

**BALANCE LEGAL CAPITAL LLP
CONFLICTS POLICY
JULY 2020**

1 Policy overview

- (a) Balance Legal Capital LLP and/or its related entities (**Balance**) provides funding for commercial litigation including in Australia.
- (b) Balance supports litigants and legal teams using its capital and experience and has a successful track record of claims funded.
- (c) Balance, in the course of its funding arrangements, may be providing financial services for a Litigation Scheme (**Litigation Scheme**) including in respect of representative proceedings issued in the Federal Court or in a State or Territory Supreme Court.
- (d) Corporations Amendment Regulations 2012 (No 6) Amendment Regulation 2012 (No 1) (**Regulation**) makes a 'litigation funding arrangement' that involves a single claimant subject to the obligation to maintain adequate practices for managing conflicts of interest (**Other Funding Arrangement**).
- (e) Balance relies on an exemption to holding an Australian Financial Services Licence, which is provided for by the Regulation.
- (f) The Regulation provides that Balance must maintain, for the duration of the Litigation Scheme, or Other Funding Arrangement, adequate practices for managing any conflicts of interest that may arise in relation to the Litigation Scheme or Other Funding Arrangement.
- (g) Australian Securities and Investments Commission (**ASIC**) Regulatory Guide 248: Litigation Schemes and proof of debt schemes: Managing conflicts of interest (**RG 248**) sets out ASIC's expectations for compliance with the obligation to maintain adequate practices to manage conflicts of interest.
- (h) This document outlines the policies and procedures Balance has in place for managing conflicts of interest.

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

- (a) Balance as a person who is providing a financial service to a Litigation Scheme or Other Funding Arrangement must maintain and follow, for the duration, adequate practices for managing any conflict of interest that may arise in relation to activities undertaken by Balance in relation to the Litigation Scheme or Other Funding Arrangement.

3 Conflicts of interest

- (a) The nature of the arrangements between the parties involved in a Litigation Scheme or Other Funding Arrangement (**both, Funded Litigation**) has the potential to lead to a divergence between the interests of the members and the interests of the funder and the lawyer. RG 248 notes the following interests of the parties usually involved:

- “(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.”*

- (b) 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.

4 Potential conflicts in a Litigation Scheme / Funded Arrangement

- (a) Conflicts of interest between the funder, lawyers and members may arise where:
 - (i) the lawyers act for both the funder and the members;
 - (ii) there is a pre-existing legal or commercial relationship between the funder, lawyers and/or members; and
 - (iii) the funder has control of, or has the ability to control, the conduct of proceedings.
- (b) The divergence of interests between the funder, lawyers and members could affect:
 - (i) the recruitment of prospective members;
 - (ii) the terms of any funding agreement;
 - (iii) the way a case is conducted where there are, for example, difficulties with the case of the representative party, but not with the cases of the other members of the class; and
 - (iv) any decision to settle or discontinue the action.

5 What is the purpose of the obligation to manage conflicts of interest?

- (a) The purpose of the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest is to ensure that funders such as Balance only conduct funded litigation when it has included robust arrangements for managing conflicts of interest in its internal policies, including by ensuring appropriate provisions are included in its funding agreements.

6 Procedures for adequately managing conflicts of interest

- (a) Balance, in meeting its obligation to maintain adequate practices and follow certain procedures to manage conflicts of interest, must be able to show through documentation that:
 - (i) it has conducted a review of its business operations that relate to the Funded Litigation to identify and assess potential conflicting interests;
 - (ii) it has written procedures for identifying and managing conflicts of interest;
 - (iii) it has effectively implemented the procedures;

- (iv) it regularly reviews and updates, as needed, the written procedures; and
- (v) its senior management or partners oversee the implementation, review and update of its procedures.

7 Procedures for managing situations in which interests may conflict

- (a) Balance's procedures provide mechanisms for:
 - (i) identifying divergent interests and where conflicts may arise;
 - (ii) assessing those interests and potential conflicts; and
 - (iii) deciding upon and implementing an appropriate response to those divergent interests and potential conflicts.
- (b) Balance's procedures also provide mechanisms for continuing to monitor, assess and evaluate those divergent interests for the duration of the Funded Litigation as well as to monitor, assess and evaluate whether the procedures remain adequate to address and minimise the impact of those divergent interests.

8 Conflicts Management Officer

- (a) Balance has, in implementing the required procedures, appointed a person in senior management as the Conflicts Manager with responsibility for dealing with conflicts of interest issues that arise within Balance's Funded Litigation in Australia.
- (b) The Conflicts Manager is responsible, amongst other things, for:
 - (i) reviewing the procedures in this document;
 - (ii) implementing the procedures set out in this document and checking and monitoring the procedures in this document;
 - (iii) communicating the procedures to those responsible for implementing them and other stakeholders;
 - (iv) ensuring that Balance has adequate staff and resources to undertake the required compliance functions;
 - (v) training Balance staff and representatives who have the conduct of Funded Litigation in Australia to ensure they understand the legislative framework, the Regulation, RG 248, applicable law generally and the meaning of "conflicts of interest" and the procedures in this document;
 - (vi) implementing clear reporting lines for the staff responsible for the procedures;
 - (vii) reporting generally against this policy and compliance with this policy;
 - (viii) noting and recording conflict issues and reporting to senior management on any conflicts of interest issues that may arise;
 - (ix) managing and resolving any conflicts in accordance with this policy;

- (x) reviewing all advertising and recruitment scripts to ensure that prospective members are not misled when dealing with recruiting prospective members;
 - (xi) ensuring that the disclosures required under the terms of the Funding Agreement are made to members and that a record of those disclosures is kept; and
 - (xii) record keeping and reporting under this policy.
- (c) The Conflicts Manager may perform their responsibilities with advice or assistance from external legal counsel from time to time where appropriate.

9 Implementing and reviewing our procedures

- (a) Balance implements and maintains its procedures and also undertakes compliance monitoring designed to ensure that conflicts management arrangements are actually followed and appropriate action is taken when non-compliance is identified.
- (b) To successfully manage situations where interests may conflict, Balance will, through the Conflicts Manager:
- (i) identify the divergent interests relating to Funded Litigation;
 - (ii) assess those interests and where any conflicts may arise;
 - (iii) implement appropriate measures to address and minimise the impact of the conflicts; and
 - (iv) regularly review its procedures.

10 Management of conflicts

- (a) The Conflicts Manager will assess any conflicts and decide whether that conflict is manageable or whether it should be avoided.
- (b) If the Conflict Manager decides that the conflict can be managed, the Conflicts Manager will:
- (i) review the terms of the proposed funding agreement any other agreement entered into for the purposes of the Funded Litigation to determine whether the mechanisms in those agreements are adequate to protect the interests of prospective claimants, having regard to the guidance provided in RG 248;
 - (ii) if not adequate, recommend appropriate amendments;
 - (iii) otherwise approve the disclosures to be made to the prospective members, prior to entry into the funding agreement, to ensure that they are sufficiently informed to be able to assess the conflicts and how Balance is proposing to manage them; and
 - (iv) consider any other steps appropriate to manage the conflict, for example:
 - (A) ongoing specific monitoring; or
 - (B) suggesting a change of solicitor or law firm; or
 - (C) a change of counsel; or

- (D) the imposition of Chinese Wall confidentiality protection.
- (c) If the Conflicts Manager decides that the conflict cannot be managed, the Conflicts Manager should make a recommendation to the senior management or Board of Balance on whether it is appropriate to provide the service to the prospective members affected by the conflict.
- (d) In the ongoing management of conflicts, the Conflicts Manager will:
 - (i) continue to monitor and assess the nature of any divergent interests of the parties to the Funded Litigation;
 - (ii) assess whether the procedures remain adequate to address and minimise the impact of any divergent interests; and
 - (iii) if necessary, revise the procedures to ensure that they adequately manage the conflicts and update relevant documentation in relation to those conflicts.
- (e) If the Conflicts Manager identifies any new conflicts, the Conflicts Manager must assess, manage and disclose (where appropriate) the conflicts and any steps proposed to manage them in accordance with these procedures.

11 General policy for disclosure of conflicts of interest

- (a) Balance's disclosure to members and prospective members of Funded Litigation will include:
 - (i) providing prospective members with information about the different significant interests of the funder, lawyers and members, and how they may conflict;
 - (ii) providing details of any dispute resolution options that are available to members.
 - (iii) disclosure to members of any significant conflicts of interest that arise during the conduct of the litigation.
 - (iv) be timely, prominent and specific, and contain enough detail for members to understand the potential impact of the divergent interests on the litigation scheme or proof of debt scheme.

12 Process for disclosure to prospective / current members of a Litigation Scheme

- (a) Disclosure is to be made:
 - (i) as required by this document;
 - (ii) in any event, during the "bookbuild" phase of a proposed multi-party action when Balance seeks to identify and inform prospective claimants of their rights; or
 - (iii) immediately prior to the signing of a funding agreement by a prospective funded claimant; or
 - (iv) during the course of the Funded Litigation once it has commenced (in the case of conflicts which have not already been disclosed).
- (b) Any disclosures of conflicts to members should, in accordance with RG 248:

- (i) be in writing unless there are specific reasons why writing is not appropriate in which case it may be given verbally;
 - (ii) contain sufficient information that will assist the claimant to understand the different interests of Balance, the lawyers and the claimant and assist the claimant to make an informed decision about the conflict;
 - (iii) contain the specific examples of conflicts that may arise in the Litigation Scheme and how the interests may conflict, for example:
 - (A) the different financial interests of Balance and the members;
 - (B) potential issues around settlement of a case;
 - (C) Balance's fees and how they are calculated;
 - (D) Balance's rights to terminate the funding agreement;
 - (iv) disclose any relevant relationships between Balance and its associated persons and the lawyers or any funded claimant and their associated persons and disclose any relevant interests; and
 - (v) contain details of any dispute resolution options that are available to the claimant who has a dispute with Balance.
- (c) Balance will, in any event, provide ongoing disclosure to members of any other conflicts that are identified during the course of the Funded Litigation and how Balance intends to manage those conflicts.
 - (d) Balance, when recruiting prospective members for a funded claim, will ensure that it does not engage in misleading or deceptive conduct by having our Conflicts Manager oversee the recruitment process.
 - (e) Balance will not engage in recruitment strategies that are misleading or deceptive, or likely to mislead or deceive including about risks or returns from any case and the Conflicts Manager will review all advertising and recruitment scripts to ensure that prospective members are not misled.

13 The terms of any funding documentation

- (a) The funding agreement between Balance and the representative plaintiff in group proceedings (the **Applicant**) and the retainer agreement between the Applicant and the lawyers, contain terms which assist in the management of conflicts of interest.
- (b) The funding agreement and/or retainer agreement include the following terms:
 - (i) an obligation for the lawyers to protect the interests of the Applicant and/or members in the event of a divergence or conflict between the interests of the Applicant and/or members and the interests of Balance;
 - (ii) a procedure that will be applied in reviewing and deciding whether to accept any settlement offer;

- (iii) an obligation for the lawyers and Balance to clearly communicate and provide full disclosure of any terms of settlement to the Applicant and to the Court (where applicable);
- (iv) that any disputes in relation to the proposed settlement will be resolved by the appointment of an independent settlement assessor (who will usually be Senior Counsel or Queens Counsel) to provide an opinion on the settlement which will be binding on all parties;
- (v) an obligation to provide clear and full disclosure to the Applicant of the terms of the agreement between the funder and the lawyers.

14 Lawyers' obligations to both the funder and members

- (a) Balance funds the lawyers on terms that make clear that if there is a divergence of interests between the funder and the lawyers' clients or members of any class, the lawyers must ensure that the members' interests are adequately protected.
- (b) Balance prefers that other than for an extraordinary situation, the lawyers will have a direct relationship with the funded party.
- (c) Subject to the terms of the Funding Agreement, Balance has rights of control over the litigation and is entitled and usually will give instructions to the lawyers and require the lawyers to consider these instructions in light of their obligation to the members and if able to do so to act in accordance with instructions from Balance.

15 Independence of the funder, lawyers and members

- (a) It is the policy of Balance that there will be either:
 - (i) independence between the funder, lawyers and members; or
 - (ii) if there is no such independence, the relationship will be disclosed to members.
- (b) Balance will prominently disclose to members:
 - (i) if the funder and lawyers are associates, or if their spouses, children, directors, partners or senior employees are associates;
 - (ii) any relationships between other directors, partners or senior employees of Balance and the lawyers or members;
 - (iii) any relationships (outside the provision of the services for the Funded Litigation) with any other parties to the Funded Litigation (including any involvement with any other Funded Litigation); and
 - (iv) 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.
- (c) Disclosure will be timely, prominent and meaningful for members and potential members.

16 Oversight of settlement agreements and offers

- (a) 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 Funded Litigation.
- (b) The potential for conflicts of interest in the settlement of a Funded Litigation means that as part of its obligation to manage situations in which interests may conflict, Balance must have adequate practices to manage conflicts of interest in the settlement of proceedings.
- (c) If the litigation settles without a proceeding being issued, Balance will obtain an opinion from Counsel (usually a Senior Counsel or Queens Counsel) on the terms of any settlement agreement. The Counsel will have accrued significant knowledge of the strengths and weaknesses of the claims and is in a good position to judge whether the settlement is fair and reasonable without incurring the additional cost and delay of briefing an independent party.
- (d) Balance will otherwise seek Court approval for settlement of a Litigation Scheme.

17 Criteria for settlement approval

- (a) In the event of a dispute over settlement, counsel must be satisfied that the settlement agreement is fair and reasonable, taking into account the following, non-exhaustive list of factors:
 - (i) the net amount offered to each member, taking into account the amounts that may be reasonably expected to be payable under the funding agreement and pursuant to any Court order for distribution, or otherwise;
 - (ii) the prospects of success in the proceeding (i.e. the weaknesses, substantial or procedural, in the case advanced by the members);
 - (iii) the likelihood of members obtaining judgment for an amount significantly in excess of the settlement sum, taking into account: (A) interest that may reasonably be expected to be payable on any principal sum awarded on judgment; and (B) the amounts that may be reasonably be expected to be payable under the funding agreement and pursuant to any Court order for distribution, or otherwise;
 - (iv) whether the settlement sum falls within a realistic range of likely outcomes;
 - (v) the terms of any advice received from an independent expert on the issues that arise in the case;
 - (vi) the attitude of the group members to the settlement;
 - (vii) the likely duration and cost to members of proceedings if continued to judgment;
 - (viii) 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;
 - (ix) whether the proposed settlement will provide return to the funder that adequately reflects the risk taken and capital committed by the funder;
 - (x) whether the funder might refuse to fund further proceedings if the settlement is approved or not approved; and

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

18 Training and compliance monitoring

- (a) Balance will, through the Conflicts Manager, ensure the policies and procedures set out in this document have been followed by all relevant staff, for all Funded Litigation.
- (b) If the Conflicts Manager finds that the policy or part of it has not been complied with, the Conflicts Manager will seek to rectify the non-compliance in a timely manner and record this.
- (c) The Conflicts Manager will also implement a training program for all staff involved in funding of Funded Litigation in Australia and will ensure such staff have a copy of and have been informed of the content of the policy.

19 Compliance audit

- (a) The Managing Partner of Balance is responsible for ensuring that the Conflicts Manager and all relevant staff have complied with these policies and procedures.
- (b) The Managing Partner will report any material non-compliance to the Board and will make recommendations to the Board on how to rectify the non-compliance.

20 Policy review

- (a) Balance reviews its written procedures at intervals of no greater than 12 months to ensure that they are adequate to identify, assess and evaluate, and successfully manage, conflicts of interest.

21 Records retention

- (a) Balance will keep, for at least seven years, records of:
 - (i) conflicts identified and action taken;
 - (ii) any reports given to senior management about conflicts of interest matters; and
 - (iii) copies of written conflicts of interest disclosures given to members, prospective members and the public as a whole.

22 General

- (a) This policy governs any funding activities of Balance for cases sourced and conducted in Australia.
- (b) Balance will seek at all times to comply with this policy and the applicable law.