIGATION FUNDING

The prohibition of maintenance and champerty for over half a millennium was based on various considerations, some of which appear to be less applicable in the modern era, though with others still having some salience. The latter have tended to be issues around which the modern policy and regulatory debate has revolved. Rather than the blunt instrument of an outright ban however, the modern approach has been a more nuanced attempt to deal with these individual issues. This may be in line with modern regulatory ideas where total prohibitions on activities are rarer, and regulatory regimes seek to modify behaviour and minimise undesirable externalities while facilitating the positive effects that flow from certain activities.[52] Thus the better and modern approach to TPLF may be to recognise its potentially undesirable externalities that are predicted by both theory and the lessons of legal history, and seek to deal with these; at the same time taking a permissive approach to seeing whether it produces benefits in terms of ongoing access to the justice system. In that sense, the historical context is also useful in the sense that, in considering how litigation funding should be regulated in the 21st century, it can be instructive to attempt to understand the mischief(s) that that long-time ban was intended to address.

As will be noted below however, many of these issues and the criticisms of litigation funding relate much more to 'retail' litigants including those in class actions rather than insolvency litigation involving 'repeat player' experienced litigants such as liquidators.[53] The need for legislative and regulatory protections of the former group is clearly much greater than it is for the latter.

Another factor that must be noted is that the introduction of Group Costs Orders in class actions in Victoria[54] in 2020 has blurred the distinction between funders and lawyers in class actions. Some of the potential problems in litigation funding that are discussed below can also, with some modification, be applied to litigation funding by lawyers who take a percentage contingency fee to fund litigation. This is because it is clear that the 'legal costs' under a Group Costs Order

52 A historical analogy could be drawn with corporate regulation where substantial investor losses and other problems from the South Seas investment 'bubble' saw the early *Bubble Act 1720*, 6 Geo 1, c 18 ('*Bubble Act*') go so far as to ban all new joint stock companies which were not authorised by Royal Charter. This was partly motivated by fairly primitive notions of investor protection in seeking to avoid the possibility of investor losses by limiting the use of the corporate form. The *Bubble Act* banning of companies was repealed in 1825 following unmanageable levels of demand for Parliamentary bills to authorise new joint stock companies, scepticism about the effectiveness of the ban, and a new mood of economic liberalism influenced by the writings of Adam Smith. See generally JH Farrar and BM Hannigan, *Farrar's Company Law* (Butterworths, 1998) 18–19; Ron Harris, 'The *Bubble Act*: Its Passage and Its Effects on Business Organization' (1994) 54(3) *Journal of Economic History* 610, 611 <https://doi.org/10.1017/S0022050700015059>.

53 It is probably the case that 'repeat playing' funded claimant litigants such as liquidators are mostly well able to look after themselves. Vicki Waye has suggested that the consumer anchored concern about litigation funding may ignore this 'repeat player' issue. See Vicki Waye, 'Litigation Risk Transfer and Law Firm Financial Arrangements' (2014) 17(1) *Legal Ethics* 107, 126–30 <https://doi.org/10.5235/1460728X.17.1.107>. See also Duffy, 'Two's Company' (n 10) 166.

54 *Vic Supreme Court Act* (n 44) s 33ZDA.

represent not just legal fees but also a funding cost calculated partly by reference to risk – principally the risks of losing the case and of having to fund any adverse costs indemnity of the plaintiff.

A More Litigation

A longstanding judicial criticism of external funders maintaining litigation for profit was that, if permitted, the practice would significantly increase the amount of civil litigation – and that this was against the public interest.[55] In more modern times it has been suggested that litigation funding encourages people to make claims which they may not otherwise have made and which may be 'frivolous'[56] and that this is *undesirable* as infringing traditional public interest in reducing and quelling the amount of civil disputation.[57] On this view, the public interest in avoiding an unduly litigious society may suggest the undesirability of lawyers or third parties devoting significant resources to identifying claims and creating civil litigation. The latter may be said to infringe the maxim that *interest rei publicae ut sit finis litium*.[58]

As well as litigiousness, more litigation may also likely mean higher costs to the taxpayer to fund and staff more courts, judicial officers and personnel, as well as increased imposts on citizens and businesses in insuring to meet the increased risks and liabilities from a greater likelihood of being sued.[59]

Further, though this article does not deal with other types of funded litigation beyond class actions and insolvency litigation, it should be noted there have been some criticisms of litigation funding in relation to other areas.[60] These criticisms often focus on conflicts of interest (see below) and the perceived undesirability in some cases of powerful or wealthy players 'bankrolling' lawsuits by others for financial reward.

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55 See *Alabaster v Harness* [1895] 1 QB 339, 342 (Lord Esher MR) ('*Alabaster*').

56 Nicholas Dietsch, 'Litigation Financing in the US, the UK, and Australia: How the Industry Has Evolved in Three Countries' (2011) 38(4) *North Kentucky Law Review* 687, 689.

57 See, eg, PA Keane, 'Access to Justice and Other Shibboleths' (Speech, Judicial Conference of Australia, 10 October 2009). See also the minority judgment of Callinan and Heydon JJ in *Fostif* (n 11). See also generally *US Chamber of Commerce Institute for Legal Reform* (Web Page) <http://www.instituteforlegalreform.com>.

58 Id est, '[t]hat it is in the public interest that litigation come to an end'. The maxim is not an historical curiosity as, in modern times, it provides the rationale for low-cost tribunals and alternative dispute resolution as well as court orders for mediation to seek to reduce the number of disputes that turn into court litigation. Indeed, the public and private interest in minimising disputation and litigation is also the basis for much of the work that lawyers do in drafting commercial and other documentation designed to clarify understandings so as to *avoid* the need for litigation.

59 That is, more insurance cover will be needed, but this in turn may have a price effect. The Australian Law Reform Commission noted a 200% increase in the cost of directors and officers insurance in the 12–18 months prior to its 2018 discussion paper: see Australian Law Report Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Discussion Paper No 85, June 2018) 30 [1.74].

60 See, eg, Jennifer A Trusz, 'Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration' (2013) 101(6) *Georgetown Law Journal* 1649. There have also been a few notable instances in the United States ('US') of suits bankrolled by third parties for various controversial purposes: see Charles Silver and David A Hyman, 'TPLF: Panacea or More Problems?' (Research Paper, Georgetown University Law Center, 18 September 2023) <http://dx.doi.org/10.2139/ssrn.4438503>.

Yet proponents of litigation funding argue, conversely, that increased litigation has real *benefit* having its own public interest value as an expression of *access to justice* where more claimants entering the legal system to vindicate their claims and obtain financial redress is viewed as a positive for those claimants, for the administration of justice and for the rule of law. Thus, public interest and social justice arguments favour the facilitation of plaintiffs pursuing meritorious claims and sometimes breaking new ground in using the law to increase accountability.[61] This is said to increase access to civil justice[62] in increasing the number of claims brought by citizens who would otherwise be unable to access the legal system,[63] bringing greater social balance between the rights and interests of ordinary citizens of modest means and those with comparatively large resources (the latter including both corporations and government).[64]

A further argument is that litigation funding is beneficial in increasing the quantity of private *law enforcement* with a regulatory or public purpose and that this has a deterrent effect on regulatory breaches.[65] In the insolvency area, the argument is similarly put that there is public interest in insolvency administrators pursuing all viable claims for creditors and rigorously enforcing the law. This utility has been explicitly recognised by the court in cases where it was apparent that the proceeds of a successful outcome would only be sufficient to cover the funding premium and liquidator remuneration, with unsecured creditors not benefiting from the action at all.[66]

Securities nondisclosure class actions have also been a major area backed by litigation funders[67] and have been argued to be a form of such law enforcement

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61 Given the ubiquity and dominance of information technology, artificial intelligence and the internet in the modern world, it is likely that using the courts to increase the accountability of 'big tech' and online private and public businesses, entities, organisations and service providers to the community may be an increasingly desirable area for growth.

62 Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 402–3.

63 Ibid.

64 Vince Morabito and Jarrah Eckstein, 'Class Actions Filed for the Benefit of Vulnerable Persons: An Australian Study' (2016) 35(1) *Civil Justice Quarterly* 61. See also Michael Duffy, Andrew Coleman and Matt Nichol, 'Mapping Changes in the Access to Civil Justice of Average Australians: An Analysis and Empirical Survey' (2021) 42(1) *Adelaide Law Review* 293 <https://doi.org/10.2139/ssrn.4188667>.

65 See, eg, Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third-Party Litigation Funding' (2013) 61(1) *American Journal of Comparative Law* 93 <https://doi.org/10.5131/AJCL.2012.0017>. For an analysis of the regulatory purpose argument in relation to securities disclosure laws, see Michael J Duffy, 'Australian Private Securities Class Actions and Public Interest: Assessing the "Private Attorney-General" by Reference to the Rationales of Public Enforcement' (2017) 32(2) *Australian Journal of Corporate Law* 162 ('Private Securities Class Actions').

66 See, eg, *Hall v Poolman* (2009) 75 NSWLR 99, 147 [187] (Spigelman CJ, Hodgson JA and Austin J) ('*Hall*'); *Re Cardinal Group Pty Ltd (in liq)* (2015) 110 ACSR 175, 186–7 [34] (Black J) ('*Re Cardinal Group*'); *Marsden v Screenmasters Australia Pty Ltd* [2015] FCA 1256, [63] (Markovic J) ('*Marsden*'). See also below Part IV(C)(2) for further discussion.

67 Vince Morabito, 'Empirical Perspectives on Twenty-One Years of Funded Class Actions in Australia' (Research Report, Department of Business Law and Taxation, Monash Business School, Monash University, April 2023) 6, 16 <http://dx.doi.org/10.2139/ssrn.4422278>.

with deterrent effects on the problem of securities nondisclosure.[68] In these actions, purchasers of shares over a period of corporate nondisclosure of negative information sue a company for loss of the commercial opportunity[69] to buy those shares at a lower price.[70] Such claims by individual small investors may be quite small, yet, when combined with hundreds or thousands of other investors, can be a substantial payout for a company that is sued. Admittedly, if there is no or insufficient insurance nor other defendants sued (such as directors or auditors), then it is the company's longer term shareholders who will have to fund these damages and costs (referred to as the circularity problem[71]) yet clearly some deterrence will be effected (an issue then being the degree and quality of that deterrence, especially relative to that achieved by regulatory action).[72]

The plaintiff view (and the view of the ALRC in 1988[73]) is that more small meritorious claims are a good thing as they increase access to justice. Claims that are frivolous in the sense of being unmeritorious and not likely to succeed at trial, are curbed in English common law systems, they argue, by the disincentive effect of the *English Rule* on cost shifting (as opposed to the lack of costs shifting under United States ('US') law) whereby unsuccessful plaintiffs (or their funder – see below) may be ordered to pay adverse costs.[74]

The overall evidence appears to be that the advent of litigation funding has seen increased litigation in the area of class actions with the number of class actions trending slightly upwards over the years, including following *Fostif* in 2006.[75] The introduction of class action proceedings may also statistically mask a

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68 Matthew Kennedy and Ewen McNee, 'Circularity Arguments against Australian Shareholder Class Actions Ignore Their Significant Benefits', *Omni Bridgeway* (Blog Post, 28 August 2020) <https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2020/08/28/circularity-arguments-against-australian-shareholder-class-actions-ignore-their-significant-benefits>. See also Bryant Garth, Ilene H Nagel and S Jay Plager, 'The Institution of the Private Attorney-General: Perspectives from an Empirical Study of Class Action Litigation' (1988) 61 *Southern California Law Review* 353.

69 See *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 350 (Mason CJ, Dawson, Toohey and Gaudron JJ).

70 Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed, 2012) 917 [19.850].

71 *Litigation Funding Inquiry* (n 4) 276–8 [9.60]–[9.68]; Paul Miller, 'Shareholder Class Actions: Are They Good for Shareholders?' (2012) 86(9) *Australian Law Journal* 633, 635–7.

72 Michael Legg, *Public and Private Enforcement of Securities Laws: The Regulator and the Class Action in Australia's Continuous Disclosure Regime* (Hart Publishing, 2022) 154–6 <https://doi.org/10.5040/9781509941544>; Duffy, 'Private Securities Class Actions' (n 65) 182–6.

73 *Grouped Proceedings in the Federal Court* (n 42) 10 [17], 27 [63].

74 Murphy and Cameron (n 62) 410. It should be noted however that indemnification of plaintiffs by litigation funders of such adverse costs may remove this disincentive to making frivolous claims from claimant litigants themselves, though probably transferring that disincentive to the indemnifying funder: Duffy, 'Two's Company' (n 10) 186. It is also the case that in a class action, common issues will normally be determined first, and during this stage at least, only the representative party and not the group members, has any risk of liability to adverse costs, so that the disincentive does not apply to class members. See *Federal Court Act* (n 38) s 33R(2).

75 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, July 2017) 22–4 <http://dx.doi.org/10.2139/ssrn.3005901>. The recent legalisation in Victoria of solicitor percentage contingency fees in class actions (known as Group Costs Orders) may add to this trend.

large increase in 'claims' going through courts. This is because, what would once have been many individual proceedings (prior to class action legislation) are now often replaced by one nominal 'individual' proceeding covering many claims. It is also notable that over 70% of Australian shareholder class actions to 2017 were funded by third party litigation funders.[76]

Given that there is a deep divide in the argument about whether an increased amount of litigation is actually a problem, regulation of litigation funding has not focused very specifically on directly trying to reduce the quantity of litigation. Some forms of regulation may however do this indirectly by significantly increasing funder legal compliance costs if regulation is overly complicated – which may reduce the overall supply of funding.[77]

B Significant Adverse Costs Orders against Unsuccessful Litigants

Another historic concern about third parties funding litigation was for the position of litigants who were encouraged by third party maintainers and champertors to pursue unsuccessful claims.[78] These litigants then suffered the adverse effects of a failed suit including liability for large costs orders (under the same *English Rule*) for which funders, as non-parties, would not necessarily be liable.[79]

1 Adverse Costs and Funder Liability Generally

Mindful of this problem, beginning in the UK, courts have increasingly made costs orders against third party litigation funders.[80] This has since generally encouraged the voluntary offering of adverse cost indemnities by funders to litigants in that jurisdiction, and in Australia at least in relation to class actions. Clarifying and entrenching the power to make adverse costs orders and security for costs orders against third party funders has been recommended in Australia by the ALRC[81] and the Parliamentary Joint Committee on Corporations and Financial Services ('PJCCFS').[82] The other way this has been increasingly addressed is by courts making orders that plaintiffs provide security for defendant costs relatively early in proceedings. It can be noted though, that the recoverability of types of

76 Ibid 30.

77 Though originally imposed by the courts rather than the legislature, the one-time characterisation of funded class actions as Managed Investment Schemes might perhaps fall into the category of overtly complicated regulation increasing regulatory compliance costs, particularly given the somewhat inapt characterisation (see Part IV(D)(1) below) or analogy and the fairly detailed regulatory requirements for schemes under chapter 5C of the *Corporations Act* (n 23).

78 *Alabaster* (n 55) 342 (Lord Esher MR), quoting *Bradlaugh v Newdegate* [1883] 11 QBD 1, 11 (Lord Coleridge CJ).

79 Another longstanding concern: see *Alabaster* (n 55). See generally Grave, Adams and Betts (n 70) 847–9 [17.880]–[17.930].

80 See *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055.

81 *Litigation Funding Inquiry* (n 4) 10 (Recommendations 11 and 12).

82 *PJCCFS Report 2020* (n 4) xxiv (Recommendations 9 and 10).

security offered – particularly when provided by overseas entities – has sometimes been questioned.[83]

2 Adverse Costs in Insolvency Proceedings

The matter of cost orders is also a live issue in funded insolvency proceedings. The distinct nature of the insolvency context should once again be recognised here. Two types of recovery proceedings for the benefit of a company in liquidation (and indirectly its creditors) can be distinguished, namely 'liquidator actions' and 'company actions'. Liquidator actions are brought directly by the insolvency practitioner in their own name and include proceedings against directors for breach of insolvent trading under section 588G of the *Corporations Act*,[84] and voidable action recovery proceedings.[85] In the case of company actions, the company will be the obvious plaintiff, with the liquidator acting indirectly to cause the company to bring the proceedings. Company actions could involve any typical civil causes of actions and would also include, for example, actions against directors on the basis of breach of common law and equitable fiduciary duties and statutory obligations.[86]

In a practical sense, concerns in relation to significant adverse cost orders can be related to arguments about 'excessive' funding premiums (see Part IV(C)(1) below). Thus, though a very high funding premium that causes a negligible return to creditors might be argued to be justified on the basis that creditors 'only stand to win', and cannot be any worse off from the pursuit of the litigation, such arguments are negated by the making of an adverse costs order. This is because a wholly failed claim resulting in an adverse cost order against the insolvent company plaintiff, would clearly result in creditors being worse off. Moreover, this would be further exacerbated by the fact that such costs would enjoy a statutory priority under section 556(1)(a) of the *Corporations Act*, which provides for a priority in relation to 'expenses … properly incurred … in preserving, realising or getting in property of the company'. This means that the adverse costs order would be a priority expense to be paid in the winding up before creditor distributions, and not just as another unsecured creditor claim. As stated by Finkelstein J in the Federal Court:

> If the liquidator commenced an unsuccessful action in the name of the company any costs ordered against the company were not to be proved as a debt in the winding up. This was because the costs were incurred in the winding up and were payable in full out of the company's assets. … Moreover, if the company was insolvent the costs were to be paid in priority to the general costs of the liquidation and in priority to the liquidator's remuneration.[87]

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83 Evidence to Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding and the Regulation of the Class Action Industry, Parliament of Australia, Canberra, 13 July 2020, 44–5 (Alexander Morris and Justin McDonnell, witnesses, in response to questions of Honourable Patrick Gorman).

84 In terms of section 588M(2) of the *Corporations Act* (n 23).

85 In terms of section 588FF of the *Corporations Act* (n 23).

86 See, eg, breach of statutory duties in terms of sections 180(1), 181(1), 182(1) and 183(1) of the *Corporations Act* (n 23), to name but a few.

87 *Lofthouse, Re Riverside Nursing Care Pty Ltd (subject to deed of company arrangement)* (2004) 22 ACLC 215, 221–2 [26].

It should be noted however, that the court has the discretion to make a non-party cost order against the liquidator who initiated the proceedings on behalf of the company, where the conduct of the litigation is improper which might include conduct by the liquidator in regard to the litigation that is 'unreasonable, unnecessary or dishonest'.[88]

Somewhat similar principles apply in relation to liquidator actions. Like any other unsuccessful litigant, a liquidator as plaintiff is vulnerable to adverse cost orders. However, a liquidator is generally entitled to be indemnified out of company assets in respect of such costs where they were properly incurred,[89] which costs will enjoy a statutory priority under section 556(1)(a).[90] The reduction in assets available for distribution among unsecured creditors as a result of the liquidator being indemnified out of company assets will once again have an adverse impact on the position of unsecured creditors. However, it is important to note that the court may refuse the liquidator's right of indemnity in the case of unsuccessful proceedings where the court finds that the costs were not properly incurred, in which case the liability for costs will be personal.[91]

In *Movitor*, the Court opined that, though a funding agreement that did not indemnify the liquidator may be permissible under the insolvency exception, '[c]ommercial practicalities' would ensure that funders were likely to offer liquidators terms that would provide appropriate protective measures regarding potential liability to meet the defendant's costs, should the action fail (presumably by the funder providing a full or partial indemnity for such adverse costs).[92] Increasingly, in dealing with applications for approval of litigation funding agreements in insolvency, the court appears to focus both on the risk posed by caps on funding (being a risk that funding will be exhausted before the proceedings are resolved) and the degree of protection provided by funders' indemnities to the liquidator contained in the funding agreement,[93] as well as the financial ability of a funder to meet their obligations under the funding agreement.[94]

Liquidators, who possess a high degree of specialist knowledge and commercial sophistication, are no doubt aware of the pitfalls of unsuccessful liquidator actions. They would presumably take care to avoid personal liability for cost orders by, for example, ensuring inclusion of adverse cost indemnities from the funder in the litigation funding agreement.

It is further important to note that it is possible for a litigation funder to be held liable for a non-party cost order in an unsuccessful claim, even where their role was limited to provision of security ordered by the court to be provided for the defendant's costs. This is so where, but for the funder's involvement in giving

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88 *Mead v Watson (as liquidator for Hypec Electronics)* (2005) 23 ACLC 718, 720–2 [11]–[16] (Sheller, Ipp and Tobias JJA).

89 *Silvia v Brodyn Pty Ltd* (2007) 25 ACLC 385, 394 [51] (Hodgson JA, Ipp JA agreeing at 399 [86], Basten JA agreeing at 399 [87]).

90 See, eg, *Re Mendarma Pty Ltd (in liq) [No 2]* (2007) 61 ACSR 601, 610 [44]–[45] (White J).

91 *Re Lonnex Pty Ltd (in liq) [No 2]* (2019) 57 VR 238.

92 *Movitor* (n 25) 396 [38] (Drummond J).

93 See, eg, *Re Leigh; AP and JP King Pty Ltd (in liq)* [2006] NSWSC 315, [28], [34]–[36] (Austin J).

94 *Re Imobridge Pty Ltd (in liq) [No 2]* [2000] Qd R 280, 299 [47] (Fryberg J) ('*Re Imobridge*').

security, the proceedings would have been stayed, so that funder involvement was a key factor in allowing the proceedings to continue.[95]

To some extent, one could therefore argue that the 'vulnerability' of the parties ultimately exposed to the detrimental impact of an adverse cost orders in the insolvency context, the unsecured creditors, is mitigated in two ways: firstly, due to the role of the liquidator in litigation, particularly the fact that the liquidator is a commercially sophisticated litigant and also the fact that the liquidator could be personally liable for adverse cost orders for actions not properly brought; and secondly, through judicial scrutiny of the funding agreement in respect of provision for cost orders, indemnities and the funder's ability to meet their obligations under the agreement.

C Excessive Funding Commissions

There is also a longstanding concern that third party funding agreements[96] may be extortionate and unfair on litigants.[97]

1 Funder Commissions in Class Actions

The size of funding commissions was a topic of particular concern in the 2020 PJCCFS inquiry into litigation funding and the regulation of the class action industry.[98] This problem has also certainly been a subject of concern by the courts. The power of courts to approve class action settlements has been interpreted in Australia to connote a power to approve the reasonableness of legal costs[99] which has been extended in some cases to approval of the reasonableness of funding commissions.[100] Courts have acted to reduce commissions in some cases[101] however there is still considerable uncertainty about the power of the court to override a contractually agreed commission rate in class actions without consent of the funder.[102]

In certain types of class action claims, where the chances of succeeding at trial or obtaining a settlement are perceived to be strong, there is the phenomenon

95 *Jin Lian Group Pty Ltd (in liq) v ACapital Finance Pty Ltd [No 2]* [2021] NSWSC 1202, [64]–[68] (Stevenson J).

96 Nowadays, in Victoria at least, this concern could also apply to percentage contingency fees by lawyers obtained under group costs orders: see *Vic Supreme Court Act* (n 44) s 33ZDA (though court supervision will provide some protection here).

97 This longstanding concern appears in the 19th century case of *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) 2 App Cas 186, 210 (Sir Montague E Smith).

98 See *PJCCFS Report 2020* (n 4) 38, 106, 110, 116–23, 131–3, 143, 147–70.

99 *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 473 [47] (Goldberg J); *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 318 [42] (Sackville J); *Kelly v Willmott Forests Ltd (in liq) [No 4]* (2016) 335 ALR 439, 510–11 [324]–[328] (Murphy J) ('*Kelly*').

100 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208–13 [76]–[96] (Murphy, Gleeson and Beach JJ) ('*Money Max*'). See also *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433; *Camping Warehouse Pty Ltd v Downer EDI Ltd* [2016] VSC 784.

101 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd [No 3]* (2018) 132 ACSR 258, 261 [11], 274–5 [74], 311–12 [254]–[258] (Murphy J) ('*Petersen Super Fund*').

102 In *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 ('*Brewster*'), the High Court of Australia cast doubt upon some of the reasoning in *Money Max* (n 100) and the absence of criteria to guide the exercise of discretion by the court to fix a commission: at 603 [59] (Kiefel CJ, Bell and Keane JJ).

of lawyers with their funders competing for the exclusive right to run the action (known as 'competing class actions'). In this scenario, competition between two or more lawyers (funded by two or more respective funders) for 'carriage' appears to have had the effect of reducing such commissions.[103]

2 Funder Commissions in Insolvency Actions

In certain insolvency claims by contrast, there is a statutory process of prior approval of litigation funding agreements.[104] The practice to seek approval for the entering into of a litigation funding agreement in relation to insolvency proceedings has come about as a result of certain provisions of the *Corporations Act*, specifically section 477(2B), and sections 90-20 and 90-15 of the *IPSC*.[105]

Section 477(2B) requires prior approval for agreements entered into by the liquidator that would continue for more than three months. Litigation funding agreements will typically continue for more than three months and are thus captured by the provision. The approval must be either court approval, or approval by creditors (by way of a committee of inspection or creditor resolution). Court approval could obviously be avoided by obtaining approval from creditors instead. However, in many instances, liquidators opt for court approval in any event. Reasons for doing so include concerns about votes of interests associated with proposed examinees;[106] significant creditors being the defendants in the proposed litigation;[107] or because the funding agreement itself contains court approval as a condition.[108]

Section 90-15 of the *IPSC* is a broad provision facilitating court involvement in the external administration of the company. In terms of this provision, the court may make 'such orders as it thinks fit in relation to the external administration of a company',[109] either on its own initiative, or on application of,[110] for example, an officer of the company,[111] which will include the liquidator.[112] This provision enables liquidators to seek directions from the court in relation to the external administration of the company regarding a broad range of matters, which could

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103 With the additional competition from the introduction of Group Costs Orders seemingly adding to this. See the recent Supreme Court decisions in *DA Lynch v Star Entertainment Group* [2023] VSC 561, [314] (Nichols J). As to the amount of the commission being one of the factors a court can look at in granting carriage rights to a firm and funder, see *Wigmans v AMP Ltd* (2021) 270 CLR 623 ('*Wigmans*').

104 See *Re ACN 076 673 875* (2002) 42 ACSR 296; *Re Stewart; Newtronics Pty Ltd* [2007] FCA 1375; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher and Barnet* (2015) 89 NSWLR 110; *Re Ascot Vale Self Storage Centre Pty Ltd (in liq)* [2013] VSC 519; *CBA Corporate Services (NSW) Pty Ltd Re ZYX Learning Centres Ltd (in liq) (recs and mgrs apptd) v Walker* [2013] FCA 243; *Young v Thomson* (2017) 253 FCR 191.

105 See also section 479(3) of the *Corporations Act* (n 23), which has now been repealed.

106 In *Re ACN 076 673 875* (n 104), this is the reason that was advanced for seeking court approval for a litigation funding agreement, after the motion to approve the agreement was defeated: at [2] (Austin J).

107 *Re Feastys Family Restaurants Pty Ltd (in liq)* (1996) 14 ACLC 1058.

108 See, eg, *Re Great Southern Ltd (in liq) (recs and mgrs apptd)* [2012] FCA 1072, [26] (Gilmour J); *Re Robinson* [2017] FCA 594, [44] (Gleeson J). See also *Re OLI 1 Pty Ltd (in liq)* [2020] FCA 450 for an illustration of circumstances that would compel a liquidator to seek court approval under section 477(2B).

109 *IPSC* (n 35) s 90-15(1).

110 Ibid s 90-15(2).

111 Ibid s 90-20(1)(d).

112 In terms of the statutory definition of 'officer' under section 9AD of the *Corporations Act* (n 23).

include an application for approval of a litigation funding agreement. In earlier cases, the predecessor of this provision[113] was used regularly by insolvency practitioners when the principles around insolvent litigation funding were less settled, to obtain directions from the court in relation to the entering into of a litigation funding agreement.[114] In later cases, this provision has been used when liquidators regard it as 'prudent' to seek the approval of the court, even where the committees of inspection or creditors agreed in principle to the litigation funding agreements, due to concerns about compliance with liquidators' obligations.[115]

The regularity with which court approval is sought for litigation funding agreements allowed the development of a set of 'judicial guidelines' over time in respect of approval of litigation funding agreements – an indication of the factors that the court will consider when requested to approve an insolvent litigation funding agreement. These include, for example, key aspects such as the size of the funder's premium.[116]

The issue about the size of a funding premium was recognised in *Movitor*, which paved the way for legitimising litigation funding in insolvency proceedings. The Court noted the relevance of the size of the funding premium, but took the view that a 'grossly excessive' premium would be indicative of the liquidator not exercising the power of sale in a bona fide manner, thus placing the funding agreement outside the 'insolvency exception' to the rules relating to champerty and maintenance.[117] The Court did not provide an indication of what would be considered a 'grossly excessive premium' and expressed reluctance to second-guess the commercial judgment of the liquidator in this regard.[118] The 12% funding premium in this case did not present a significant issue, however.

Following *Movitor*, an objection was made against an excessive funding premium in *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* ('*UTSA*').[119] The Court recognised that the premium appeared relatively high, but with reference to *Movitor,* exercised its discretion to approve the funding deed on the basis that 'there was no evidence put during the applications which persuaded … that the exercise by the liquidators of their statutory powers in this case has been anything

113 Section 479(3) of the *Corporations Act* (n 23), now repealed and replaced by the provisions in the *IPSC* (n 35).

114 See, eg, *Movitor* (n 25); *Re Tosich Construction* (n 30); *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583 ('*Re Addstone*'); *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357 ('*Buiscex*').

115 See, eg, *Re GB Nathan and Co Pty Ltd (in liq)* (1991) 24 NSWLR 674, in which case the Court indicated that a liquidator acting in accordance with directions under section 479(3) would be 'protected from claims by unsecured creditors or by contributories (or by the company itself), of any alleged breach of his duties as liquidator by so acting': at 679 (McLelland J). See also *Re Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1556, [7]–[9] (Black J), where the principles applicable to the exercise of the court's power under section 479(3) (or its equivalent, *IPSC* (n 35) section 90-15) are set out in detail, cited with approval in *Krejci (liquidator), Re Community Work Pty Ltd (in liq)* [2018] FCA 425, [47] (Gleeson J).

116 See Lombard and Symes, 'Judicial Guidelines' (n 6) 171–9 for a detailed discussion regarding these guidelines and their consideration by court.

117 *Movitor* (n 25) 394 (Drummond J).

118 Ibid.

119 [1997] 1 VR 667 ('*UTSA*').

other than bona fide and in the interests of the company'.[120] The most extreme example of an 'excessive' funding premium is likely the 75% premium in *Buiscex Ltd v Panfida Foods (in liq)*.[121] The Court acknowledged that the resultant 25% return left to the company might 'in the general run of cases', be regarded as 'far too low', but accepted the premium as reasonable in that particular case, based on the modest chances of recovery and substantial costs of investigation.[122]

It appears, therefore, that the court relies significantly on the commercial judgment of the liquidator in respect of the funding premium, thus allowing a significant margin for negotiating a funding premium. The nature of insolvency, and the view that a small return 'is a better result for the company's creditors than nothing'[123] could further contribute to the court's lenience in relation to the size of the premium.

However, that assumes that unsecured creditors will receive something. This is not always the case and there are seemingly less acceptable instances where the proceeds of successful proceedings are sufficient only to cover the funding premium and liquidator costs and remuneration.[124] A related concern is therefore the extent to which unsecured creditors would ultimately benefit from the proceeds of a successful outcome. Yet it appears that the court is at times willing to accept unsecured creditors not benefiting from the litigation at all on the basis of public interest considerations around liquidators being entitled to remuneration and the importance of funders being willing to fund insolvency proceedings;[125] as well as proper enforcement of both directors' duties[126] and voidable transaction provisions.[127]

D Financial Reliability of Funders

Another concern in relation to litigation funding that affects both plaintiff litigants and successful defendants is that even if funders are made liable for adverse costs, they may not have the asset backing in the jurisdiction to meet any such costs order. There may also be concern if funding is undertaken by subsidiary entities given that creditors will generally have no claim on the larger – and sometimes listed – parent entity.[128] A lesser related concern is the financial ability of smaller funders to see cases through to a conclusion. Thus, asset-backing and

120 Ibid 708 (Hansen J).
121 *Buiscex* (n 114).
122 Ibid 364–5 (Hodgson CJ).
123 *Re City Pacific Ltd* (2017) 35 ACLC ¶17-028, 475 [20] (Brereton J).
124 As happened in cases such as *Re Imobridge* (n 94); *Hall* (n 66); and *Marsden* (n 66).
125 *Re Cardinal Group* (n 66).
126 *Hall* (n 66) 147 [187] (Spigelman CJ, Hodgson JA and Austin J).
127 *Marsden* (n 66) [63] (Markovic J).
128 Vince Morabito and Vicki Waye 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' [2011] (2) *New Zealand Law Review* 323; Michael Legg et al, 'The Rise and Regulation of Litigation Funding in Australia' (2011) 38(4) *Northern Kentucky Law Review* 625, 659, 670–1; George Brandis, 'Terms of Reference: Inquiry into Class Action Proceedings and Third Party Litigation Funders', *Australian Law Reform Commission* (Web Page, 15 December 2017) <https://www.alrc.gov.au/inquiry/litigation-funding-inquiry/terms-of-reference-22/>.

prudential supervision of funders has been a concern and a focus of law reform inquiries in Australia.[129]

Full prudential regulation of litigation funders by the Australian Prudential and Regulatory Authority ('APRA') was not recommended by the ALRC[130] nor did it consider that an Australian Financial Services ('AFS') licensing system[131] would ensure capital adequacy.[132] Instead it noted the role of orders for security for costs in protecting defendants, and suggested that funders, rather than representative parties, be made expressly liable for same.[133]

1 Funder Financial Reliability Regulation through Managed Investment Provisions

Notwithstanding this, in 2020 the former Coalition government reimposed a form of financial regulation of funded class actions cases on the basis that the courts had previously found them to be Managed Investment Schemes ('MIS') under the *Corporations Act*.[134] Under the managed investment provisions, a 'responsible entity' was required to operate such a funded class action 'scheme' and such entity had to be a public company with an Australian Financial Services licence ('AFSL').[135] The latter in turn connoted the obligation to 'have adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence'.[136] This was perhaps a form of de facto prudential regulation by the Australian Securities and Investments Commission ('ASIC') but obviously well short of actual prudential regulation as required for APRA-regulated entities. The recent decision of the Full Federal Court in *LCM Funding Pty Ltd v Stanwell Corporation Ltd* however has overturned this earlier authority and found that a litigation funding scheme relating to a class action did not fall within the description of a MIS.[137]

The Federal Government furthermore announced the commencement of new litigation funding regulations on 16 December 2022, in terms of which litigation funding arrangements are now generally exempt from the MIS, AFSL, product disclosure and anti-hawking regimes in terms of the *Corporations Act*.[138] In addition, ASIC has extended relief relating to aspects not covered by the new regulations.[139]

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129 *Litigation Funding Inquiry* (n 4) 6, 15, 21.

130 Ibid 161.

131 Financial services licensees under *Corporations Act* (n 23) section 912A(1)(d) are required to have adequate resources, including financial resources, to provide the financial services.

132 *Litigation Funding Inquiry* (n 4) 161.

133 Ibid 163.

134 As had been determined by the Full Court of the Federal Court in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

135 *Corporations Act* (n 23) s 601FA.

136 Ibid s 912A(1)(d).

137 (2022) 292 FCR 169.

138 See *Corporations Amendment (Litigation Funding) Regulations 2022* (Cth).

139 See *ASIC Credit (Litigation Funding-Exclusion) Instrument 2020/37*, which provides relief from the application of the National Credit Code in schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth); *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38*, which provides relief from the requirements in chapter 5C (managed investment schemes) and chapter 7 (financial services

It can be noted also that under the Victorian Group Cost Order regime introduced in 2020, the law practice representing the plaintiff and group members is liable for any adverse costs and must give any security for the costs of the defendant that the court may order the plaintiff to give.[140]

2 Relevance of Funder Financial Reliability in Insolvency Actions

The ability of the litigation funder to meet their financial obligations is equally relevant in the insolvency context. However, unlike funded class actions, there is potentially a 'safety net' available in the context of insolvency proceedings in the form of liquidators' reasonable obligations to satisfy themselves as to a funder's wherewithal arising under their general law fiduciary duties,[141] general law duties of care and skill,[142] as well as statutory obligations similar to those owed by directors,[143] due to their status as 'officers' of the company.[144] One could argue that these obligations compel liquidators to conduct due diligence in relation to the financial capability of a particular funder. The potential for public and private enforcement of liquidator obligations (such as by ASIC or by a creditor) further serve to enhance protection for creditor interests where a funder is unable to meet an adverse cost order.

This relatively longstanding architecture setting out professional liquidators' duties might be contrasted with the uncertain and untested nature of the duties to class members of a non-professional representative party in a class action (discussed further in Part V(A) below).

E Securitisation of Legal Claims

An emerging issue in the litigation funding debate is the question of securitisation of legal claims. This refers to the emergence of secondary markets where claims are bought and sold by third parties.[145] Taken to extremes, and to the extent that restrictions on assignability are not applied, this might also lead to the creation of forms of aggregated or collateralised chose assets or products. While this might amount to the 'trafficking in legal claims' which has long troubled courts and been seen as contrary to public policy,[146] there are arguments both for and against such a development. Trading in legal claims in the form of book debts and 'debt factoring' services has been with us some time and does provide a service to businesses

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licensing and disclosure) of the *Corporations Act* (n 23) to litigation funding arrangements where members wholly or substantially fund their legal costs under conditional costs arrangement.

140 *Vic Supreme Court Act* (n 44) s 33ZDA(2).

141 *Australian Securities and Investments Commission v Edge* (2007) 211 FLR 137, 151 [44] (Dodds-Streeton J).

142 *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd* (1996) 65 FCR 234.

143 Provided for in terms of *Corporations Act* (n 23) ss 180–3.

144 Ibid s 9AD.

145 See, eg, Tom Coyle, 'Aggregating Consumer Arbitration Claims after *Italian Colors* through Litigation Finance and Securitization of Legal Claims' (2016) 12(3) *New York University Journal of Law and Business* 833.

146 See the discussion in *Fostif* (n 11) 424 [64], 428 [74], 431–3 [79]–[81], [84], [86] (Gummow, Hayne and Crennan JJ), 444–5 [126], 451 [147] (Kirby J), 483–4 [257]–[260] (Callinan and Heydon JJ).

in more rapidly realising amounts owed to them.[147] It may however be that civil claims for goods sold and delivered are different in kind from actionable civil claims arising from common law, tort or statutory wrongs. Certainly, the evidential requirements of proving the latter are likely to be more complex. A number of ethical issues can be foreseen for the court system from securitisation, including financial relationships between claim assignees and witnesses and this may be a matter for further research.

F Conflicts of Interest

One of the most wide-ranging and potent criticisms of litigation funding particularly in relation to class actions has been that it leads to increased conflicts of interest in the civil justice system. These can include conflicts among funders, lawyers, lead litigants, represented class members and unrepresented class members in class actions[148] and funders, lawyers, liquidators and creditors in insolvency actions. Historically, conflicts of interest could even extend to judicial officers.[149]

1 Conflicts Generally and in Class Actions

Conflicts of interest arise generally because of funders' interests in maximising profit from successful claims which may conflict with the duties of lawyers and other players to the court and the system of impartial justice.[150] Lawyers' duties and fees may also raise issues where non-client third party funders are paying the fees and where (particularly in class actions) there is an attenuated relationship of the lawyer with the litigant.[151] Finally, under the Group Cost Order regime in Victoria, lawyers themselves will face increased conflicts of interest between their own financial interest in maximising profit from successful claims and their duties to the court and the system of impartial justice.[152]

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147 See, eg, Khaled Soufani, 'On the Determinants of Factoring as a Financing Choice: Evidence from the UK' (2002) 54(2) *Journal of Economics and Business* 239 <https://doi.org/10.1016/S0148-6195(01)00064-9>.

148 Vicki Waye, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs' (2008) 19(1) *Bond Law Review* 225, 227–61 <https://doi.org/10.53300/001c.5506> ('Conflicts of Interest'); Michael Legg, 'The *Aristocrat Leisure Ltd* Shareholder Class Action Settlement' (2009) 37 *Australian Business Law Review* 399, 406; Brandis (n 128).

149 Corruption of judicial officers in ancient times was a major reason for the original ban on maintenance and champerty: see generally Percy H Winfield, 'History of Maintenance and Champerty' (1919) 35(1) *Law Quarterly Review* 50, 59.

150 Duffy, 'Two's Company' (n 10) 185.

151 Vicki Waye and Michael Duffy, 'The Fate of Class Action Common Fund Orders: The Policy, Procedural and Constitutional Issues of a Legislative Revival' (2021) 40(2) *University of Queensland Law Journal* 215, 227 <https://doi.org/10.38127/uqlj.v40i2.5435>.

152 A practical example of the conflict would be the lawyer's obligation to advise their plaintiff client to discover and disclose documents that may be adverse to the plaintiff client's case. This obligation to the court and to the justice system will directly conflict with the lawyer's own financial interest in winning the case to recover their fees. Suggested partial solutions and safeguards such as mandating a standard form discovery obligation notice to class members (as well as bans on contingent fees to witnesses) were sadly not taken up by the Victorian legislature when it introduced contingency fees in the form of Group Costs Orders in 2020.

It appears that the ancient prohibitions on maintenance and champerty were, in the early days of English courts, partly originally focused on prevention of corruption of lawyers and court officials through receipt of a share of the proceeds of successful litigation.[153] There are today, however, many laws dealing with these issues. These include substantial statutory regulation of lawyers[154] in addition to civil liability for breaches of fiduciary duty as well as regulation designed to directly avoid false testimony,[155] banning bribery of witnesses[156] or public officials[157] (including judicial officers[158]) or otherwise perverting the course of justice or conspiring to defeat justice.[159]

In addition, in Australia, there has been some level of conflict of interest management between funder, lawyers and clients for most of the period since 2012 through regulations made under the *Corporations Act* that apply to insolvency litigation funding schemes or litigation funding arrangements (which effectively cover funded class actions and funded insolvency actions).[160] Though such funded litigation is currently exempted from the requirements of the managed investment provisions, funders are required to have adequate practices for managing conflict evidenced by written procedures for identifying, managing, monitoring, disclosing and otherwise dealing with the conflict to protect claimants, pursuant to which ASIC published a Regulatory Guide in 2013.[161]

Following amendments to *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*') in 2022 these have been supplemented by a further obligation. This is an obligation to ensure that a funder also maintains adequate practices to ensure that a lawyer providing services in relation to the exempted funding scheme or arrangement, and any immediate family member of such a lawyer, does not have or obtain a direct or indirect material financial interest in the funder.[162] The latter is a significant reform to separate the lawyer from the funder function given that such ownership interests may otherwise incentivise funders and lawyers to act in each other's interest rather than in the litigant's interest.[163]

The need for such regulation here might be exemplified by some recent experience in Australia suggesting that early optimism that the interests of litigants and litigation funders in class actions would always be well aligned has proven

153 Winfield (n 149) 59.
154 See, eg, *Lawyers and Conveyancers Act 2006* (NZ); *Legal Profession Uniform Law Application Act 2014* applying to each Australian state: see, eg, *Legal Profession Uniform Law* (NSW).
155 *Crimes Act 1914* (Cth) s 35 ('*Crimes Act*').
156 Ibid.
157 *Criminal Code Act 1995* (Cth) s 142.
158 Ibid.
159 *Crimes Act* (n 155) ss 41–5.
160 *Corporations Amendment Regulation 2012 (No 6)* (Cth).
161 Australian Securities and Investment Commission, 'Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest' (Regulatory Guide No 248, April 2013).
162 *Corporations Regulations 2001* (Cth) reg 7.6.01AB(2)(a)(ii) ('*Corporations Regulations*'), inserted by *Corporations Amendment (Litigation Funding) Regulations 2021* (Cth) sch 1.
163 Duffy, 'Two's Company' (n 10) 191–3.

to be somewhat naïve. By contrast, the predictions of some[164] that these interests could diverge, particularly at the settlement negotiation and distribution stage have proven to be correct: a number of cases have devolved into objections or disputes between lawyers, litigation funders (including disputes between one or more funders) and their litigant clients in relation to allegations such as excessive funding commissions, excessive legal fees and poor settlement returns to litigants.[165]

Lastly, the ancient problem of corruption of public and judicial officers through conflict of interest was also a substantial reason for the historical prohibition on maintenance and champerty from the time of Edward I (1272–1307).[166] The modern relaxation of the prohibition does not, thankfully, appear to have seen any re-emergence of this problem in contemporary Australia.[167]

2 Conflicts in Insolvency Actions

The issue of conflicts of interest could also exist in the insolvency sphere, albeit in a different guise. In the class action context, the 'plaintiff' or class members are vulnerable to the repercussions of conflicts of interest. However, in the case of funded insolvency proceedings the concern is that the liquidator (either when acting directly as the 'plaintiff' in the case of a 'liquidator action',[168] or indirectly when acting on behalf of the company to bring a 'company action' in the company's name[169]) can be conflicted. Generally, liquidators are required to

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164 Michael Legg, 'Class Action Settlements in Australia: The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 600; Waye, 'Conflicts of Interest' (n 148) 225, 228–32; Duffy, 'Two's Company' (n 10) 189; Brandis (n 128) 176.

165 See, eg, *Bolitho v Banksia Securities Ltd [No 8]* [2020] VSC 174; *Smith v Australian Executor Trustees Ltd [No 5]* [2019] NSWSC 751; *Petersen Super Fund* (n 101); *Caason Investments Pty Ltd v International Litigation Partners No 3 Ltd* (2018) 265 FCR 487; *Nemeth v Australian Litigation Funders Pty Ltd* [2014] NSWCA 198; *Chameleon Mining NL v International Litigation Partners Pte Ltd* (2010) 79 ACSR 462.

166 Winfield (n 149) 59.

167 The lesser question of public and judicial officers or court officials owning shares in litigation funders (or insurers) might perhaps be guided by the somewhat analogous issue of ownership of shares in litigants. The question may ultimately be whether it is material enough to constitute a financial interest in the outcome of a piece of litigation (and/or whether there was any corresponding other interest that might balance it). In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, a majority in the High Court of Australia indicated that the mere fact of ownership of shares in a listed public company which is a litigant did not mean that a judge had a direct pecuniary interest in the outcome of the litigation, there being a difference between having an interest in the outcome of a case, and having an interest in a party to the case. If the judge had a financial interest in the outcome of the litigation, then under the apprehension of bias principle, the judge would be disqualified. If the outcome of a case would have no bearing upon the value of the shares then the judge did not have a direct pecuniary interest in the outcome of the litigation: at 356–7 [54] (Gleeson CJ, McHugh, Gummow and Hayne JJ). Kirby J and Gaudron J took a stricter view with the former holding that a judge would be automatically disqualified from hearing a matter if they had a direct pecuniary interest either in 'the subject matter of, or in a party to, litigation': at 394 [173] (Kirby J). Cf at 366 [92]–[94] (Gaudron J).

168 Actions that could be brought directly by the liquidator in their own name include proceedings against directors for breach of insolvent trading (in terms of section 588M of the *Corporations Act* (n 23)) and voidable action recovery proceedings (in terms of section 588FF of the *Corporations Act* (n 23)).

169 Liquidators have the power to 'bring or defend any legal proceeding in the name and on behalf of the company' (in terms of section 477(2)(a) of the *Corporations Act* (n 23)), including company actions against directors for breach of traditional directors' obligations, such as the duty to act in good faith in the best interests of the company and the duty to act with care and diligence.

avoid conflicts of interest and are not permitted to profit from their position except by way of approved remuneration and so to have a material financial interest in a funder would be in breach of their duty.[170] Insolvency practitioners who are aware of a conflict should apply to the court for leave to resign.[171] Additionally, liquidators as 'officers' for the purposes of the *Corporations Act*, are required under section 182 of the *Act* not to make improper use of their position to gain an advantage and so engaging a funder in which they held a material financial interest would be in breach of this provision.[172]

However, a more immediate concern in many instances is that the distribution rules that apply in winding-up[173] make it possible for a liquidator and funder acting in concert to ensure an outcome that will benefit them, neglecting the interests of unsecured creditors. This could ultimately lead to unsecured creditors potentially not receiving anything in spite of an action having been successful.

Once again, the insolvency law framework may offer some protection here. As mentioned previously, insolvency practitioners owe a range of general law and statutory obligations,[174] including fiduciary obligations.[175] Creditors furthermore have standing as persons 'with a financial interest in the external administration of the company'[176] to apply to court for an inquiry into the external administration (liquidation) of the company, as do officers of the company, the committee of inspection and ASIC,[177] enhancing liquidator accountability. Examples of orders that the court could make under these circumstances include 'an order in relation to any loss that the company has sustained because of a breach of duty' by the liquidator.[178] The possibility of both private and public enforcement of liquidator obligations thus strengthen the protection provided in terms of the duties that liquidators owe.

V PRACTICAL POINTS OF DISTINCTION: FUNDING IN CLASS ACTIONS AND FUNDING IN INSOLVENCY CLAIMS

The above discussion demonstrates that even though traditional policy concerns in relation to litigation funding are relevant in both the class action and insolvency contexts, the impact and importance of those concerns may differ depending on the context. The same holds true in respect of practical issues that could arise in respect of litigation funding. In this Part, we will compare and contrast the issues

170 *IPSC* (n 35) s 60-20; *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 ('*Harvey*').
171 *Harvey* (n 170).
172 *Corporations Act* (n 23) s 182.
173 Section 556 of the *Corporations Act* (n 23) provides that certain unsecured claims, including, eg, the remuneration of the liquidator (section 556(1)(de)) enjoy a statutory priority and have to be satisfied before unsecured creditors may receive any dividends.
174 See above Part IV(F)(2).
175 See Beth Nosworthy and Christopher Symes, 'The Liquidator: A Hybrid of Agent, Fiduciary and Officer' (2016) 31(1) *Australian Journal of Corporate Law* 65.
176 *IPSC* (n 35) s 90-10(2)(a).
177 Ibid s 90-10(2)(b)–(d).
178 Ibid s 90-15(3)(e).

and practices in relation to funded class actions and funded insolvency actions to highlight those differences.

A Protection of Class Members

The issue of protection of group members in relation to funders and lawyers is an area where controversies still exist. These controversies include, for instance, the question of class closure and how far it is ultimately consistent with the adoption by the legislature in 1992 of an opt-out rather than an opt-in class action model.[179] This problem becomes particularly stark if non-responsive group member claims are effectively prematurely extinguished by the proceeding.[180] The issue affects funders also, given that their remuneration is contingent on getting offers of settlements from defendants and structuring settlements in a manner that has attraction to defendants – notably through creating finality. Yet class closure may raise questions, as it has in the US in relation to funders' duties and, more particularly, lawyers' duties to litigants including the problem of conflicts between the interests of class members who participate in a settlement and those who do not. Class closure may also raise potential issues of conflict with the position and interests of the representative party which may raise difficult issues given that the representative party appears to have duties to class members including to unidentified or non-responsive class members.[181] These duties are generally untested in the courts.[182]

These types of issues may not directly arise as much in insolvency claims where liquidators are clearly structurally regulated to act equally in the interest of all residual unsecured creditors (after those with statutory priority – such as employees – are paid out). In that regard, the settlement of claims by liquidators

179 On one view, an opt-out model tends to create an inherent likely future conflict of interest between identified and unidentified/non-responsive class members, which then can become an actual conflict of interest problem for a lawyer purporting to act for both: see generally Samuel Issacharoff, 'Class Action Conflicts' (1997) 30(3) *University of California Davis Law Review* 805.

180 See the different approaches in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1 and in *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890. In this regard, it is submitted that there is an important distinction of principle between, on the one hand, legitimately removing a non-responsive group member from the class without extinguishing their individual claim and, on the other hand, extinguishing or effectively extinguishing their individual claim under a settlement. In the US, the practice of requiring class members to act affirmatively in some manner in order to participate in a class action (by filing a claim form or other 'inclusionary request') was said to be banned under the US rule, as being 'fundamentally inconsistent' with the language and policy of the Federal Rules of Civil Procedure, rule 23 opt-out regime: Rachael Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2011) 50 *Canadian Business Law Journal* 376, 405. See also William B Rubenstein, *Newberg and Rubenstein on Class Actions* (West, 5th ed, 2011) vol 3, 550–565 [§ 9.47]–[§ 9.52].

181 *Dyczynski v Gibson* (2020) 280 FCR 583, 635–6 [209] (Murphy and Colvin JJ) ('*Dyczynski*').

182 In Australia, see generally *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459; *Williams v FAI Home Security Pty Ltd [No 5]* [2001] FCA 399. As for the US academic literature, see Morris A Ratner, 'Class Conflicts' (2017) 92(2) *Washington Law Review* 785; Samuel Issacharoff and Richard A Nagareda, 'Class Settlements under Attack' (2023) 156(6) *University of Pennsylvania Law Review* 1649.

against third parties, unlike the situation of class closure (or 'soft class closure'[183]) in class actions is generally separate to and 'disjuncted' from the process of creditors 'coming forward' through the lodgement of proof of debt. On the other hand, it can be noted that the *Corporations Regulations*, similarly to class closure, also arguably prescribe a similar form of 'closure' or 'sudden death' for creditors who do not come forward and lodge proofs of debt within the prescribed time (usually 21 days from the notice of declaration of a dividend by the liquidator).[184] Unlike the finality of class closure in class actions however, there may be the possibility of a second dividend in a liquidation (or bankruptcy) and a right to participate in this.[185]

Liquidators are also likely to have reasonably good lists of affected persons (creditors) from company records and are required to notify them of their rights in writing under regulation 5.6.65. Representative 'lead' plaintiffs and their lawyers by contrast may have few records of the identities and locations of those who may be in an affected class and the requirements of notice to them under section 33Y(5) of the *Federal Court Act* are also considerably less protective of class members.[186]

B Nature of Litigant: Representative Party versus Liquidator

It has been noted that '[m]uch of the criticisms related to [TPLF] concern the potential exploitation of non-sophisticated consumer clients'.[187] However, this criticism does not hold true in the insolvency context, where the 'client' or plaintiff is the insolvency practitioner – a commercially sophisticated litigant (whether it be directly on the basis of an insolvency practitioner action, or indirectly on the basis of a company action mediated through the insolvency practitioner). The commercial sophistication of the insolvency practitioner litigant necessarily means that the plaintiff is significantly less vulnerable than the potentially non-sophisticated and uninformed class action plaintiff(s) (including both the representative party and the class members). Admittedly, in insolvency, the unsecured and trade creditors themselves may also be less experienced in litigation than liquidators and funders, however it is not these creditors who will be the direct participants in the litigation brought by the liquidator, and these will also not directly contract with the funder.

183 'Soft class closure' is said to refer to orders requiring group members to come forward and register their details by a specified date (usually in advance of a scheduled mediation), if they wish to be eligible to receive a payout from any settlement. If, however, no settlement is reached by a particular date, the class closure order expires and the class reverts to the full group (whether identified or unidentified) in the class definition contained in the statement of claim. See, eg, *Parkin v Boral Ltd* (2022) 291 FCR 116, 120 [8] (Murphy and Lee JJ); *Andrianakis v Uber Technologies Inc* [2023] VSC 415, [3] (Nichols J).

184 *Corporations Regulations* (n 162) regs 5.6.65–5.6.66. See also *Bankruptcy Act* (n 22) s 140.

185 *Corporations Regulations* (n 162) reg 5.6.68. See also *Bankruptcy Act* (n 22) s 144.

186 Section 33Y provides, inter alia, that notice may be given 'by means of press advertisement, radio or television broadcast, or by any other means' and further that the Court 'must not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so'.

187 Gian Marco Solas, *Third Party Funding: Law, Economics and Policy* (Cambridge University Press, 2019) 266.

In addition, liquidators operate under supervision of and registration by ASIC,[188] and the court.[189] Strict regulatory supervision of liquidators and onerous legal obligations, supported by standing and broad ability of ASIC to enforce these obligations, is designed to create a framework within which adequate consideration will be given to the interests of creditors when entering into litigation funding agreements. Though creditor apathy may raise concerns about creditor willingness to become involved in enforcement of liquidator obligations, the dual private/public nature of enforcement of liquidator obligations may to some extent mitigate against concerns in this respect.

In class actions by contrast, a large part of this role is played, at least nominally, by the representative party or 'lead plaintiff' who conducts the litigation on behalf of the class and is advised by solicitors who are acting for that representative party. Yet such representative parties will be much less likely to be 'repeat litigation players' as they will be limited to persons who were actual victims of the legal breaches the subject of the litigation. They will therefore be less knowledgeable and familiar with the litigation process. They tend, in practice, to be 'chosen' by the lawyers and funders with some limited court oversight.[190] They are also not registered nor regulated in the same manner as liquidators are, though they do appear to have duties to the class members, and are advised by lawyers who also have duties to the class (though these are currently still not clearly defined).[191] The lawyers may also be retained specifically by some class members and will also have a general role in acting for all class members, including unidentified or non-responsive class members (it is not clear whether there is any difference between the lawyer's duties to the former and latter, but it is submitted that any such difference would appear to be problematic).[192]

Class members are effectively litigants too, though they are not initially named nor initially liable for adverse costs nor will they generally give instructions to the representative party or to their lawyers on the litigation of the common issues. Class members' interests must be taken into account by the representative party and the lawyers however, and courts and legislatures have had to develop new doctrinal machinery to deal with the need to protect class members in the litigation,

188 *IPSC* (n 35) division 40 sets out the process by which ASIC may take disciplinary and other actions against liquidators, which could include suspension (section 40-25) or cancellation of registration (section 40-30).

189 *IPSC* (n 35) division 45 describes court oversight of liquidators.

190 Such as the ability of the court, on application by a class member, to substitute another person who will more adequately represent the class: *Federal Court Act* (n 38) s 33V. By contrast, US class action law, particularly in securities class actions, places much more emphasis on the adequacy of the representative party before certifying that an action can even proceed: see, eg, Andrew S Gold, 'Experimenting with the Lead Plaintiff Selection Process in Securities Class Actions: A Suggestion for PSLRA Reform' (2008) 57(2) *DePaul Law Review* 447.

191 In *Dyczynski* (n 181), the Court noted that 'the scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of the class members and has fiduciary obligations to them' and that 'the applicant's lawyers also owe obligations to class members but how far those obligations extend is not settled': at 635 [209] (Murphy and Colvin JJ).

192 See, eg, Degeling and Legg (n 7).

including the 'special protective role' of the court which arises at various times, but notably in relation to court approval of settlement.[193]

As in insolvency, the court in class actions also has a considerable supervisory role. By contrast, with recent reforms winding back managed investment and credit law protection, ASIC now has a reduced role in class actions. As with insolvency litigation, legal professional regulation will also play a role in regulating the lawyers acting in the claims which will provide some protection to litigants.

C Court Approval of Funding Arrangements

In insolvency litigation, it is common for liquidators to seek court approval before entering into litigation funding agreements due to the operation of statutory provisions as discussed above.[194] This enables the court to fulfil a quasi-regulatory role in respect of litigation funding agreements in the insolvency context. However, it should be noted that this measure does not necessarily offer ultimate protection in respect of creditor interests, due to the court's own restricted view of its purview in this regard, as well as the fact that court approval is not mandatory.

In class actions, court approval, court supervision or court involvement in actual or de facto approval of funding agreements has become more common in the context of interlocutory decisions relating to both competing class actions and common fund orders. In competing class actions, courts are often required at an early stage to decide which of various similar competing funded class actions will proceed, and one aspect of this will usually involve a competitive comparison of fee agreements or at least commission rates charged by litigation funders.[195]

Applications for common fund orders similarly have in the past involved scrutiny of proposed funding terms and commissions though there is perhaps less 'early' or 'advance' scrutiny with the effect of the High Court decision of *BMW Australia Ltd v Brewster* ('*Brewster*').[196] A common fund order involves an application by the plaintiff supported by their lawyers and funders, that class member funding and legal costs be paid by all class members, including those class members who have not signed any fee or retainer agreement with the lawyer or funder. Following the High Court decision in *Brewster*, which decided inter alia that there was no power of the court to make a common fund order at the commencement of a proceeding,[197] this process has tended to be deferred somewhat to the settlement or conclusion stage of a class action so that 'early' or 'advance' approval of funder fee agreements is seemingly less apparent.

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193 *Perera v GetSwift Ltd* (2018) 263 FCR 1, 7 [3] (Lee J); *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8] (Jacobson, Middleton and Gordon JJ).

194 See above Part IV(C)(2).

195 See generally *Wigmans* (n 103). See also Michael Legg and Ilana Gottlieb, 'The AMP Competing Class Actions: From Five to One' (2019) 93(10) *Australian Law Journal* 817; Duffy, 'Competing Class Actions' (n 39).

196 *Brewster* (n 102).

197 See generally Waye and Duffy (n 151). See also Ben Slade, Simon Gibbs and Vince Morabito, 'Post-*Brewster* Jurisprudence: The Future of the Common Fund Doctrine' (2022) 96(6) *Australian Law Journal* 430; Michael Legg, 'The Future of Common Fund Orders in Australian Class Actions after *BMW Australia Ltd v Brewster*' (2021) 10 *Journal of Civil Litigation and Practice* 101.

D Control of Litigation

When courts are approached for approval of litigation funding agreements in insolvency claims, one issue that may arise is the extent to which the funder will be able to control the proceedings. The basis on which the funding agreement was entered into is relevant in this regard. In *UTSA*, for example, the Court noted that funder control of the litigation would be appropriate in the case of an assignment of the complete cause of action by the liquidator;[198] however, an assignment of part of the proceeds of a successful action would require the liquidator to remain in control of the litigation.[199] This approach is supported in subsequent cases.[200] The court accepts that the funder may negotiate to exercise a degree of influence over proceedings, even where the agreement involves assignment of parts of the proceeds of a successful action, recognising that '[n]o sane litigation funder would agree to fund proceedings without some measure giving it some influence'.[201] However, this will be only the case where these are 'limited rights' and where 'ultimate control of the proceedings remains with the liquidator';[202] and where the litigation funding agreement 'provides a number of control measures to ensure that the liquidator retains ultimate control and decision-making over the course of the litigation'.[203]

Since the initial use of litigation funding in insolvency proceedings, control of funded proceedings appears to remain a sticking point. During the earlier stages of legitimisation of litigation funding in insolvency, control was used as a factor to determine whether the funding agreement would fit the 'insolvency exception' and thus not fall foul of doctrines against champerty and maintenance.[204] As use of the mechanism in insolvency became more broadly accepted, this argument may not be as relevant as it was previously. Instead, control issues now appear to be assessed through the lens of liquidator obligations, with the court indicating that where the cause of action is not assigned to the funder, the liquidator 'remains responsible under the Law for its conduct' and that the role of liquidator 'carries onerous legal responsibilities and is one which must be unfettered and is largely non-delegable'.[205]

This 'control' issue has also arisen in funded class action litigation where the question arises as to how far the representative party and class members have any real control of the proceeding given terms and conditions that may be contained

198 *UTSA* (n 119) 401 (Hansen J).

199 Cf *Movitor* (n 25), in which case Drummond J appears to be accepting of funder control even in instances where the agreement involves assignment of part of the proceeds of a successful action: at 391.

200 See, eg, *Re Tosich Construction* (n 30).

201 *Re City Pacific Ltd* (n 123) 475 [24]–[25] (Brereton J).

202 *Re Addstone* (n 114) 596–7 (Mansfield J).

203 *Re City Pacific Ltd* (n 123) 475 [24]–[25] (Brereton J).

204 See 'Cross-jurisdictional Comparison' (n 6) 42, which notes that prior to statutory intervention, an issue facing an insolvency funder 'is that it could not exercise control over how an office holder action was pursued', as an attempt to exercise control, 'was likely to be found to be champertous'. See also Cini (n 34) 173, who remarks on the relationship between concerns about funder control and falling foul of the common law rules against maintenance and champerty.

205 *Elfic* (n 31) 145 [105] (McMurdo P).

in funding agreements – where they may delegate much of this control to funders and lawyers. In this regard, it has been suggested that, where the litigant has substantially contracted out of their ability to make decisions in the litigation, 'there will be a substantial risk that the funder's intervention will be inimical to the due administration of justice'.[206] Yet it can be noted that essentially the same situation can also arise in relation to insurers' involvement in legal proceedings.

It does seem clear that as a matter of professional ethics, solicitors must usually formally take instructions (in the initial case to prove the common issues) from the representative party/lead applicant rather than from the funder, however this may nevertheless be subject to contractual terms that the representative party accepts the reasonable advice of the lawyer, so that what happens in reality may be a bit unclear.[207] Yet, given the representative party's potential possible liability to the class for breaches of duty in decision making, those lawyers (sometime referred to as 'class counsel') must obviously keep centrally in mind the interests of the representative party as well as the class members.[208]

E Court Approval of Settlement of Proceedings

Though litigation funding agreements entered into by liquidators may be subject to initial court approval under section 477(2B) of the *Corporations Act*, later settlement of litigation and claims by liquidators will not require court approval unless they amount to a compromise of a claim for a 'debt' that is greater than $100,000.[209] 'Debts' in this context appear to be 'sums of money immediately payable or which, by reason of a present obligation, will become payable in the future'.[210] There may therefore not be a need for court approval of claims more in the nature of unliquidated damages, provided that the latter are 'unquestionably not a debt as such'.[211]

Where court approval is required under section 477(2A), it has been noted by courts that it is often in the interests of creditors that the liquidator compromise a claim early and 'without the expensive factual and legal investigation that resolution of the debt/non-debt question may demand'.[212] Courts will thus pay regard to the commercial judgment of the liquidator.[213] Though the court does not 'rubber stamp' whatever is put forward by the liquidator, it is however necessarily confined in

206 *Clairs Keeley (a Firm) v Treacy* (2004) 29 WAR 479, 502 [125] (Steytler, Templeman and McKechnie JJ).

207 Duffy, 'Two's Company' (n 10) 191–2.

208 If a representative party made a decision that was in reality made by funders and/or lawyers who contractually had effective decision-making power, and that decision breached a duty of care or fiduciary duties of the representative party to the class, class members might theoretically have a right to sue the representative party. The latter might then ultimately make third-party indemnity claims against funders and lawyers. As to the representative party's duties to class members, see *Dyczynski* (n 181).

209 *Corporations Act* (n 23) s 477(2A). The threshold amount of $20,000 is modified to $100,000 by regulation 5.4.02 of the *Corporations Regulations* (n 162).

210 *Handberg v MIG Property Services Pty Ltd* (2012) 92 ACSR 38, 49 [66] (Robson J), quoting *Re Luxtrend Pty Ltd (in liq)* [1997] 2 Qd R 86, 87–8 (Moynihan J); *Webb v Stenton* (1883) 11 QBD 518, 526 (Brett MR); *Re Australia and New Zealand Savings Bank Ltd* [1972] VR 690, 692 (Pape J for the Court).

211 *HIH Insurance Ltd (in liq)* [2004] NSWSC 5, [12] (Barrett J).

212 *Elderslie Finance Corporation Ltd v Newpage Pty Ltd [No 6]* (2007) 160 FCR 423, 429 [27] (Lindgren J).

213 *Re Chase Corporation (Australia) Equities Ltd* (1990) 8 ACLC 1118.

attempting to 'second guess' the liquidator in the exercise of their powers.[214] Courts will therefore generally not interfere to block a settlement unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct.[215]

The prior approval of litigation funding agreements under section 477(2B) will tend to mean that the issue of reasonableness of a funder's commission in any such an approval under section 477(2A) may already have been substantially dealt with by the court and so may not necessarily arise again. Settlement of insolvency actions will also require court approval if the settlement terms or obligations extend over a period of longer than three months.[216] It can be noted also that settlement of claims may also connote general issues about 'control' of proceedings as discussed above.

By contrast, section 33V of the *Federal Court Act* provides that all representative proceedings (class actions) may not be settled or discontinued without the approval of the Court. The purpose of this arises from the very nature of class action proceedings in that the Court must be satisfied that any settlement or discontinuance of representative proceedings must be undertaken in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent.[217]

The effect of section 33V(2) is that upon approving a settlement the court may make such orders as are just with respect to the distribution of any money paid under the settlement. Court approval of proposed settlements have thus involved some scrutiny of any party–party or solicitor–client legal costs agreed to be paid by a defendant or party in addition to the settlement sum, as well as legal costs of a representative party where contribution to same is sought from class members.[218] This approval requirement has been extended to supervision of litigation funding charges to be deducted from a settlement,[219] though that issue has been somewhat subsumed in the debate about the availability of common fund orders. As well as courts supervising the amount of funder commission generally, common fund orders seek to spread those funding costs across the entire class including those class members who may not have signed up to a funding agreement with the funder. Common fund orders were initially founded on the general power of the Court to make orders appropriate or necessary 'to ensure that justice is done in the proceeding' set out in section 33ZF[220] but have more recently been justified by the

214 *Re Spedley Securities* (1992) 9 ACSR 83, 85–6 (Giles J).
215 Ibid.
216 In which case section 477(2B) will apply, being the same provision that applies to litigation funding agreement approval.
217 *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258 (Branson J).
218 This has occurred even where same are argued to be solicitor–client costs recoverable contractually from group members: see *Kelly* (n 99) 512–15 [331]–[348] (Murphy J).
219 *Money Max* (n 100) 208 [72] (Murphy, Gleeson and Beach JJ).
220 Ibid 209 [78].

Court primarily under the power in section 33V(2) to make orders in relation to distribution of settlement moneys.[221]

VI CONCLUSION

It is undoubtedly true that the legitimisation of litigation funding and the growth of the litigation funding industry have had a significant impact on civil litigation in Australia, both in the class action and insolvency contexts. The benefits of these developments in increased access to civil justice and remedies, vindication of rights and enhanced opportunity for enforcement of law and legal obligations have been highlighted in judgments and by legal and academic commentators. At the same time, it has been recognised that litigants are vulnerable when commercial funders become involved in civil actions.

Despite 'on-again, off-again' attempts at formal regulation to address some of the concerns regarding the operation of litigation funding and to protect the interests of litigants in funded proceedings, this is an industry and area of law that continues to operate largely unfettered by formal regulation for the moment. It is not impossible that commercial litigation funding may come under the regulatory spotlight once again at some time in the future as political interest in this topic waxes and wanes.

Should that occur, we suggest that any future wholesale regulatory reform should carefully consider the differences that exist in respect of use of litigation funding in the class action context, compared to the insolvency context, as highlighted in this article. We have sought to demonstrate that, for the most part, the ultimate intended beneficiaries of funded proceedings in the class action context (class action litigants) are impacted differently by certain policy concerns and practical issues, compared to the ultimate intended beneficiaries of funded insolvency proceedings (unsecured creditors). We believe that this is due to a number of factors but, most significantly, through the central role of the insolvency administrator, commonly a liquidator, as plaintiff in insolvency litigation, in contrast to the more insubstantial and somewhat interpolative function of the representative party in class actions. As we have noted, the former is usually an experienced litigant, and though far from infallible, is nevertheless a professional legal actor, registered and heavily regulated under relatively longstanding legislative architecture and commercially sophisticated. The latter on the other hand is a more obliquely chosen claimant victim of misconduct and legal happenstance with no necessary experience in the conduct of litigation, whose duties are still untested in the courts.

Other factors differentiating insolvency litigation and class action litigation include: (1) the greater potential for conflicts of interest in class actions given the individual interests of class members versus representative party, lawyer and funder interests, particularly in settlement discussions and non-disjunctive class closure processes; (2) closer involvement by ASIC in regulating insolvency plaintiffs such

221 *Elliott-Carde v McDonald's Australia Ltd* (2023) 301 FCR 1.

as liquidators and; (3) liquidator experience in negotiating funder commission rates and adverse costs protection. *Ex ante* approval of litigation funding agreements by the court is another difference (though admittedly there may be some de facto supervision of commission rates by courts in class actions in those cases where courts must decide which of a number of competing class action proposals will proceed). All of these reflect that in many instances, the liquidator will be a much more commercially sophisticated and experienced litigant than the representative party in funded class action proceedings.

Commercial third party litigation funders provide the 'coin' that in many cases enables litigation to take place and their legitimate interests will be primarily in funding litigation that provides a commercial return. For the legal system, regulators, and the legislature however, there will always be wider issues about protection of litigants, fairness and ultimate public trust in the integrity of the third arm of government. In that regard, this article has noted that though they have much in common and can analogise in a number of ways, there will also be qualitative differences in different forms of funded litigation – in this case insolvency and class action litigation – and it will be instructive and useful to keep this in mind as courts and legislators continue to grapple with the not inconsequential rise of third party funded litigation.