



ASSOCIATION OF LITIGATION FUNDERS OF AUSTRALIA

Best Practice Guidelines for Litigation Funders & Managers

January 2019

1. These Best Practice Guidelines ('the Guidelines') set out standards of practice and behaviour to be observed by Funders and Managers (as defined in clauses 4 and 5 below, respectively) who are Members¹ of The Association of Litigation Funders of Australia ('the Association') in respect of funding and/or managing the resolution of Relevant Disputes. These are not mandatory for Members to comply with; however, these Guidelines represent a best practice framework within which Members may develop their own standards, policies and procedures.
2. Where a Member's conduct departs from the Guidelines, that Member should disclose the departure to prospective funded parties in their pre-contract disclosure documents.
3. 'Relevant Disputes' are defined as disputes whose resolution is to be achieved through a claims resolution process, including but not limited to, arbitration with an Australian seat and, litigation procedures in Australian Courts. Members shall be deemed to have embraced, considered and implemented the Guidelines to the extent possible in respect of funding and/or managing, respectively, the resolution of Relevant Disputes.
4. A Funder has access to funds immediately within its control to fund the resolution of Relevant Disputes pursuant to Litigation Funding Agreements ('LFAs') to enable a party to the dispute ('the Funded Party') to meet the costs (including pre-action costs and adverse cost orders) of the resolution of Relevant Disputes. In return, the Funder receives a share of the proceeds if the claim is successful (as defined in the LFA) and does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA.
5. A Manager manages litigation financed by a Funder and in return receives a share of the proceeds if the claim is successful (as defined in the LFA).
6. The promotional literature of Members should be clear and not misleading.
7. Members should observe the confidentiality of all information and documentation relating to any proposed or funded claim to the extent that the law permits, and subject to the terms of

¹ The identity of the current Members can be found on the Association website www.associationoflitigationfunders.com.au.



any Confidentiality or Non-Disclosure Agreement agreed between the Funder and/or Manager and the Funded Party.

8. An LFA is a contractually binding agreement entered into between a Funder and/or Manager and a Funded Party relating to the resolution of Relevant Disputes.
9. Members should:
 - 9.1. take reasonable steps to ensure that the Funded Party receives independent advice on the terms of the LFA prior to its execution and has been provided with adequate opportunity to obtain that independent advice. Members should expressly recommend that the Funded Party obtain its own independent advice before entering into the LFA;
 - 9.2. not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties; and
 - 9.3. comply with all laws and regulations pertaining to Funders imposed by Australian law or regulation.
10. Funders should maintain at all times access to adequate financial resources to meet the obligations of the Funder to fund all the Relevant Disputes that they have agreed to fund and in particular, should ensure that they maintain the capacity to pay all debts as and when they become due and payable.
11. The LFA should state whether (and if so to what extent) the Funder is liable to the Funded Party to:
 - 11.1. meet any liability for adverse costs that results from a settlement accepted by the Funded Party or from an order of the Court;
 - 11.2. pay any premium (including insurance premium tax) to obtain adverse costs insurance;
 - 11.3. provide security for costs; and
 - 11.4. meet any other financial liability.
12. The LFA should state whether (and if so how) the Member will:
 - 12.1. provide input to the Funded Party's decisions in relation to settlements; and
 - 12.2. terminate the LFA in the event that the Member:
 - 12.2.1. reasonably ceases to be satisfied about the merits of the dispute;
 - 12.2.2. reasonably believes that the dispute is no longer commercially viable; or
 - 12.2.3. reasonably believes that there has been a material breach of the LFA by the Funded Party.
13. The LFA should not establish a discretionary right for a Member to terminate an LFA in the absence of the circumstances described in clause 12.

14. If the LFA does give the Member any of the rights described in clauses 12 or 13, the LFA should provide that:
 - 14.1. if the Funder terminates the LFA, the Funder shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 12.2.3;
 - 14.2. if there is a dispute between the Funder and the Funded Party (other than in respect of any termination by the Funder), a binding opinion shall be obtained from a Queen's or Senior Counsel, whose appointment process is to be set out in the LFA and followed by the Member.
15. Members should maintain a complaints procedure. Members should provide a copy of their complaints procedure to each Funded Party in their pre-contract disclosure documents or as an attachment to the LFA. Alternatively, Members should publish their complaints procedure on their website or if the Member does not have a website, in some other publicly accessible form.
16. Members should publish or alternatively, provide a copy of their privacy and conflicts policies that conform with relevant regulations to each Funded Party in their pre-contract disclosure documents or as an attachment to the LFA, and they should comply with those policies.
17. Nothing in these Guidelines should prevent a Funder, when not engaged in the funding of the resolution of Relevant Disputes, from engaging in any other kind of financial or investment transaction that is permitted under the relevant law, such as taking an assignment of a claim from an insolvency practitioner.
18. These Guidelines only apply to a Funder in relation to the funding of the resolution of Relevant Disputes and does not purport to regulate or guide the activities of a Funder if it engages in any other kind of financial or investment transaction.
19. Nothing in these Guidelines shall be construed to prohibit Members from conducting appropriate due diligence, both before the offer of funding and during the course of the litigation procedures that are being funded, including but not limited to analysis of the law, facts, witnesses and costs relating to a claim, and including regularly reviewing the progress of the litigation.