REGULATORY GUIDE 248

Litigation funding schemes: Managing conflicts of interest

December 2024

About this guide

This guide sets out our approach on how a person who provides a financial service can satisfy the obligation to maintain adequate practices and follow certain procedures for managing potential and actual conflicts of interest in relation to a litigation funding scheme or a litigation funding arrangement.

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In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

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- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in December 2024 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 248 *Litigation schemes and proof of debt schemes: Managing conflicts of interest,* issued April 2013

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A person providing financial services for litigation funding schemes is exempt from the requirements that would otherwise apply under Ch 7 of the *Corporations Act 2001* (Corporations Act), but the person must maintain, for the duration of the scheme, adequate practices for managing any conflicts of interest that may arise in relation to the scheme.

Our guidance on managing conflicts of interest applies to you to the extent that you are involved in a litigation funding scheme and you rely on the exemptions under the *Corporations Regulations 2001* (Corporations Regulations) for litigation funding schemes, or conduct your activities under an Australian financial services (AFS) licence.

This guide sets out our expectations for compliance with the obligation to maintain adequate practices to manage conflicts of interest. We expect that you will be:

- responsible for determining your own arrangements to manage interests that may conflict; and
- able to demonstrate that you have adequate practices to manage conflicts of interest, including documenting, implementing and reviewing your arrangements.

Our guidance also applies to litigation funding arrangements.

What is the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest?

RG 248.1 A person who is providing, or has provided, a financial service to a litigation funding scheme (service provider) must maintain and follow, for the duration of the scheme, adequate practices for managing any conflict of interest that may arise in relation to activities undertaken by a person in relation to the scheme or arrangement: see reg 7.6.01AB(2) of the Corporations Regulations.

RG 248.2 The service provider must also have adequate practices for ensuring that a lawyer providing services in relation to the scheme or arrangement (and any immediate family of such a lawyer) does not have or obtain a material financial interest in the service provider: see reg 7.6.01AB(2)(a)(ii). Failure to maintain adequate practices and follow certain procedures for managing these conflicts is an offence.

Note: In this document, references to specific regulations (e.g. ‘reg 7.6.01AB’) are to the Corporations Regulations.

What is a litigation funding scheme?

RG 248.3 There are two types of litigation funding schemes, defined at regs 5C.11.01(2A) and (3) respectively of the Corporations Regulations. For the purposes of this guide, the first type is a 'litigation scheme' and the other a 'proof of debt scheme'.

Litigation scheme

RG 248.4 Regulation 5C.11.01(2A) defines a litigation scheme as a scheme that has all of the following features:

(a) the dominant purpose of the scheme is for each of its general members to seek remedies to which they may be legally entitled;

(b) the possible entitlement of each of the general members of the scheme to remedies arises out of:

(i) the same, similar or related transactions or circumstances that give rise to a common issue of law or fact; or

(ii) different transactions or circumstances, but the claims of the general members can be appropriately dealt with together;

(c) the possible entitlement of each of the general members of the scheme to remedies relates to transactions or circumstances that occurred before or after the first funding agreement (dealing with any issue of interests in the scheme) is finalised;

(d) the steps taken to seek remedies for each of the general members of the scheme include a lawyer providing services in relation to:

(i) making a demand for payment in relation to a claim;

(ii) lodging a proof of debt;

(iii) commencing or undertaking legal proceedings;

(iv) investigating a potential or actual claim;

(v) negotiating a settlement of a claim; or

(vi) administering a deed of settlement or scheme of settlement relating to a claim;

(e) a person (the funder) provides funds or indemnities, or both, under a funding agreement (including an agreement under which no fee is payable to the funder or lawyer if the scheme is not successful in seeking remedies) to enable the general members of the scheme to seek remedies; and

(f) the funder is not a lawyer or legal practice that provides a service for which some or all of the fees or disbursements, or both, are payable only on success.

RG 248.5 A common form of litigation scheme is a representative proceeding or group proceeding issued in the Federal Court or a state or territory Supreme Court. While the terms 'representative proceeding' and 'group proceeding' are used in these courts, these proceedings are commonly referred to as 'class actions'. A litigation scheme can be structured as fully funded by an external funder, partly funded by lawyers or unfunded (i.e. funded by the members).

Proof of debt scheme

RG 248.6 A proof of debt scheme often has a similar structure to a litigation scheme, but the key difference is that the company against which remedies are sought has become insolvent. As a result, legal proceedings cannot be issued or continued against it without the permission of the liquidator.

RG 248.7 Regulation 5C.11.01(3) defines a proof of debt scheme as a scheme that has all of the following features:

(a) the scheme relates to an externally administered body corporate;

(b) the creditors or members of the body corporate provide funds (including through a trust) or indemnities, or both, to the body corporate or external administrator;

(c) the funds or indemnities, or both, enable the external administrator or the body corporate to:

(i) conduct investigations;

(ii) seek or enforce a remedy against a third party; or

(iii) defend proceedings brought against the body corporate in relation to the external administration of the body corporate (other than in relation to allegations, made by creditors or members of the body corporate, of negligence or non-performance of duties by the external administrator).

Note: Regulation 5C.11.01 does not use the term 'proof of debt scheme', although this term was historically used in other provisions of law (some of which may no longer be in force). For the purposes of this guide, a proof of debt scheme is the type of litigation funding scheme described at reg 5C.11.01(3). A proof of debt scheme is also known as an 'insolvency litigation funding scheme'.

What is a litigation funding arrangement?

RG 248.8 Regulation 5C.11.01 also defines what constitutes a 'litigation funding arrangement': see regs 5C.11.01(4) and (5). These arrangements are subject to the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest that may arise in relation to the arrangement.

RG 248.9 Our guidance also applies to litigation funding arrangements defined in reg 5C.11.01(4) or (5).

When does the obligation apply?

RG 248.10 Our guidance on maintaining adequate practices and following certain procedures for managing conflicts of interest only applies to a person involved in a litigation funding scheme to the extent they:

(a) rely on the exemptions under the Corporations Regulations for litigation funding schemes; or

(b) do not rely on the exemptions under the Corporations Regulations but conduct their activities under an AFS licence.

Note: When we refer to 'a person', we mean a person relying on the exemptions in the Corporations Regulations or those who conduct their activities under an AFS licence.

RG 248.11 Funders and lawyers are most likely to rely on the exemptions in the Corporations Regulations or hold an AFS licence in relation to a litigation funding scheme (i.e. funders and lawyers are most likely the service providers). However, any person involved in a litigation funding scheme can seek to rely on the exemptions.

RG 248.12 Many of the activities undertaken by lawyers for litigation funding schemes will not be financial services or are likely to be exempt from compliance with the relevant requirements of Ch 7 of the Corporations Act without the need to rely on the exemptions in the Corporations Regulations for litigation funding schemes.

Note: For example, under s766B(5) of the Corporations Act, advice given by a lawyer in a professional capacity about matters of law, legal interpretation or the application of law, or any other advice given by a lawyer reasonably necessary to be given in the ordinary course of activities as a lawyer, is not financial product advice. Further, under reg 7.6.01(1)(e) of the Corporations Regulations, we consider that merely referring a claimholder to a litigation funder would not constitute providing a financial service.

RG 248.13 More generally, lawyers are already subject to obligations to their clients relating to conflicts of interest. For example, lawyers are subject to fiduciary duties to their client, ethical duties to the court, statutory duties under state or territory legal profession Acts, and professional codes of conduct and practice rules.

Conflicts of interest

RG 248.14 The nature of the arrangements between the parties involved in a litigation funding scheme has the potential to lead to a divergence between the interests of the members and the interests of the funder and lawyers because:

(a) the funder has an interest in minimising the legal and administrative costs associated with the scheme and maximising their return;

(b) lawyers have an interest in receiving fees and costs associated with the provision of legal services; and

(c) the members have an interest in minimising the legal and administrative costs associated with the scheme, minimising the remuneration paid to the funder and maximising the amounts recovered from the defendant or insolvent company.

RG 248.15 The divergence of interests may result in conflicts between the interests of the funder, lawyers and members. These conflicts of interest can be actual or potential, and present or future.

Potential conflicts in a litigation scheme

RG 248.16 Conflicts of interest between the funder, lawyers and members may arise in a litigation scheme where:

(a) the lawyers act for both the funder and the members;

Note: In such a case there may be a perception of a conflict for the lawyers. For example, the funder retains the lawyers, and retainers offered by the funder can provide significant fees for the lawyers. Members do not, usually, engage their own lawyers.

(b) there is a pre-existing legal or commercial relationship between the funder, lawyers and/or members; and

Note 1: The service provider must ensure that the lawyers (and any immediate family of the lawyer) do not have or obtain a direct or indirect material financial interest in the service provider: see reg 7.6.01AB(2)(a)(ii).

Note 2: For example, the lawyers may also own, or be officers of, the funder.

(c) the funder has control of, or has the ability to control, the conduct of proceedings.

Note 1: For example, the funder may determine whether or not the lawyers are provided with the funds to initiate interlocutory proceedings or an appeal on particular points of law or procedure.

Note 2: For example, a proceeding against a multinational corporation may be proposed that will be funded by a funder, and there are several possible causes of action, all of which are viable. Some causes of action are stronger than others. In an effort only to reduce legal costs, the funder may recommend to the lawyer that certain causes of action should not be pleaded.

RG 248.17 The divergence of interests between the funder, lawyers and members in a litigation scheme could affect:

(a) the recruitment of prospective members;

Note: For example, advertisements placed calling for prospective members to participate in the litigation scheme may give undue prominence to the scheme's prospects of success to maximise the number of members recruited.

(b) the terms of any funding agreement;

Note 1: For example, the funding agreement may include terms that the funder is to be paid 30% of the amount recovered if proceedings are issued within one year or, if proceedings are not issued within one year, the funder is to be paid 45% plus a management fee of 5%.

Note 2: For example, the funding agreement may provide that the funder can make or participate in decisions affecting the litigation scheme, such as the decision to enter into alternative dispute resolution, settle or appeal.

(c) a scheme where there are difficulties with the case of the representative party, but not with the cases of the other members of the class; and

Note: For example, the defendant may make an offer to a representative party with a weak case not to claim costs if the proceedings of the class are discontinued.

(d) any decision to settle or discontinue the action.

Note: For example, a settlement offer may be received from the defendant before proceedings are issued. The settlement offer may be attractive to the funder due to the size of the global resolution sum. However, the lawyers may regard the damages payable to the majority of the class as insufficient.

RG 248.18 This list is not exhaustive. You should review your individual circumstances to identify divergent interests and assess those interests and potential conflicts.

Potential conflicts in a proof of debt scheme

RG 248.19 A proof of debt scheme does not generally involve legal proceedings being issued, so the areas where conflicts of interest may arise in a litigation scheme will not necessarily apply in a proof of debt scheme. In those instances where legal proceedings are issued to dispute the decision by a liquidator to admit or refuse a claim, those areas where interests may diverge in a litigation scheme will also apply.

RG 248.20 Conflicts of interest may arise in a proof of debt scheme in the following areas:

(a) the recruitment of prospective members;

(b) the terms of any funding agreement;

(c) schemes where the lawyers act for both the funder and the members; and

(d) schemes where there is a pre-existing relationship between the funder, lawyers and/or members.

What is the purpose of the obligation?

RG 248.21 The purpose of the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest is to ensure that you

only conduct a litigation funding scheme if you have robust arrangements for addressing potential, actual or perceived conflicts of interest and you follow those arrangements.

RG 248.22 Our guidance is designed to enhance the protection of members by setting out our expectations of what is required to satisfy the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest that may arise in relation to a litigation scheme or a proof of debt scheme.

RG 248.23 We are concerned with ensuring that you have practices and procedures in place to protect the interests of members and that you follow these practices and procedures.

When do you need to comply with the obligation?

RG 248.24 You must be able to show that you can comply with the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest from the time you commence recruitment of prospective members to the litigation funding scheme until all members cease to have an interest in the scheme.

Our expectations for compliance

RG 248.25 This guide sets out our expectations for compliance with the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest. While you must take responsibility for determining your own approach to managing interests that may conflict, in our view, if your arrangements are not consistent with the guidance and expectations in this guide, you are less likely to be complying with the obligation and will be exposed to a greater risk of regulatory action.

> Note: In this guide, we use the phrase 'we expect' to describe what we look for when we assess compliance with the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest that may arise in a litigation funding scheme.

RG 248.26 We do not provide exhaustive guidance on what you need to do to comply with the obligation. You must determine, on an ongoing basis, what arrangements you need to have in place to manage interests that may conflict. You must also be able to demonstrate that you maintain adequate practices and follow certain procedures for managing conflicts of interest.

RG 248.27 The nature of the arrangements between the funder, lawyers and members means that it will be difficult for you to avoid conflicting interests. Instead, we expect that you will be:

(a) responsible for determining your own arrangements to manage interests that may conflict; and

(b) able to demonstrate that you have adequate practices to manage conflicts of interest, including documenting, implementing, monitoring and reviewing your arrangements (see Section B).

RG 248.28 You are best placed to know your own interests and where conflicts may arise based on the arrangements that you have with the members of the litigation funding scheme. What you need to do to comply with the obligation may vary according to the nature, scale and complexity of the scheme: see RG 248.34–RG 248.35.

RG 248.29 Our guidance sets out some practices for managing any conflict of interest that may arise in relation to a litigation funding scheme. These practices are not intended to be exhaustive. Table 1 summarises the key practices to adequately manage conflicts of interest.

Table 1: Summary of the key practices to satisfy the obligation

Practice	Description	Location of guidance
Procedures for managing situations in which interests may conflict	You must be able to show through documentation that: • you have conducted a review of your business operations that relate to the litigation funding scheme or litigation funding arrangement to identify and assess potential conflicting interests; • you have written procedures for identifying and managing conflicts of interest; • you have implemented the procedures; • the written procedures are reviewed, at intervals of not less than 12 months; and • the procedures are implemented, monitored and managed by your senior management or partners: reg 7.6.01AB(4).	Section B
Procedures for protecting the interests of members	Your written procedures must include procedures about protecting the interests of members and prospective members of the litigation funding scheme: reg 7.6.01AB(4)(d)(iv).	Section B
Disclosure of conflicts of interest	You must have written procedures dealing with how to disclose conflicts of interest to members and prospective members of the litigation funding scheme: reg 7.6.01AB(4)(d)(ii).	Section C
Recruitment of prospective members	Your written procedures must include procedures about recruiting prospective members: reg 7.6.01AB(4)(d)(viii).	Section D

Practice	Description	Location of guidance
Review the terms of the funding agreement	Your written procedures must include procedures about reviewing the terms of the funding agreement to ensure the terms are consistent with Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act): reg 7.6.01AB(4)(d)(vii).	Section D
Lawyers' obligations to both the funder and members	Your written procedures must include procedures about dealing with situations in which the lawyer acts for both the funder and members: reg 7.6.01AB(4)(d)(v).	Section D
Independence of the funder, lawyers and members	Your written procedures must include procedures about how to deal with situations in which there is a pre-existing relationship between any of the funder, lawyer and members: reg 7.6.01AB(4)(d)(vi).	Section D
Oversight of settlement agreements and offers	If your litigation scheme settles without a proceeding being issued, the terms of any settlement agreement should be approved by counsel (or senior counsel if involved): as part of reg 7.6.01AB(4)(d)(iii) obligations.	Section E

B Procedures for adequately managing conflicts of interest

Key points

To meet your obligation to maintain adequate practices and follow certain procedures to manage conflicts of interest, you must be able to show through documentation that:

- you have conducted a review of your business operations that relate to the litigation funding scheme or litigation funding arrangement to identify and assess potential conflicting interests;
- you have written procedures for identifying and managing conflicts of interest;
- you have implemented the procedures;
- you review the written procedures at intervals of not less than 12 months; and
- your senior management or partners oversee the implementation, monitoring and management of your procedures: see reg 7.6.01AB(4).

The obligation is scalable—that is, what you need to do to meet the obligation will vary depending on the nature, scale and complexity of the litigation funding scheme.

Procedures for managing situations in which interests may conflict

RG 248.30 We use the expression 'procedures' in this guide to refer to your measures, processes and procedures for ensuring that you comply with your obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest.

RG 248.31 You must be able to demonstrate that you have procedures to:

(a) identify divergent interests and where conflicts may arise;

(b) assess those interests and potential conflicts; and

(c) decide upon and implement an appropriate response to those divergent interests and potential conflicts.

RG 248.32 We expect you to continue to monitor, assess and evaluate those divergent interests for the duration of the litigation funding scheme, as well as to monitor, assess and evaluate whether the procedures remain adequate to address and minimise the impact of those divergent interests.

RG 248.33 The procedures you adopt should be:

(a) designed or tailored according to the nature, scale and complexity of the litigation funding scheme;

(b) documented;

(c) effectively implemented;

(d) regularly monitored and reviewed, and updated as needed; and

(e) overseen by a designated senior person (or persons) who takes responsibility for their implementation, reviewing and updating.

Tailoring of your procedures to the nature, scale and complexity of your scheme

RG 248.34 The procedures you adopt should be designed with your own particular circumstances in mind. We encourage you to ensure that your conflicts management arrangements are designed or tailored according to the nature, scale and complexity of your litigation funding scheme.

RG 248.35 'Nature, scale and complexity' includes factors such as:

(a) the number of members of the litigation funding scheme;

(b) the potential for conflicts of interest to arise;

(c) the identity of the group members (e.g. whether the class of group members is open or closed, consumers and/or institutions) because this can have an impact on the cost of organising and conducting proceedings, whether strong and weak claims are combined and the distribution of any settlement;

(d) legal representation of group members in the proceeding, including fee and retainer agreements with group members; and

(e) the structure of the litigation scheme (e.g. choice of defendants, such as whether to commence proceedings against some or all of a corporate group, its directors or its advisers) because this can have an impact on prospects of success, costs exposure, length of litigation and the likely recovery.

Note: For example, for small and simple schemes, arrangements could include procedures such as meetings with affected members and periodic reviews of files and records. On the other hand, for a large, complex scheme you are more likely to need procedures that include, for example, the use of detailed policy manuals, dedicated staff, internal structures and reporting lines that support management of conflicts of interest, and comprehensive disclosure of potential and actual conflicts of interest.

Documenting your measures

RG 248.36 You must document your procedures for managing conflicts of interest: see reg 7.6.01AB(4)(b)(i). You will need to be able to show us how you are

complying with the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest. Documentation helps you demonstrate this. This generally involves having a written conflicts management policy and documenting how you implement measures to address and minimise the impact of conflicts.

RG 248.37 When you document your procedures, we expect this will include details of who is responsible for compliance and associated record keeping and reporting.

RG 248.38 We expect you will keep records showing what you have done to monitor compliance with your conflicts management practices and procedures. Conflicts management arrangements are unlikely to be adequate if they do not ensure that compliance monitoring records are kept.

RG 248.39 We expect you will keep, for at least 7 years, records of:

(a) conflicts identified and action taken;

(b) any reports given to your owners or senior management about conflicts of interest matters; and

(c) copies of written conflicts of interest disclosures given to prospective members or the public as a whole.

Note: You should consider what records of oral disclosure should be kept to help you in monitoring your compliance with your obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest. You should consider how they will demonstrate your compliance with the obligation in the event of review. For example, you may wish to keep copies of oral disclosure 'scripts' used by your representatives.

RG 248.40 You should consider how best to keep these documents and records (e.g. it may be appropriate to keep records in the form of a register). Documents and records may be kept electronically.

Implementing and reviewing your procedures

RG 248.41 It is not enough just to document your procedures for managing any conflicts of interest. To be adequate, your procedures must be implemented and maintained and accompanied by effective compliance monitoring designed to ensure that conflicts management arrangements are actually followed and appropriate action is taken when non-compliance is identified: see reg 7.6.01AB(2)(b).

RG 248.42 To successfully manage situations where interests may conflict, we expect you to be able to:

(a) identify the divergent interests relating to the litigation funding scheme;

(b) assess those interests and where any conflicts may arise;

(c) implement appropriate measures to address and minimise the impact of the conflicts; and

(d) regularly review your procedures.

RG 248.43 This means you need to put them into practice and integrate them into the day-to-day conduct of the litigation funding scheme.

RG 248.44 For measures to work effectively in practice, you should have people at all levels of your business who understand them and are committed to their success. Integrating your measures into the culture of your business helps ensure they are effective on an ongoing basis.

RG 248.45 Primary responsibility for the implementation and monitoring of the interests and potential conflicts should rest with your senior management or partners. The senior person designated to be directly responsible should satisfy themselves that the procedures are adequate and approve a response to any conflicts that are identified: see RG 248.48–RG 248.50.

RG 248.46 Under reg 7.6.01AB(4)(c), you must review your written procedures at intervals of no greater than 12 months. We expect you will regularly review your procedures to ensure that they are adequate to identify, assess and evaluate, and successfully manage, conflicts of interest.

RG 248.47 Where there are changes to your operational practices or to the legislative landscape affecting the litigation funding scheme, you should consider whether changes should be made to your written procedures. You should consider whether it is appropriate for your regular review to be an internal review or conducted by a third party such as an auditor. As part of your review, where necessary, your procedures should be updated.

Approval and oversight by senior management

RG 248.48 Regulation 7.6.01AB(4)(f) requires that you allocate to a person in senior management responsibility for implementing, monitoring and managing your procedures. We expect that the person or persons you designate as being responsible for implementing, monitoring and managing your procedures will be responsible for reporting to the board or partnership (including having ready access to the board or partnership).

Note: ‘Senior management’ is defined in the ‘Key terms’.

RG 248.49 We expect the person or persons you designate as being responsible for overseeing your procedures and deciding upon and implementing an appropriate response to a conflict of interest should be free of any business or other relationship that could materially interfere with—or could reasonably be perceived to interfere with—the independent exercise of their judgement.

The role of the person or persons approving and overseeing procedures

RG 248.50 The role of the person or persons you designate as being responsible for approving your procedures and overseeing the implementation of your procedures might extend to:

(a) communicating the procedures to those responsible for implementing them and other stakeholders;

(b) ensuring that you have adequate staff and resources to undertake the required compliance functions;

(c) ensuring staff awareness of the procedures;

(d) implementing clear reporting lines for the staff responsible for the procedures; and

(e) receiving regular reports on the measures and reporting to the governing body.

Procedures for protecting the interests of members

RG 248.51 We expect that you will have in place appropriate policies and procedures so that when you are faced with a conflict between your interests and the interests of members, the members' interests are adequately protected.

RG 248.52 You should be able to demonstrate that you have practices to ensure that, regardless of the presence of divergent interests, your services are provided in a way that meets your obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest. Your commercial interests need to be pursued in a manner that ensures adequate protection of members' interests.

RG 248.53 You should not conduct a litigation funding scheme without taking into account the risks that a divergence of interests may pose to the members' interests.

C Disclosure of conflicts of interest

Key points

You must have written procedures dealing with how to disclose conflicts of interest to members and prospective members of the litigation funding scheme: see reg 7.6.01AB(4)(d)(ii).

We expect that the procedures you adopt will include procedures about providing prospective members with information about the different significant interests of the funder, lawyers and members, and how they may conflict, as well as details of any dispute resolution options that are available to members.

Your written procedures should include procedures about disclosure to members of any significant conflicts of interest that arise during the conduct of the litigation funding scheme.

Your disclosure should be timely, prominent and specific, and contain enough detail for members to understand the potential impact of the divergent interests on the litigation funding scheme.

RG 248.54 We expect that you will make full and appropriate disclosure to members and prospective members as part of your procedures to manage interests that may conflict. While disclosure alone will sometimes not be enough, it is a key mechanism that you should use to manage potential and actual conflicts of interest.

Disclosure to prospective members

RG 248.55 You must have written procedures dealing with how to disclose conflicts of interest to prospective members. These should include procedures about providing prospective members with:

(a) information that will assist them to understand the different interests of the funder, lawyers and members, the specific situations where conflicts may arise in the scheme or arrangement and how the interests may conflict; and

(b) details of any dispute resolution options that are available to a member who has a dispute with the funder.

RG 248.56 Disclosure reduces the risk of you breaching your obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest by promoting accountability. In addition, disclosure may be necessary to avoid prospective members being misled in deciding whether they participate in the litigation funding scheme. For our expectations on

arrangements for avoiding misleading and deceptive conduct, see RG 248.67–RG 248.71.

RG 248.57 Adequate disclosure that highlights potential conflicts of interest at the outset of the funding arrangement enhances prospective members' ability to make more informed decisions about entering into any funding agreement and reduces the risk of them being misled.

> Note: For example, if certain members of the scheme are likely to receive a greater proportion of any settlement because they help fund the claim, this should be clearly disclosed.

RG 248.58 Dispute resolution is potentially an important mechanism to resolve conflicts of interest because it is one means by which your interests and members' interests can be fairly balanced. Therefore, details about the availability of any dispute resolution mechanism are important for a member in assessing the likely impact of potential conflicts.

Disclosure to existing members

RG 248.59 We expect that disclosure of conflicts of interest will be ongoing throughout the course of the litigation funding scheme. Your written procedures should include procedures about notifying members of any significant conflicts of interest that arise during the conduct of the scheme at the first reasonable opportunity, using the most efficient and effective method of communication.

RG 248.60 The most efficient and effective method of communication will depend on the facts and circumstances: see RG 248.65–RG 248.66. Disclosure may be given in writing or verbally. If given verbally, appropriate records of the disclosure should be retained.

> Note: We expect you will keep, for at least 7 years, records of conflicts of interest disclosure given to members, prospective members or the public as a whole: see RG 248.39.

RG 248.61 We recognise that in some situations disclosure may not be appropriate (e.g. the source of the conflict of interest may be confidential). In these situations you will need to assess whether the conflict can be adequately managed through other mechanisms or whether it is appropriate to continue to provide the service to the affected member.

Timely, prominent, specific and meaningful disclosure

RG 248.62 Disclosure about conflicts of interest should:

(a) be timely, prominent and specific; and

(b) contain enough detail for members to understand the potential impact of the divergent interests on the litigation funding scheme.

RG 248.63 We expect that you will provide disclosure on a timely basis and provide enough detail in a clear, concise and effective manner to allow the member to make an informed decision about how the conflicts of interest may affect the service being provided to them.

RG 248.64 We consider that 'boilerplate' disclosure is unlikely to be appropriate. To be specific, and so be meaningful for members, disclosure should refer to the particular facts and circumstances and should be specific enough for members to understand the potential impact of the divergent interests.

Method of delivering disclosure

RG 248.65 We expect that you will determine the method of delivering disclosure that best suits the members and will not expose those members to undue risk of scams or fraud. In some cases, the members might be better suited to receiving paper disclosures (e.g. members without ready access to the internet or who, while they have access to the internet, do not use it regularly or feel uncomfortable with online communication). In other cases, disclosure can be delivered by sending members or prospective members:

(a) text in an email or an attachment to an email; or

(b) an email with a hyperlink to the disclosure; or

(c) a written (paper or electronic) notification that the disclosure is available from a website.

RG 248.66 We consider that, generally, you should obtain a member's consent before delivering disclosures online (e.g. paper disclosure should be the default method of delivering disclosure) and the member should be told that, if consent is given:

(a) paper documents may no longer be given; and

(b) consent to the giving of documents by electronic communication may be withdrawn at any time.

Note 1: Some disclosures can be delivered online without first obtaining member consent. For example, in an open class representative proceeding in which a prospective member's identity is unknown, the only practicable method of delivering disclosure is by making the information available on a website.

Note 2: We encourage you to take into consideration our good practice guidance when delivering disclosures online: see Section D of Regulatory Guide 221 *Facilitating digital financial services disclosures* (RG 221).

D Managing situations in which interests may conflict

Key points

As part of the obligation under reg 7.6.01AB(4)(d)(iii) to manage situations in which interests may conflict, we expect that your written procedures will include procedures about:

- recruitment of prospective members to ensure that conflicts do not result in misleading or deceptive conduct;
- the terms of any funding agreement;
- ensuring that if there is no direct contractual relationship between the lawyers and members, any funder will engage the lawyers on terms that make clear that if there is a divergence of interests between the funder and members, the lawyers will ensure that the members' interests are adequately protected; and
- disclosure to members if there is a pre-existing relationship between any of the funder, lawyer and members.

Note: We encourage you to consider the specific issues listed in this section in managing conflicts of interest. However, the issues listed in this section and the matters dealt with in the Corporations Regulations are not intended to be exhaustive. You should determine which issues are relevant to your litigation funding scheme and have processes and procedures dealing with how to effectively manage any conflicts that may arise.

Recruitment of prospective members

RG 248.67 Your written procedures for identifying and managing conflicts of interest must include procedures about recruiting prospective members: see reg 7.6.01AB(4)(d)(viii).

RG 248.68 When recruiting prospective members for a litigation funding scheme, we expect that you will have arrangements to ensure that conflicts do not result in misleading or deceptive conduct, including having a person who is in senior management with designated responsibility to oversee the recruitment process.

RG 248.69 Recruiting a sufficient number of prospective members with good claims to participate in a litigation funding scheme is of commercial importance to the person operating the scheme or arrangement. We consider that this could be

an area where divergent interests between a funder, lawyers and members could arise.

> Note: For example, in *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2008] FCA 575, after a notice to opt out of a class action proceeding was given to group members, the solicitor for the plaintiffs made representations concerning the anticipated amount of damages the court might award. The court held that the statements were misleading because the solicitor incorrectly attributed them to the Australian Competition and Consumer Commission and that the statements could have a significant impact on a group member's opt-out decision because the inaccurate statements artificially inflated the member's expectations of potential compensation.

RG 248.70 We expect that you will not engage in recruitment strategies that are misleading or deceptive, or likely to mislead or deceive. In view of the conflict that may arise, you should have in place arrangements to ensure that advertising or recruitment practices do not mislead prospective members about significant features, risks or returns.

> Note: For example, you should have arrangements for checking marketing communications to ensure they do not suggest that prospective members will receive a certain amount without disclosing the amounts that will be subtracted from this sum for the fees and costs of the funder. Communications should not suggest prospective members can only recover their losses through the claim if in fact there are other avenues to recover their losses.

RG 248.71 In recruiting prospective members, you should be mindful of all our expectations on managing situations where conflicts may arise. For example, the person or persons in senior management you have designated as being responsible for overseeing the processes and procedures to manage conflicts of interest should review all advertising and recruitment scripts to ensure that prospective members are not misled.

The terms of any funding agreement

RG 248.72 Members do not always have legal knowledge, and may not be well placed to negotiate a funding agreement or have the ability to assess the terms they agree to. This can create an asymmetry of bargaining power between the funder and members.

RG 248.73 We consider that including terms in a funding agreement to manage conflicts of interest is an important tool that a funder and/or lawyer should use to meet its obligation.

RG 248.74 In considering the types of terms that may assist in managing conflicts of interest, the funder and/or lawyer will need to consider the interests of each person or group of people in the scheme and where interests may actually or

potentially diverge in the scheme. However, we expect the funder and/or lawyer will consider including the following terms in the funding agreement:

(a) an obligation to comply with and implement procedures to meet the requirements of the Corporations Regulations;

(b) a cooling-off period which provides an opportunity for members to seek legal advice;

(c) an obligation for the lawyer to give priority to the instructions given by the member over those of the funder;

(d) the procedure that will be applied in reviewing and deciding whether to accept any settlement offer, including the factors that will and will not be taken into account in deciding to settle;

(e) an obligation to provide clear and full disclosure of any terms of settlement to all members and to the court (where applicable);

> Note: We expect that disclosure of the terms of settlement will allow members to understand the settlement in the context of the total amount of the claim. For example, a funder should provide disclosure to members that sets out the total settlement amount as a percentage of the total amount of the claim and a worked example of how the proposed settlement might affect claimants.

(f) how disputes in relation to the scheme will be resolved;

(g) an obligation to provide clear and full disclosure to members of the terms of the agreement between the funder and the lawyers; and

(h) an obligation to provide timely and clear disclosure to members of any breach of the Corporations Regulations and a right to terminate the agreement if the funder does not comply with the regulations.

RG 248.75 Under the Corporations Regulations you must also review the terms of any funding agreement to ensure the terms are consistent with Div 2 of Pt 2 of the ASIC Act: see reg 7.6.01AB(4)(e).

RG 248.76 As part of the obligation to manage situations where conflicts may arise, you should review the terms of agreements to which you are a party in light of the existing body of law on unfair contracts and unconscionability, where relevant.

RG 248.77 We consider that there are some protections for members from being bound by unfair terms of funding agreements, including:

(a) the law on unfair contracts contained in Subdiv BA of Div 2 of Pt 2 of the ASIC Act and the law on unconscionable conduct and consumer protection contained in Subdivs C and D of Div 2 of Pt 2 of the ASIC Act;

(b) the consequent loss of any return on investment for the funder if the agreement, or part of it, is found to be invalid by the courts; and

(c) the increasing participation of more sophisticated members who are well informed and familiar with contractual terms and legal proceedings, and who are unlikely to agree to the terms of an unfair contract.

RG 248.78 You should be mindful of the statutory prohibitions on unconscionable conduct and unfair contract terms in drafting the funding agreement and ensure that it is checked with due regard to the law. We expect that the funding agreement will be approved by the designated person with responsibility for the implementation and monitoring of arrangements to manage conflicts of interest.

Lawyers' obligations to both the funder and members

RG 248.79 Under the Corporations Regulations your written procedures for identifying and managing conflicts of interest should include procedures about dealing with situations in which the lawyer acts for both the funder and members: see reg 7.6.01AB(4)(d)(v).

RG 248.80 We expect that if there is no direct contractual relationship between the lawyers and each of the members, the funder should ensure that they engage the lawyers on terms that make clear that if there is a divergence of interests between the funder and the members, the lawyers must ensure that the members' interests are adequately protected.

RG 248.81 In a lawyer–client relationship, the lawyer has fiduciary obligations to the client. Lawyers also have fiduciary obligations to people who are not in a direct contractual relationship with them. However, we consider that the potential for any adverse impact on members as a result of a divergence of interests is reduced when the members are the clients.

RG 248.82 We recognise that it is necessary for there to be communication between the lawyers and the funder during the course of the litigation funding scheme. It is appropriate for the funder to give instructions to the lawyers and for the lawyers to consider these instructions in light of their obligation to the members. However, we do not think that having the lawyers act solely for the members will impede this occurring.

Independence of the funder, lawyers and members

RG 248.83 Your procedures for managing conflicts of interest should include procedures about how to deal with situations in which there is a pre-existing relationship between any of the funder, lawyer and members: see reg 7.6.01AB(4)(d)(vi).

RG 248.84 You must also have adequate procedures to ensure that the lawyer (and any immediate family of the lawyer) does not have and does not obtain a material financial interest in the service provider: see reg 7.6.01AB(2)(a)(ii).

Note: Material financial interest refers to interests that are more than incidental. This condition applies regardless of whether the lawyer holds the interest directly or indirectly. For example, a material financial interest could arise where the lawyer's spouse is the officeholder of the service provider.

RG 248.85 We expect that there will be either:

(a) independence between the funder, lawyers and members; or

(b) if there is no such independence, appropriate management of the relationship (e.g. the relationship is disclosed to members).

Note: When reading this section, you should bear in mind the key concepts in Section C.

RG 248.86 We consider that the independence of lawyers from the funder means that their interests are less likely to conflict than when there is a relationship between the lawyers and the funder.

Disclosure

RG 248.87 Disclosure assists members to understand where their interests may diverge with those of the funder and lawyers.

RG 248.88 We consider that you should prominently disclose to members:

(a) if the funder and lawyers are associates, or if their spouses, children, directors, partners or senior employees are associates;

Note: 'Associated person' is defined in the 'Key terms'.

(b) any relationships between other directors, partners or senior employees;

(c) any relationships (outside the provision of the services for the litigation funding scheme) with any other parties to the scheme (including any involvement with any other litigation funding scheme); and

(d) any direct or indirect fee or benefit to be paid or given by one party to the scheme to another for providing services to, or participating in, that scheme.

Note: For example, if a member is receiving a fee that other members are not receiving for participating in the scheme, it should be disclosed. If a lawyer is a partner of a law firm that is acting for members in a litigation scheme and a director of the funder is providing the funding for the same litigation scheme, it should be disclosed.

RG 248.89 Disclosure should relate to relationships or interests that are current, proposed or existed in the previous 2 years. This 2-year period is a minimum period for disclosure. Earlier relationships may be so significant that they warrant disclosure as well.

RG 248.90 Disclosure should be timely, prominent and meaningful for members and potential members. 'Boilerplate' disclosures (e.g. 'we receive fees for professional services') should be avoided in favour of more specific disclosure. You should clearly disclose enough detail to allow members to make informed decisions about how the relationship may affect the service being provided to them.

Material financial interest

RG 248.91 We expect that you maintain adequate procedures to ensure that a lawyer (and any immediate family of the lawyer) does not have or obtain a material financial interest in your business: see reg 7.6.01AB(2)(a)(ii). If you become aware of such an interest, you may need to take action (beyond disclosure) to ensure that the lawyer stops providing services or relinquishes the relevant interest.

E Oversight of settlement agreements and offers

Key points

Some litigation schemes settle without a proceeding being issued and the courts will only look at the settlement agreement if it is challenged on some other grounds.

We expect that if your litigation scheme settles without a proceeding being issued, the terms of any settlement agreement will be approved by counsel (or senior counsel if involved).

When you evaluate a settlement offer or formulate a settlement proposal, we expect that you will be mindful of our expectations set out in Section B that you have in place appropriate policies and procedures to protect members' interests.

Independent review

RG 248.92 There is a considerable body of Australian case law in which issues of potential conflicts of interest have emerged in the context of the settlement of a litigation scheme.

> Note: For example, see *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, *Wotton v State of Queensland* (2009) 109 ALD 534 and *Crawford v Bank of Western Australia Ltd* [2005] FCA 949.

RG 248.93 The potential for conflicts of interest in the settlement of a litigation scheme means that as part of the obligation to manage situations in which interests may conflict (see reg 7.6.01AB(4)(d)(iii)), you must have adequate practices to manage conflicts of interest in the settlement of proceedings. In this regard, you should consider appropriate terms in any funding agreement.

> Note: For more information, see RG 248.73–RG 248.74.

RG 248.94 We expect that if your litigation scheme settles without a proceeding being issued, the terms of any settlement agreement should also be approved by counsel (or senior counsel if involved).

RG 248.95 We recognise that the funder and lawyers involved in a litigation scheme have a good understanding of the legal and commercial factors behind the claim and so have important insight into whether settling is in the best interests of the members. We believe that this knowledge is an important resource that should be used to assist members in settlement negotiations. However, we are concerned about the potential for the funder and lawyers to prefer their own commercial interests over those of the members, or for the

settlement to be in the interests of the lead plaintiff and defendant and not necessarily the other group members.

RG 248.96 If you have issued representative or group proceedings, any settlement or discontinuance cannot occur without the approval of the court. We consider that this independent oversight of the court provides protection for group members as a whole against the potentially conflicting commercial interests of the funder and/or lawyers and for group members against each other.

RG 248.97 Some litigation schemes settle without a proceeding being issued and the courts will only look at the settlement agreement if it is challenged on some other grounds. Our expectation about reviewing settlement agreements applies to these schemes because the members are not afforded the same protection as when proceedings are issued.

RG 248.98 We expect that the terms of the settlement agreement will be reviewed by counsel (or senior counsel if involved). Parties engage in pre-litigation settlement to minimise cost and delay. We consider that counsel will have accrued significant knowledge of the strengths and weaknesses of the claims and would be in the best position to judge whether the settlement is fair and reasonable without incurring the additional cost and delay of briefing an independent party.

RG 248.99 We expect that you will also be mindful of our expectations that you have in place appropriate policies and procedures to protect members' interests when evaluating a settlement offer or formulating settlement proposals: see RG 248.51–RG 248.53.

Criteria for approval

RG 248.100 We consider that in reviewing a settlement agreement, counsel (or senior counsel if involved) must be satisfied that the settlement agreement is fair and reasonable, taking into account the claims made on behalf of the members who will be bound by the settlement and potential conflicts between the funder, lawyers and the members, as well as between members.

RG 248.101 In satisfying themselves that the proposed settlement is fair and reasonable, counsel should take into account, among other things, the following factors:

(a) the amount offered to each member;

(b) the prospects of success in the proceeding (i.e. the weaknesses, substantial or procedural, in the case advanced by the members);

(c) the likelihood of members obtaining judgment for an amount significantly in excess of the settlement sum;

(d) whether the settlement sum falls within a realistic range of likely outcomes;

(e) the terms of any advice received from an independent expert on the issues that arise in the case;

(f) the attitude of the group members to the settlement;

(g) the likely duration and cost to members of proceedings if continued to judgment;

(h) the terms of any funding agreement about the procedure that will be applied in reviewing and deciding whether to accept any settlement offer, including the factors that will and will not be taken into account in deciding to settle;

(i) whether the funder might refuse to fund further proceedings if the settlement is not approved; and

(j) whether the settlement involved any unfairness to any member or categories of members for the benefit of others.

RG 248.102 A considerable body of case law has developed on the appropriate factors for a court to consider in determining whether to approve a settlement of a representative proceeding. Our approach adopts the tests applied by the Federal Court in approving the settlement of a representative proceeding under the *Federal Court of Australia Act 1976*.

Note: For example, see *Adamson v Professional Investment Services Pty Ltd* [2009] FCA 1235 and *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 (*Darwalla*).

RG 248.103 We consider that counsel should also take into account the potential for conflicts of interest between members and we have adopted the test applied by Jessup J in *Darwalla* at paragraph 41.

RG 248.104 The test applied by His Honour in *Darwalla* was to determine whether the settlement involved any actual or potential unfairness to any member or categories of members having regard to all relevant matters, including whether the overall settlement sum involved unfair compromises by some members or categories of members for the benefit of others, and whether the distribution scheme fairly reflected the apparent or assumed relative losses suffered by particular members or categories of members.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition in s9 of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
associated person	An associate (within the meaning of s9 of the Corporations Act) of the relevant person
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	*Corporations Regulations 2001*
funder	A funder defined in reg 5C.11.01(2A)(e) of the Corporations Regulations
funding agreement	An agreement between a funder and member that sets out the terms and conditions on which the funder agrees to partially or fully fund the member's participation in the litigation scheme or proof of debt scheme
litigation funding arrangement	An arrangement defined in regs 5C.11.01(4) and (5) of the Corporations Regulations
litigation funding scheme	A scheme defined in reg 5C.11.01(2A) or 5C.11.01(3) of the Corporations Regulations
litigation scheme	A type of litigation funding scheme defined in reg 5C.11.01(2A) of the Corporations Regulations
member	A member of a litigation funding scheme
proof of debt scheme	A type of litigation funding scheme defined in reg 5C.11.01(3) of the Corporations Regulations
reg 5C.11.01 (for example)	A regulation of the Corporations Regulations (in this example numbered 5C.11.01), unless otherwise specified

Term	Meaning in this document
senior management	An 'officer' of a corporation, or an 'officer' of an entity that is neither an individual nor a corporation within the meaning of s9AD of the Corporations Act
service provider	A person who is providing, or has provided, a financial service to a litigation funding scheme
unfunded scheme	A litigation funding scheme that is not funded by a funder where the members either agree to meet the costs and disbursements of the proceeding or have special funding agreements with the lawyers

Related information

Headnotes

conflict of interest, conflicts management, disclosure, litigation funding arrangements, litigation funding schemes, litigation schemes, proof of debt schemes, settlement agreements

Regulatory guide

RG 221 *Facilitating digital financial services disclosures*

Legislation

Australian Securities and Investments Commission Act 2001, Subdiv BA of Div 2 of Pt 2

Corporations Act 2001, Ch 7

Corporations Regulations 2001, regs 5C.11.01 and 7.6.01AB

Federal Court of Australia Act 1976

Cases

Adamson v Professional Investment Services Pty Ltd [2009] FCA 1235

Crawford v Bank of Western Australia Ltd [2005] FCA 949

Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) (2006) 236 ALR 322

Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited [2008] FCA 575

Wotton v State of Queensland (2009) 109 ALD 534

Consultation paper

CP 185 *Litigation schemes and proof of debt schemes: Managing conflicts of interest*

Media and other releases

22-368MR *ASIC amends relief for litigation funding arrangements* (19 December 2022)