



## LITIGATION LENDING SERVICES LIMITED CONFLICTS OF INTEREST POLICY, updated August 2017

### 1. Background

- 1.1. A business providing financial services to litigation schemes and/or litigation arrangements is exempt from the requirements that would otherwise apply under Chapter 7 of the *Corporations Act 2001* (“Corporations Act”), but must maintain, for the duration of the scheme or arrangement, adequate practices for identifying and managing any conflicts of interest that may arise.
- 1.2. ASIC’s Regulatory Guide 248 (“RG 248”) sets out ASIC’s expectations for compliance with Section 7.6.01AB of the *Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1)* as follows:
  - 1.2.1. Each entity is responsible for determining its own arrangements to manage interests that may conflict; and
  - 1.2.2. Each entity must be able to demonstrate that it has adequate practices to manage conflicts of interest, including documenting, implementing, monitoring and reviewing those arrangements.

### 2. Purpose

- 2.1. Litigation Lending Services Limited (“LLS”) relies on the exemptions under the *Corporations Regulations 2001* (“the Regulations”) for litigation funding schemes and litigation funding arrangements.
- 2.2. The purpose of this document is to set out LLS’ policy with respect to identifying, managing and monitoring conflicts of interest, so as to ensure compliance with the Regulations and to enhance the protection of Claimants’ interests.
- 2.3. The policy also sets out which positions are responsible for completion of the various tasks and responsibilities outlined in the document.

### 3. Scope

- 3.1. This policy applies to all of LLS’ cases, including those under which LLS provides either funding and/or an indemnity, and applies regardless of whether there is a single Claimant or a group of Claimants. The definitions of a litigation funding scheme and a litigation funding arrangement are outlined in reg 5C.11.01 of the *Corporations Amendment Regulations 2012 (No. 6)*.

### 4. General Principles

- 4.1. Delegations and responsibilities are to positions and not to individuals.
- 4.2. The work undertaken in respect of the policy is to be documented, so as to substantiate compliance with the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest.





- 4.3. Compliance with the obligation may vary according to the nature, scale and complexity of each type of funding arrangement.
- 4.4. All individual positions nominated are responsible for understanding the responsibilities assigned to them, and are obligated to execute their responsibilities as outlined within this document.
- 4.5. Any breaches of this policy should be reported to the CEO and Chairman of the Board.
- 4.6. This policy will be reviewed annually (in June), by the CFO and CEO, in conjunction with the Litigation Managers (LM). Any proposed changes are to be approved by the Board, and the revised policy implemented subsequent to Board approval.
- 4.7. After each annual review of the policy by the CFO and CEO, a statement will be issued to the Board confirming that the review has been completed and the regulation requirements have been met.

## 5. Conflicts of Interest

- 5.1. According to RG 248.11, the nature of the arrangements between the parties involved in a litigation funding arrangement has the potential to lead to a divergence of interests between the claimants and the interests of the funder and the lawyers because:
  - 5.1.1. The funder has an interest in minimising the legal and administrative costs associated with the scheme and maximising their return;
  - 5.1.2. Lawyers have an interest in receiving fees and costs associated with the provision of legal services; and
  - 5.1.3. The claimants 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.
- 5.2. The divergence of interests may result in conflicts between the interests of the funder, lawyers and the claimants. These conflicts can be actual or potential, and present or future.
- 5.3. Conflicts of interest between the funder, lawyers and claimants may arise in a litigation scheme where:
  - 5.3.1. The lawyers act for both the funder and the claimants;
  - 5.3.2. There is a pre-existing legal or commercial relationship between the funder, lawyers and/or claimants; or
  - 5.3.3. The funder has control of, or has the ability to control, the conduct of the proceedings.
- 5.4. The divergence of interests between the funder, lawyers and claimants in a litigation scheme could affect:
  - 5.4.1. The recruitment of prospective claimants;
  - 5.4.2. The terms of any funding agreement;





- 5.4.3. A scheme where there are difficulties with the case of the representative party, but not with the cases of other claimants of the class; and
- 5.4.4. Any decision to settle or discontinue the action.

## **6. Measures in Place to Mitigate Conflicts of Interest**

- 6.1. LLS has in place the following measures which serve to mitigate potential conflicts of interest:
  - 6.1.1. Neither LLS nor its employees provide legal advice or legal services to claimants;
  - 6.1.2. Each Director of LLS provides an annual Declaration of Existing Interests which states any interests held by that Director (direct or indirect) in incorporated or unincorporated entities, including any directorships, committee memberships or positions of office;
  - 6.1.3. In every funding agreement, LLS contracts with the claimant as a principal;
  - 6.1.4. The funding agreement provides that LLS acknowledges and agrees that the lawyers for the claimant are instructed by the claimant in all matters relating to the claim and that the claimant has the right to direct, conduct and conclude the claim;
  - 6.1.5. LLS does not engage the same lawyers to act for it in a particular matter as those that are engaged to act for the claimant, and LLS will not seek to influence the claimant's lawyers to cede control of the claim to LLS, or otherwise to act in breach of their professional duties;
  - 6.1.6. Any funds arising from a settlement or judgment are paid into the trust account of the claimant's solicitor and distributed to LLS by that solicitor according to the terms of the funding agreement;
  - 6.1.7. The funding agreement provides for dispute resolution in the event of any actual conflict of interest arising between LLS and the claimant, being referral to a third party Counsel;
  - 6.1.8. LLS will not enter into any agreements to provide funding for any claims against the company's appointed statutory auditor (or other professional services provider);
  - 6.1.9. LLS will not enter into any agreements to provide funding for any claims where the company's appointed statutory auditor is joined or likely to be joined; and
  - 6.1.10. Prior to accepting any litigation funding contract, the Litigation Manager will make appropriate enquiries to ensure that all parties involved in the claim or likely to be joined in the matter are appropriately identified and documented so that, should LLS' auditor be named, the person(s) making the final decision to proceed will be adequately informed so that clauses 6.1.8 and 6.1.9 can be put into effect before proceeding.

## **7. Procedures for Identifying Situations in Which Interests May Conflict**





- 7.1. At the time LLS determines that it will provide an offer of funding to a party (“the claimant”), the LM will review the claimant’s claim and will seek to identify any interests LLS has that may be divergent to those of the claimant.
- 7.2. At the time LLS determines that it will provide an offer of funding to the claimant, the LM will review the Declaration of Existing Interests of LLS Board members and will seek to identify any interests LLS Board members may have that may be divergent to those of the claimant.
- 7.3. The LM will discuss those divergent interests with the CEO, and determine whether LLS is in a position to proceed with the offer of funding.
- 7.4. The LM will document those divergent interests in its Register of Actual or Potential Conflicts of Interest (“Conflicts Register”), and the key agreed outcomes.
- 7.5. The LM will conduct a quarterly review of each case, with a view to assessing whether a conflict of interest has arisen between LLS’ interests and those of a claimant or claimant(s). The review will be documented in the Conflicts Register.
- 7.6. The LM will discuss any conflicts of interest that are identified as part of that quarterly review with the CEO, and summarise the agreed key outcomes in the Conflicts Register.
- 7.7. The CEO will review the Conflicts Register on a quarterly basis, and sign off that all potential and existing conflicts of interest have been identified and appropriately documented.
- 7.8. After each quarterly review of the Conflicts Policy by the CEO, a statement will be issued to the Board confirming that the review has been completed and the regulation requirements have been met.

## **8. Procedures for Disclosing and Managing Conflicts of Interest**

- 8.1. If prior to entering a funding agreement, LLS has identified that a potential conflict exists, it will notify the claimant, via the claimant’s lawyers, of those potential conflicts in the form of Schedule 1. The notification date and a copy of the letter will be filed in the Conflicts Register.
- 8.2. If prior to entering a funding agreement, LLS has identified that an actual conflict exists, it will notify the claimant, via the claimant’s lawyers, of those conflicts, together with a proposal for managing those conflicts of interest.
- 8.3. If, during the course of providing funding for a claim, LLS determines that a conflict of interest has arisen between LLS’ interests and those of an claimant or claimants, LLS will notify the claimant(s), via their lawyer, of the conflict it has identified, and will provide the claimant with a proposal to seek to manage the conflict as follows:
  - 8.3.1. In the first instance, LLS will recommend to the claimant(s) that they seek legal advice in relation to the conflict.
  - 8.3.2. LLS will also propose to the claimant(s) that the conflict be referred to a third-party Counsel (i.e. one who is not already briefed in the matter) for an advice as to an appropriate and reasonable resolution of the conflict.
- 8.4. In respect of 8.2 and 8.3 above, the date the notification and proposal are provided to the claimant will be documented in the Conflicts Register, along with a copy of that notification, the proposal





and any subsequent response. The agreed processes (if any) for managing that conflict will also be filed in the Conflicts Register, and procedures will be put in place to adhere to that agreement.

- 8.5. The method of delivery of disclosure/notification to the claimants, as provided for above will in most cases be in writing and delivered in hard copy form to the claimant's lawyer. If, however LLS determines that this method and form is inappropriate, it will choose a method and form more suitable to the particular circumstances of the case.

## **9. Recruitment of Prospective Members/Claimants for Class Actions or Representative Proceedings**

- 9.1. Recruitment is usually undertaken by the lawyers for the claimants, not by LLS. LLS however will take steps to ensure that as far as possible and reasonable, it will review the process of recruitment of prospective claimants to any litigation funding arrangement. This review will include a LM reviewing the terms of any advertisements made to the public to ensure that no misleading or false statements are made in relation to aspects of the funding arrangement. That review, and any subsequent correspondence with the lawyers, will be documented in the Conflicts Register.
- 9.2. The CEO will recommend to the lawyers engaged in the recruitment process that any documents provided to prospective claimants must clearly state any risks to claimants in entering into a litigation funding arrangement, as well as the amount or percentage return to be paid to the funder. The LM will note the date that this letter was provided in the Conflicts Register, along with a copy of that letter and any subsequent correspondence with the lawyers.

## **10. The Terms of the Funding Agreement**

- 10.1. LLS will ensure that it includes terms within any funding agreements to which it is a party that provide:
  - 10.1.1. A clear statement as to the total amount of funding that LLS is providing for the claimant's costs and disbursements, any undertaking by LLS to provide security for costs or to pay any adverse costs ordered against the claimant and any other financial liability which LLS is undertaking to meet for the benefit of the claimant;
  - 10.1.2. That it agrees to keep the existence and terms of the funding agreement confidential and that it will not, without the claimant's consent, disclose the funding agreement to any third party other than LLS' legal and financial advisers or as required by law;
  - 10.1.3. The terms on which LLS may provide input into any settlement negotiations or offer which the claimant is proposing to submit or accept;
  - 10.1.4. A mechanism for resolution of any dispute between LLS, the claimant and/or the lawyer, including but not limited to any dispute in relation to settlement, being referral of the dispute to a third-party Counsel;
  - 10.1.5. That in the event the claimant and LLS disagree on whether or not the claim should be concluded, or the terms upon which the claim is concluded, LLS acknowledges that the lawyers ultimately act for the claimant;





- 10.1.6. In relation to Class Actions and Representative Proceedings, a cooling off period, to enable the potential claimant an opportunity to obtain legal advice; and
    - 10.1.7. The terms on which LLS and the claimant, respectively, may terminate the funding agreement.
  - 10.2. LLS will provide a prospective claimant with the opportunity to negotiate amendments to the terms of a funding agreement, and a reasonable period of time within which to consider whether or not the claimant wishes to enter into the funding agreement with LLS on the terms offered by LLS.
- 11. Procedures for Dealing with Situations Where the Lawyer Holds Obligations to Both the Funder and Claimants**
  - 11.1. If the lawyers are engaged on terms that they act for LLS as well as for the claimant (generally not the case), the CEO will instruct the lawyers that their primary obligations are to the claimant and in the event there is a divergence of interests between those of LLS and those of the claimant, the lawyers must act to prefer the interests of the claimant over those of LLS.
  - 11.2. In a situation where there is no direct contractual relationship between the lawyers and any of the claimants to a litigation scheme, the CEO will ensure that the lawyers are aware that in the event there is a divergence of interests between LLS and the claimants, the lawyers hold an obligation to the claimants to protect their interests.
  - 11.3. The LM will record in the Conflicts Register the date that it provided the instruction to the lawyers as outlined in 11.2 and 11.2, along with a copy of that instruction (or a summary of the meeting notes).
- 12. Procedures for Dealing with a Pre-existing Relationship Between any of the Funder, Lawyer and Claimants**
  - 12.1. In the event LLS has an existing relationship with the lawyers instructed on a particular matter (ie, LLS has previously worked on a matter with the lawyers), it will disclose such relationship to the claimant, including the term of the relationship and the nature of the relationship, and invite the claimant to consider whether it wishes to proceed with the funding arrangement.
  - 12.2. The LM will record in the Conflicts Register the date that the disclosure was provided to the claimant as outlined in 12.1, along with a copy of that correspondence (or a summary of the notes from that meeting). The claimant's response will also be documented in the Register.
- 13. Procedures for Oversight of a Settlement in a Situation Where No Proceedings Have Been Issued**
  - 13.1. If settlement of a litigation scheme is being considered by the parties prior to proceedings having been issued, the CEO will ensure that the proposed settlement has been considered by Counsel and that Counsel has indicated that it is an appropriate settlement. The LM will file a copy of the CEO's correspondence to Counsel (or a copy of the notes for the meeting with Counsel) in the Conflicts Register.
  - 13.2. In considering the settlement, Counsel will be asked to take into account the following:





- 13.2.1. The amount offered to each claimant;
  - 13.2.2. The prospects of success of the claim;
  - 13.2.3. The likelihood of the claimant(s) obtaining judgment for an amount in excess of the settlement sum;
  - 13.2.4. Whether the settlement sum falls within a realistic range of likely outcomes;
  - 13.2.5. The terms of any advice received from an independent expert on the issues that arise in the case;
  - 13.2.6. The attitude of the group claimants to the settlement;
  - 13.2.7. The likely duration and cost to claimants of proceedings if continued to judgment;
  - 13.2.8. The terms of any funding agreement that specify 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;
  - 13.2.9. Whether the funder might refuse to fund further proceedings if the settlement is not approved; and
  - 13.2.10. Whether the settlement involved unfairness to any claimant or categories of claimants for the benefit of others.
- 13.3. The LM will record in the Conflicts Register the date that LLS received the advice from Counsel as outlined in 13.1, as well as a copy of Counsel's advice.
- 13.4. LLS will be bound by Counsel's advice in regard to the settlement.

#### **14. Monitoring and Review of the Conflicts Register, Reporting to the Board**

- 14.1. The CEO will conduct a quarterly review of all existing funded matters, as well as the Conflicts Register in order to ensure that LLS is fully compliant with the policy, and that the Conflicts Register is current. This review will be documented in the Conflicts Register.
- 14.2. The CEO will summarise the key conflicts as part of his/her CEO Report to the Board on a quarterly basis. Further, the CEO will use his/her discretion in reporting significant conflicts of interest to the Board as they arise. These reports will be filed in the Conflicts Register.





## SCHEDULE 1- LLS DISCLOSURE LETTER TO CLIENT

Dear [Client]

Litigation Lending Services Limited (LLS) has provided litigation funding for parties to pursue claims for over 15 years.

Pursuant to Regulatory Guide 248 issued by the Australian Securities and Investments Commission in April 2013, LLS is required, as a litigation funder, to advise you of potential conflicts of interest that may arise throughout the duration of the attached litigation funding agreement (LFA).

The nature of the arrangements between the parties to a LFA has the potential to lead to a divergence of interests between the clients, the funder and the lawyers because, although those interests are generally aligned, in the sense that both aim to achieve a successful outcome to the litigation, there are some circumstances in which those interests may be in conflict. These conflicts of interest can be actual or potential, and present or future.

The conflicts of interest that we anticipate may arise are as follows:

- Where there is a pre-existing or potential future legal or commercial relationship between the funder and your lawyers. **Please be advised that LLS has previously worked with \_\_\_\_\_ Lawyers who were retained to act for the plaintiff on a matter/several matters that was funded by LLS. [Term].** Pursuant to clause [insert] of the LFA, your lawyers, [insert], will only be acting for you, not for LLS. Accordingly, your lawyers have an obligation to prefer your interests over any interests of LLS. However, we invite you to consider whether you wish to enter into the attached LFA where LLS has a pre-existing relationship with [insert].
- Negotiation of the terms of the LFA. You are advised to seek advice from your lawyers in relation to the terms of the LFA. Pursuant to [insert] of the draft LFA you are entitled to a cooling off period within which you may withdraw from the LFA.
- Procedural aspects of the claim. The parties may potentially disagree about the best strategy for pursuing the claim to achieve an optimal outcome. In the event there is a disagreement in relation to any procedural aspects of the claim, clause [insert] of the LFA provides for a dispute resolution mechanism by way of referral to Counsel.
- Proposed settlement. The parties may potentially disagree about whether or not to accept a settlement offer, or whether to make a particular settlement offer. In the event there is a disagreement in relation to settlement, clause [insert] of the LFA provides for a dispute resolution mechanism by way of referral to Counsel. Counsel must also review and approve any proposed settlement where proceedings haven't been commenced. **In relation to class actions**







**in which proceedings have been commenced, further protection is afforded to class members as the Court is required to approve any proposed settlement.**

- Termination of the funding agreement. Clause **[insert]** of the LFA provides that LLS may terminate its obligations under the LFA, with notice, but LLS remains liable to indemnify you in respect of any adverse costs that are incurred up to the date of termination. You are also entitled to terminate the LFA in certain circumstances as outlined in clause **[insert]** of the attached LFA.
- **Recruitment of members to a class action. LLS is obliged to review any documents that are released to the public to ensure that they do not contain misleading statements in relation to the proposed claim.**

Whilst conflicts of interest have the potential to arise in the litigation funding context, LLS is committed to managing any such conflict to ensure that the interests of the client are protected and a successful outcome is achieved for all parties to the litigation funding agreement.

Specifically, LLS reviews every claim that it provides funding for (both at the outset and during the course of the litigation) and in the event that LLS becomes aware that the interests of any of the parties to the litigation funding agreement are in conflict, LLS will notify you in writing of the nature of the conflict and the way in which it proposes to manage such conflict in order to protect your interests.

Throughout the period of the litigation funding agreement, should you feel at any time that your interests are in conflict with those of LLS, please contact us and/or your lawyers in order that the conflict can be addressed without delay.

Clause \_\_\_ of the attached draft litigation funding agreement provides for a dispute resolution mechanism in the event that a conflict of interest arises and the parties are unable to resolve that conflict informally among themselves. We recommend that you obtain your own legal advice in relation to the attached draft funding agreement and ensure that it addresses any concerns that you may have in relation to the management of any potential conflicts of interest.

Yours faithfully

