MALLESONS

The Review

Class Actions in Australia 2025/2026

Fee, Fi, Fo, Fund: The state of play in Australian class action financing

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The review period has seen important developments across the class action funding environment, both in respect of how lawyers and funders are paid, and the use of innovative forms of security to enable lawyers and funders to carry a high volume of cases on their books at the same time. In particular:

- The High Court has confirmed that contingency fees for lawyers by way of a 'solicitors' common fund order' (**CFO**) **are not available** in the Federal Court.[46]
- Victoria's 'group costs order' (**GCO**) regime, which provides a lawful avenue for solicitors to earn contingency fees for class actions in the Victorian Supreme Court, has continued to evolve, including key decisions addressing the Court's power to vary GCOs.
- Courts have continued to examine the use of 'After the Event' (**ATE**) insurance by funders as a means of defraying costs risks, with novel rulings on the use of anti-avoidance endorsements to ATE policies and continued scrutiny of ATE premium deductions.
- The High Court has found that funding commissions are not recoverable as damages in actions for nuisance, with reasoning that may extend to other causes of action.[47]

This chapter considers each of these developments.

SOLICITORS' COMMON FUND ORDERS – HIGH COURT SAYS NO

Historically, lawyers in Australia have been prohibited from earning 'contingency fees' in class actions that constitute a certain percentage of the settlement sum over and above fair remuneration for their professional services.

In 2020, the Victorian Parliament legislated to permit lawyers' contingency fees under the GCO regime in the Victorian Supreme Court. In *Kain*, the plaintiff solicitors sought to extend that to the Federal Court by arguing that the powers conferred on the Court by ss33V and 33Z of the *Federal Court of Australia Act 1976* (Cth) extended to orders approving a 'solicitors' CFO' – essentially, a contingency fee for lawyers.

46 *Kain v R&B Investments Pty Ltd; Ernst & Young (A Firm) v R&B Investments Pty Ltd; Shand v R&B Investments Pty Ltd* [2025] HCA 28 (**Kain**).
47 *Hunt Leather Pty Ltd v Transport for NSW* [2025] HCA 53 (**Sydney Light Rail**).

The High Court **unanimously rejected this argument** and held that the Federal Court class action regime does not permit solicitors' CFOs.

The issue arose out of a consolidated Federal Court class action against Blue Sky Alternative Investments Limited (in liquidation), as well as certain of its former directors and its former auditor. The applicants' solicitors reached an in-principle agreement about the conduct of the proceeding which included, among other things, an order that the solicitors receive, subject to Court approval, a percentage of any resolution sum as remuneration for assuming the risks of funding legal costs and disbursements.

The High Court declined to reopen its decision in *Brewster*,[48] which held that the Federal Court and NSW Supreme Court do not have power to make CFOs in favour of third-party litigation funders at the commencement of class actions. The Court held that there is no power to make CFOs of any kind in favour of solicitors, because of the prohibition on contingency fee arrangements in State and Territory legal profession laws.[49]

The consequence of this decision is that absent legislative change, the status quo in Australia is preserved — and **Victoria remains the only jurisdiction** in which solicitors can earn contingency fees and fund class actions on that basis.

Following *Kain*, there has been an increased push for reform to funding regimes in other jurisdictions:

- At the federal level, Attorney-General Michelle Rowland has publicly indicated that the Commonwealth Government is considering replicating the Victorian GCO model in the Federal Court — although there is no draft legislation currently before Parliament.
- In NSW, there are indications that the State Government is considering legislation to establish a form of GCO. Justice Pike of the NSW Supreme Court (who becomes the Class Actions List Judge from 7 September 2026) has publicly supported reform, including the implementation of uniform class action legislation between Victoria and NSW. The Association of Litigation Funders of Australia has also made a submission to Attorney-General Michael Daley advocating various non-GCO reforms directed at supporting the competitiveness of NSW as a forum for class actions.[50]

It remains to be seen if or when such changes will be implemented.

48 *BMW Australia Ltd v Brewster; Westpac Banking Corp v Lenthall* (2019) 269 CLR 574; [2019] HCA 45.

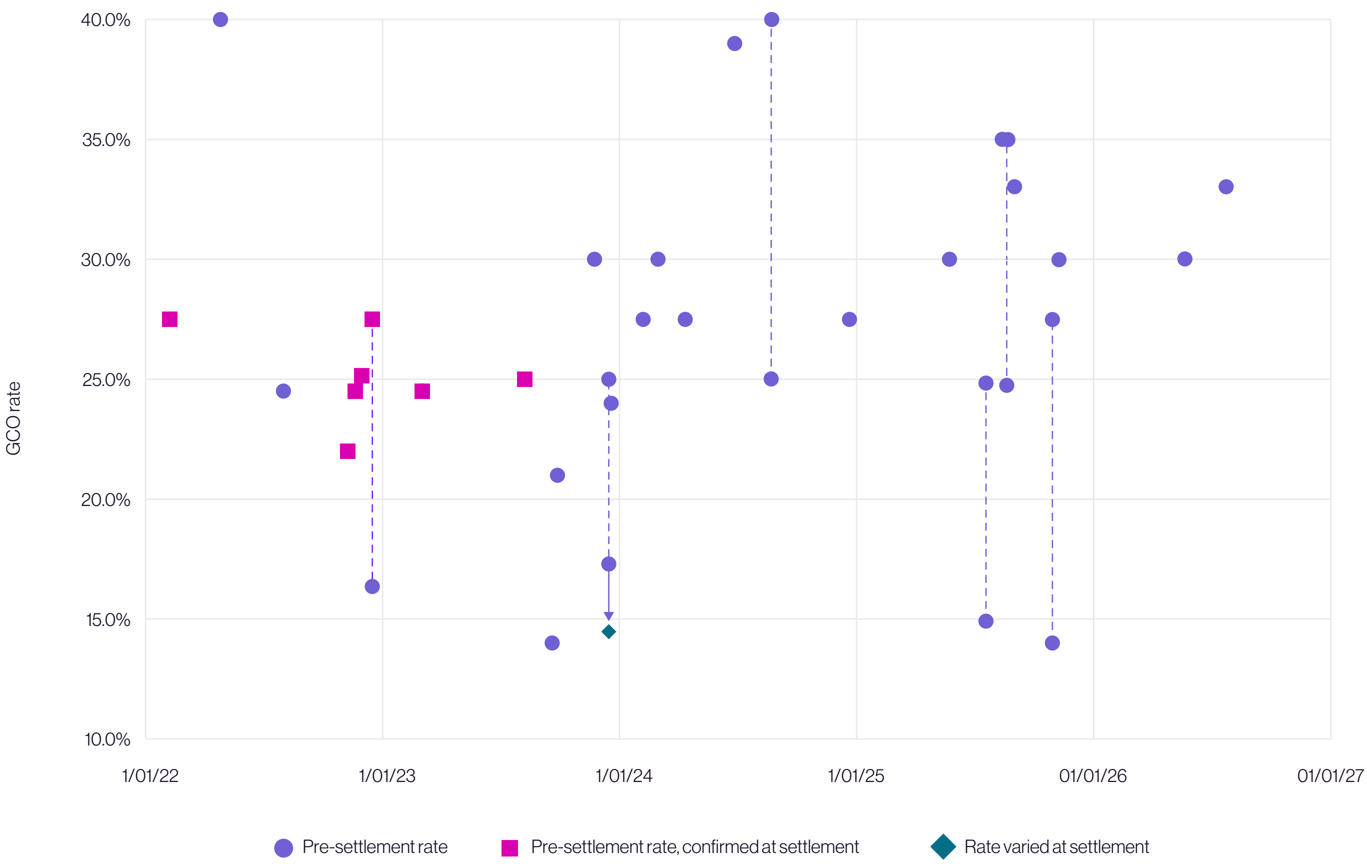
49 *Kain* at [96]-[104].

50 Association of Litigation Funders of Australia, 'Submission to the Office of the Hon Michael John Daley on Litigation Funding & Case Management Reforms in Class Actions' (9 March 2026).

GROUP COSTS ORDERS – TO VARY OR NOT TO VARY

Until legislative reform occurs in other jurisdictions, the GCO regime will likely guarantee the popularity of the Victorian Supreme Court as a forum of choice to commence class actions.

Since the regime was introduced in 2020, over 30 GCOs have been granted, at rates typically in the range of 25% to 30%, depicted in the graph below. Dotted lines are used to indicate the upper and lower rate for tiered GCOs, where the rate decreases as the quantum recovered increases.



GCOs are subject to Court approval and, even after they have been made, are also subject to variation by the Court. The review period saw significant developments in the jurisprudence of GCO variations, including the first instances of a GCO being varied:

- **at settlement**, pursuant to s33V of the *Supreme Court Act 1986* (Vic) (**VSC Act**) (in *McCoy*[51]); and
- **before settlement**, pursuant to s33ZDA of the VSC Act (in *Byrnes*[52]).

These decisions are discussed below, and may demonstrate a trend towards the Victorian Supreme Court taking a more active role in monitoring GCO rates in the interests of group members, consistent with similar decisions of the Federal Court regarding common fund order rates for third-party funders.[53]

51 *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553.

52 *Byrnes v Origin Energy Ltd (No 2)* [2026] VSC 97.

53 The Federal Court has treated a 50% return to group members as an important benchmark when scrutinising funding commissions and other deductions in recent settlement approval applications: see for example *Miciulis Superannuation Pty Ltd v CIMIC Group Ltd* [2025] FCA 307; *Impiombato v BHP Group Ltd (No 6)* [2025] FCA 1594.

MCCOY V HINO MOTORS LTD (NO 2) [2025] VSC 553

Facts	Variation	Reasons
Proceeding settled for $87m at a relatively early stage (before discovery and expert evidence).	24.66% reduced to 17.392%, and then to 13.253%.	• Appropriate and necessary to ensure that justice was done in the proceeding. • Only approximately one third of the costs budget had been expended at time of settlement, and the modelling undertaken at the time of the original GCO had assumed an expenditure of at least 50%. • Maurice Blackburn's rate of return under the original rate would have been above the 75th percentile of its own historic range, and other relevant financial metrics.

Interestingly, the Court-appointed contradictors did not argue for a rate reduction. Justice Delany ordered the downward variation in any event, finding that to leave the rate undisturbed would provide a return substantially outside the contemplation of the Court and of Maurice Blackburn at the time the original GCO was made. We discuss this decision further in the Contradictors chapter of The Review.

BYRNES V ORIGIN ENERGY LTD (NO 2) [2026] VSC 97

Facts	Variation	Reasons
Application to increase GCO rate on the basis that the plaintiff's solicitors (Phi Finney McDonald) would not continue to fund the proceeding under the existing rate.	30% increased to 35% (on first $42.5m) and 25% for amounts above.	• Appropriate and necessary to ensure that justice was done in the proceeding. • No better alternative funding path was demonstrated, and changing solicitors would duplicate work, increase cost and cause delay. • Loss of the solicitors' class action expertise would be detrimental to group members. • Effective rate under the varied GCO still sat within the range of rates ordered in other proceedings, and was lower than median third-party funding commission rates.

Justice Waller found that the applicable test is whether, having regard to all circumstances, it is appropriate and necessary to amend the GCO to ensure justice is done, and that while proof of changed circumstances will often be relevant, it is not a precondition to the exercise of the power. His Honour also indicated that standing to bring an application to vary the GCO rate is not confined to plaintiffs, but extends to any person with a sufficient interest in the amendment of the GCO.

Despite approving the upwards variation, Waller J made significant cautionary observations. His Honour emphasised that the decision should not be taken as establishing a precedent for the routine variation of GCOs during the course of proceedings: applications to increase GCO rates prior to settlement should be regarded as exceptional and approached with considerable caution, and outside settlement the threshold will not readily be met.

ATE INSURANCE

ATE insurance is cover taken out after a dispute has arisen to cover some or all of the insured party's exposure to adverse costs orders and orders to provide security for the respondent's costs. It is now commonplace in funded class actions for ATE insurance to be held by plaintiff law firms or litigation funders to protect against adverse costs risk. However, the review period has seen notable developments in the treatment by Courts of ATE insurance in relation to security for costs and settlement deductions.

ATE insurance and security for costs

ATE insurance alone has generally been regarded as insufficient to satisfy the requirements for adequate security because, unless the respondent has a direct, unconditional and readily enforceable right against the insurer, such policies cannot provide the practical equivalent of traditional security (monies paid into Court and bank guarantees).[54] Without such a right, the respondent seeking to recover costs may be exposed to coverage disputes, avoidance, satellite litigation and the insolvency of the insured.

The traditional mechanism to overcome these concerns has been for the insurer to enter into a deed of indemnity in favour of the respondent. Courts have treated such deeds as providing adequate security depending on their terms, with key considerations including directness and enforceability, whether the insurer's obligation is irrevocable and unconditional, the insurer's financial standing, the governing law and jurisdiction, and whether foreign enforcement risk is neutralised by additional security or undertakings.[55]

A more controversial mechanism to overcome these concerns has been the use of an 'anti-avoidance endorsement' to an ATE policy. This is a policy term by which the insurer agrees that, as against the respondent, it will not avoid, rescind or deny liability under the policy on specified grounds, thereby seeking to reduce the risk that the respondent will be unable to recover if an adverse costs order is made.

In *i-Prosperity*,[56] the NSW Supreme Court for the first time recognised that an ATE policy with an appropriately worded 'anti-avoidance endorsement' can constitute adequate security. The plaintiffs, funded by LCM, held an ATE policy with 7 Lloyd's syndicates. They argued that security could be provided by way of an anti-avoidance endorsement in the defendant's favour. The defendant resisted on the basis that it would not be a party to the insurance contract, would have no direct claim against the insurers, and faced a real risk of non-payment.

Justice Peden held that the insurance contract, as amended by the endorsement, would give the defendant a directly enforceable right against the Lloyd's insurers. Her Honour rejected the contention that security was deficient because the insurers were Lloyd's syndicates with allocated liabilities; each had demonstrated substantial net assets, and the location of those assets outside Australia was not dispositive given the existence of a Lloyd's security trust fund held in Australia.

Her Honour also distinguished previous cases involving differently worded anti-avoidance endorsements,[57] including those purporting to limit insurer liability until proceedings are finally concluded (which can create a risk that appeal rights might first have to be exhausted before the policy can be enforced).[58]

Following *i-Prosperity*, a shift away from deeds of indemnity and towards anti-avoidance endorsements may emerge. Litigants appear to have already adapted: recent consent orders in the *Johnson & Johnson* class action included a notation that security for costs was to be provided in the form of ATE insurance with an anti-avoidance endorsement confirming the respondent was a third-party policyholder.[59]

ATE insurance and settlement deduction

A distinct question concerning ATE insurance arises at settlement: to what extent should group members bear the cost of premiums as deductions from settlement sums? As we observed in The Review 2023/2024, courts will look closely at the reasonableness of such deductions and applicants should not assume ATE premiums will be recoverable. Recent Federal Court decisions continue to illustrate the point and demonstrate that a central concern is whether the party that acquired the insurance has already been compensated for assuming adverse costs risk.

Where a litigation funder justifies its commission by reference to adverse costs risk, seeking a separate deduction for the cost of defraying that very risk through ATE insurance may amount to 'double-dipping'. In *Mallia*,[60] for example, the Court refused to approve a $4,488,400 deduction for ATE costs where Woodsford was already receiving a 27.5% commission on a $140m settlement. The Court accepted that an effective return of 30.7% was disproportionate to the risks incurred, emphasising that a central obligation of funders is to provide an indemnity against adverse costs, which the ATE insurance had significantly reduced. The commission was approved but the ATE distribution was not.

54 See for example *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699.
55 See for example *DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401; *Re Tiaro Coal Ltd (in liq)* [2018] NSWSC 746.
56 *i-Prosperity Pty Ltd (in liquidation) v Crown Melbourne Ltd* [2025] NSWSC 1525 (**i-Prosperity**).
57 See for example *APFC No.1 Corporation v Insurance Australia Limited* [2024] NSWSC 534.
58 *i-Prosperity* at [41].
59 Orders of Moshinsky J made on 19 May 2026 in VID1395/2024.
60 *Mallia v Colonial First State Investments Ltd* [2026] FCA 463.
61 *Challenor v QSuper Board* [2026] FCA 617.

In *Challenor*,[61] by contrast, Button J adopted an aggregate approach to deductions, assessing the combined funding commission and ATE costs holistically. The funder sought $2,620,800 for premiums in addition to its 27.5% commission on a $67m settlement. The Court found that the evidence did not support a *'neat dividing line'* between the reward for capital risked and reimbursement of deferred ATE premiums, particularly where the funder's commission-setting process had already built in the cost of upfront insurance premiums.

The Court approved aggregate deductions of $16.75m (encompassing commission, ATE premiums and other costs) representing a material reduction from the total sought.

The decision in *Janssen*[62] has demonstrated that double-dipping analysis also applies in solicitor-funded proceedings conducted on a no-win, no-fee basis.[63] Slater and Gordon sought a $1.76m deduction for ATE premiums in addition to a 25% uplift on professional fees, asserting the uplift related solely to the risk of non-recovery of fees. Justice Button rejected this as *'overly simplistic'*, noting the firm had indemnified the applicants against adverse costs from the outset, before ATE insurance was obtained, and at a time when it anticipated being remunerated on a contingency fee basis where attempts would not have been made to recoup the ATE costs above the contingency fee. The Court allowed only 50% of the deduction sought ($880,000 of the $1.76m).

The Court in *Janssen* also identified an important structural conflict in ATE insurance that may inflate costs to group members. Where solicitors claim ATE premiums as a disbursement, their interests often lie in minimising the initial out-of-pocket premium while the deferred contingent premium, payable only upon success, is borne by group members. Justice Button observed that such a procurer *'has little incentive to opt for'* a higher upfront premium with a lower deferred premium, *'even if it would ultimately be more economical for the group members'*. The same incentive applies equally in third-party-funded proceedings, since it exists wherever the procurer is not the party who ultimately bears the deferred premium.

FUNDING COMMISSIONS AS DAMAGES

Issues concerning funding commissions were also addressed by the High Court during the review period. In *Sydney Light Rail*, the High Court held that funding commissions are not recoverable as damages in an action for nuisance. Funded group members sought to recover commissions of 25% to 40% of any settlement or judgment sum, arguing that the commission was a cost of vindicating their claims because it eliminated exposure to legal costs, adverse costs and security for costs. Justices Gordon and Edelman (with whom the other members of the Court agreed) held that the commission was not *'the kind of damage'* the defendant was under a duty to prevent.[64] Private nuisance is a tort against land; damages are limited to decreased land value and losses consequential upon injury to land. The commission was neither.

The Court's approach of asking whether the claimed loss is the kind of damage properly recoverable for the particular cause of action is capable of being generalised to other torts, and potentially other kinds of claim as well. That approach does not make the nuisance holding automatically determinative in other contexts, but it does suggest that a funding commission will usually be difficult to characterise as damage falling within the protected interest or duty engaged by the underlying claim.

The Court also referred to several 'reinforcing' reasons for its conclusion, drawing on reasons identified in the decision of the NSW Court of Appeal, including that recovery would make damages depend on each plaintiff's voluntary funding arrangements; that the claim was analogous to irrecoverable costs of financing litigation; and that the funder's entitlement crystallised only on settlement or judgment.[65] These reasons are not cause-of-action specific and provide further support for the proposition that funding commissions are not recoverable as damages for other kinds of actions as well.

62 *Janssen v OnePath Custodians Pty Ltd (No 2)* [2026] FCA 291.

63 See Mallesons Insight Having it both ways? Reflections on conflicts and recoverability of after the event insurance premiums in Janssen v OnePath 24 March 2026.

64 *Sydney Light Rail* at [169].

65 *Sydney Light Rail* at [170].

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