Australia Financial Lines Insurance Symposium

Summary Report

August 2025

25 YEARS IN ASIA PACIFIC

Kennedys

Introduction

The financial lines insurance landscape in Australia is continually evolving, influenced by both emerging trends and longstanding considerations that affect how professional risks are underwritten and how claims and disputes are managed before our courts.

To explore the evolving challenges and opportunities within our industry, we were proud to host the Kennedys Australia Financial Lines Insurance Symposium in Melbourne and Sydney this July. We brought together some of the sharpest minds from the legal and insurance worlds, along with our own specialists at Kennedys, to dive into the big issues shaping our industry right now and promote conversation about the big issues affecting our clients every day.

Through a series of engaging panel discussions and keynote presentations, we delved into recent legal developments, pivotal case law, and emerging trends that are reshaping the landscape of underwriting and claims management across professional indemnity and broader financial lines.

This report distils the key themes and takeaways from the symposiums, highlighting critical topics such as loss dynamics in PI/FI claims and litigation, the evolving role of expert evidence in contemporary court proceedings, updates to the Insurance Contracts Act, the progression of Group Cost Orders jurisprudence in Victorian class actions, the concept of double directness in crime insurance policies, and current patterns in Employment Practices Liability claims.

Kennedys is committed to supporting the financial lines community to stay ahead of emerging developments and providing practical guidance to help navigate this complex and shifting landscape.

We hope you find this report useful, and please reach out to our team if you would like to discuss any of the issues addressed in more detail.

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Sessions at a glance

- *The Victorian experience of Group Cost Orders*
- *Developments in the Insurance Contracts Act*
- *When "loss" is not a "Loss": disgorgement, damages and other loss issues in Financial Lines*
- *Expert evidence: the modern day experience and role of facilitators in large scale multi party litigation*
- *Double directness in crime cover*
- *Latest trends and issues in EPL claims*

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The Victorian experience of Group Costs Orders

Keynote address with The Honourable Justice Andrew Watson, Supreme Court of Victoria

Introduced in Victoria less than five years ago, Group Costs Orders (**GCOs**) permit plaintiffs' lawyers in class actions to be remunerated as a percentage of the award or settlement, despite the general prohibition on contingency fees. Under a GCO, legal costs are shared equally among class members and deducted directly from the settlement fund. The GCO specifies the percentage entitlement for the law firm, which in turn assumes personal liability for disbursements and effectively acts as a litigation funder until the settlement is distributed. Section 33ZDA of the *Supreme Court Act* confers the power on the Supreme Court to award a GCO.

Tracing the evolution of GCOs

The first class action in Victoria took place in 1992, underscoring the need for GCOs. For a class action to be successful, plaintiffs should not be discouraged to join due to cost barriers, ignorance of their legal rights, or their access to justice. However, in the original framework for class actions, plaintiffs were exposed to adverse and security costs.

In the late 1990s, 'no win no fee' arrangements eased cost barriers but remained scarce and left plaintiffs financially exposed. As a result, litigation funders assumed financial risk yet restricted participation through selective funding.

The Victorian Legal Reform Commission (**VLRC**) recognised that class actions allowed access to justice, and could reduce costs through streamlined court processes, but identified some issues with litigation funders. It proposed an option whereby the court could approve a fee as a percentage to be shared by all litigants that would allow a percentage to be allocated to include all services provided by the law firm, disbursements, and indemnity for adverse costs. This percentage would match the standard risk coverage that litigation funders provided.

Understanding the legislative framework governing GCOs

Section 33ZDA was enacted in late 2022 and has effect to the VLRC's recommendations – *to promote greater access to justice, provide security for costs, and pave the way for class actions to proceed where they otherwise could not.* It regulates the calculation and liability of the party to pay legal costs.

Subsection 1 in particular states *'that an order should be made where it is appropriate and necessary to ensure that justice is accessible'*. The interpretation of 'appropriate' and 'necessary' is therefore considered in deciding whether to make a GCO. A consideration may include whether the solicitors potential return is proportionate to the legal costs.

Subsection 2 empowers the court to amend a GCO primarily by amendment of the percentage ordered, which is recognised in authorities as the critical safeguard allowing the court to assess ongoing appropriateness.

Section 33ZDA is an open textured provision, leaving the court with unguided discretion, however it is understood the overarching purpose is to facilitate access to justice by securing funding of group proceedings.

> *His Honour brings unique practical understanding of the financial and commercial context of commencing a class action.*
>
> Nicole Wearne, Kennedys

Case authorities shaping the application of GCOs

The first application for a GCO was made on 14 September. However, Justice Nichols ultimately declined this GCO deciding that the plaintiffs had not established a basis for a 25% GCO. Justice Nichols adjourned this application which was later reapplied for and succeeded.[1]

Case law has provided some authority on how the court can interpret the considerations of 'appropriate' and 'necessary'.[2]

- ***Appropriate:*** the Court would be satisfied that making the GCO would be suitable to ensuring justice when determining the calculation of legal costs by solicitors.
- ***Necessary:*** the Court will examine the connection between the proposed GCO and ensuring justice by the facility.

These considerations create a broad evaluative assessment of whether to make an order and the rate of such order. However, it is understood the effect on members is a primary consideration. Case law provides a principle that the GCO must be a fixed proportion, and the law firm must assume the burden for any adverse or security costs.

The transparency in fixing costs removes any risk for the plaintiff that compensation recovered may be eroded by costs beyond the fixed percentage.[3]

Applying for and amending Group Cost Orders

When seeking a GCO the plaintiff's legal representatives need to provide evidence of:

- Plaintiff support for the GCO proposed;
- Evidence the GCO provides a more favourable outcome than an alternative funding model;
- Information that explains the nature of the proceeding;
- Candid assessment of the risk involved which is often accompanied by the estimate of the class size, potential damages, realistic settlement range, capital outlay of firm in various scenarios (early settlement, late settlement, success and loss at trial), and modelling which demonstrates the return to lawyers in each of those scenarios which may include financial metrics (return on investment and internal rate of return).

This evidence is confidential from the defendant, and the GCO is not determined by the trial judge or the judge managing the proceeding.

A GCO can be amended at any time (even once settlement is reached), so long as the Court is satisfied the relevant circumstances mean it is appropriate and necessary. However, in practice, there have been three occasions where the Court had the opportunity to vary a GCO and the Court opted not to.

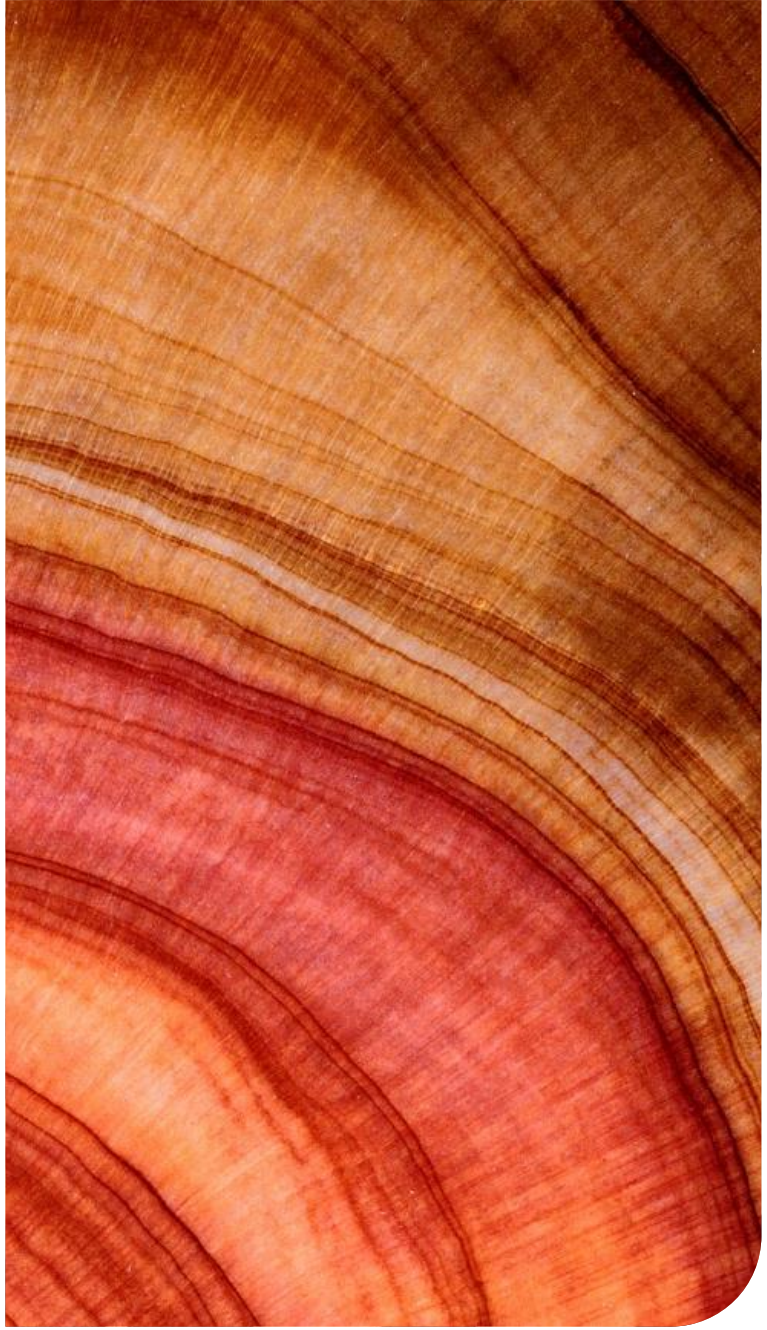
Advantages of Group Costs Orders in class action litigation

- GCOs dictate the exact slice of pie a plaintiff can expect.
- Lower cost amounts are deducted from settlements compared to traditional funding models (GCO is 22-25% compared to 40-50% on other models).
- The Victorian regime of GCOs has resulted in an increase in consumer class actions, and a decrease in shareholder class actions.
- The competition between firms wishing to represent members in a class action results in carriage disputes which gives members the most attractive funding proposal.
- GCOs have created an impact on litigation funders through more competitive funding models, and even hybrid funding arrangements between litigation funders and GCOs.

Post Script: High Court of Australia Kain v R&B Investments Pty Ltd & Ors [2025] HCA 28

- Shortly after the Symposium the High Court delivered its unanimous decision allowing each appeal on whether Part IVA empower the Federal Court upon the settlement of or judgment to approve the payment of solicitors costs on a percentage basis.
- The High Court held that sections 33V and 33Z of the FCA Act would not prohibit the making of a CFO at settlement or judgment in favour of a litigation funder. However, as the legal profession is regulated by States, the Federal Court has no power to make a Solicitors CFO in NSW as that would give effect to an agreement entered into contrary to the prohibition on contingency fee arrangements in that State.
- The Court refused to reopen and overturn *Brewster*.

1 *Fox v Westpac; Crawford v ANZ* [2021] VSC 573.
2 *Allen v G8 Education Ltd* [2022] VSC 32 and *Jeremey Clarke v JB Hi-Fi Group Pty Ltd* [225] VSC 288.
3 *Jeremy Clarke v JB Hi-Fi Group Pty Ltd* [225] VSC 288.



Developments in the Insurance Contracts Act

With Australia's *Insurance Contracts Act 1984* (Cth) (ICA) approaching its 40th year, three recent Federal Court decisions have continued to challenge the interpretation and application of longstanding ICA provisions and offer important guidance on core provisions. The cases also reflect the continuing complexity and significance of this legislation in contemporary insurance practice and examine the scope of disclosure obligations and insurer remedies, with practical implications for underwriting, broking and claims handling.

Insurance law in Australia is far from static, and the ICA remains a dynamic and evolving instrument, with established doctrines such as the prior known circumstances exclusion now under scrutiny. While some principles remain settled (e.g. *Gosford City Council v GIO* – section 54 cannot cure statutory breaches), other provisions such as sections 21, 28, and 40(3) continue to generate debate in light of recent decisions.

Case at a glance

- ***Allianz v Uniting Church:*** One of the most significant ICA judgments in decades. While numerous insurance issues were canvassed, its primary binding findings relate to the need for timely notification of circumstances that may give rise to a claim under section 40 of the ICA and confirmation that section 54 does not cure an insured's breach of a statutory requirement. The enforceability of prior known circumstances exclusions was addressed in obiter by the Court, with the majority expressing the view that the prohibition against contracting out of the ICA found at section 52 rendered the exclusion void.
- ***J & J Richards:*** A rare trial ruling on waiver of disclosure. The decision found that underwriters may waive the duty of disclosure through conduct, reinforcing the need for documented underwriting procedures and clear proposal questions.
- ***Carter v Chubb:*** Demonstrates what is required to establish fraudulent non-disclosure by an insured. The insurer prevailed by relying on strong underwriting evidence. The case also underscores the value of expressly pleading both limbs of section 21(1) and steps to be taken seeking recovery of defence costs when indemnity is declined if insurers decide to recover advanced defence costs.

Key lessons

- Section 40 cannot be relied on as a "cure-all" for insureds and has meaningful limitations.
- Courts continue to affirm that section 54 cannot remedy statutory breaches.
- Non-disclosure and misrepresentation may gain more importance while the availability of prior known circumstances exclusions are confirmed by the Courts.
- Increasing importance of detailed underwriting notes, documentation, and procedures for successful non-disclosure defences.
- Consideration should be given to engaging both limbs of section 21(1) when pleading non-disclosure if available.
- Insureds are reminded of the importance of prompt notification and accurate disclosure.
- Defence cost recovery strategies should be built into denial protocols.

When “loss” is not a “Loss”

Disgorgement and other loss issues in Financial Lines

Our panel discussions on “Loss” focused on the central issues of policy intention, drafting and interpretation. The insurance market is looking for insureds to be covered. However, the types of loss under consideration in today’s claims can be complex. The definition of “Loss” in insurance policies remains broad but nuanced, with exceptions and exclusions playing a key role.

Claims involving restitution/disgorgement, particularly multiheaded claims, can also enliven multiple insurance clauses adding a degree of complexity when assessing indemnity. Because of this, it might be necessary to look at the goal of the remedy. For example, is an insured being asked to pay back a profit it made? Is it repaying a debt, or a penalty, or paying punitive damages?

We are seeing increasing relevance of market-based causation and loss quantification methods, particularly in securities class actions. Recent cases have failed due to the inability to prove information was known to the company prior to disclosure, and the market knew about the information before it was released.

In ***Babcock and Brown***, the Court accepted broker analysis reports as evidence the market already knew the information before official disclosure, while the decision in *TPT Patrol Pty Ltd v Myer* found against the shareholders, the Court provided general support for market-based analysis as the appropriate method of assessing causation.

Cases such as ***Kyriackou v ACE Insurance Ltd*** [2013] VSCA 150 also provide guidance on the distinction between compensation or damages and claims for repayment of a debt or in restitution.

The issue is particularly complex where the precise nature of the “Loss” may not be known until the end of the litigation. A further issue can arise if defence costs are covered under a separate insuring clause, but most of the claim itself is not covered by the policy.

Key lessons

- Claims involving restitution may fall within the scope of indemnity unless expressly excluded.
- There is an ongoing need for clear policy wording, and insurers must closely analyse and define “Loss” and exclusions in policies to avoid ambiguity, especially around what constitutes “Loss”, restitution and excluded categories (e.g. outstanding fees).
- Insureds should be aware that not all financial remedies (e.g. restitution or account of profits) are covered losses.
- Claims handlers must closely assess the substance of claims, especially where multiple forms of relief are sought.
- Legal counsel and underwriters need to stay alert to evolving litigation trends, especially securities class actions.
- It’s important to make sure the Policy provides a clear definition of ‘loss’, and the exclusions are consistent with the definition.

> *The purpose of the insurance is to indemnify loss, not to provide a windfall or improper recovery.*
>
> James Melvin, Kennedys

Expert evidence

The modern day experience and role of facilitators in large scale multi party litigation

Experts are essential to insurance disputes. They help assess loss, the cause of loss and what the appropriate remedy may be. However, it is important to include the insured in the briefing of experts, as they are the expert on their business and are essential to assisting lawyers in formulating the questions for experts.

Conclaves are now a common way of experts giving evidence, and experts need to be open to participating in conclaves.

It is important for experts to be open to hearing what other experts in the conclave are saying, and flexible enough to change their opinion if required.

Key lessons

For insurers

- Brief experts early. This helps ensure that weaknesses in a case are identified early and can be addressed.
- Include the insured in the expert process.
- Be open to including experts at mediation.

For experts

- When participating in a conclave, be open and flexible. It is important to be able to change your opinion if the evidence and discussion requires it.
- Sometimes, your job will be to give bad news to the client. You should not shy away from this.

> *Facilitators are essential for conclaves, to add a legal perspective to an expert opinion.*
>
> Peter Quigley, Quigley & Co

> *Lawyers need to know what the right question is, and in order to know the right question, they should involve the client.*
>
> Owain Stone, Alvarez & Marsal

> *If you're an expert going into a conclave, be open to hear what the other experts are saying.*
>
> Toby Shnookal KC

Double directness in crime cover

The challenges of a strict causation test

The concept of "double directness" in crime policies requiring a direct financial loss directly caused by theft, fraud or dishonesty, is becoming a key pressure point in crime cover. As fraud and cyber exposures evolve, so too have crime policies, with many now incorporating tighter causation language that narrows the scope of cover.

With crime cover now often being embedded in financial lines policies, understanding how causal language affects claims is critical. Double directness raises the bar for insureds, requiring a tighter, unbroken link between the theft/fraud/dishonest act and the loss. This is a far stricter test to meet compared to the test for proximate causation which is the standard test applied for policies with "single directness".

The strict language used in crime policies presents challenges for insureds, brokers, and underwriters alike. Proactive risk management, careful disclosure of internal controls, and targeted policy review are increasingly necessary to ensure cover responds as expected.

Key trends and issues

- **Stricter policy wording:** Increasing use of "double directness" clauses means insureds must establish a clear and immediate causal link between the theft, fraud or dishonest act and the financial loss, with no intervening steps breaking that chain.
- **Judicial interpretation in *Inchcape Australia v Chubb Insurance* [2022]:** The Federal Court clarified that losses such as forensic investigation and data recovery costs were not covered, as they were not directly caused by the related cyber fraud. This was the first case to directly consider "double directness" wording in an insuring clause.
- **Tension between loss types:** Claims involving bad debts, delayed repayment, or internal process failures often fall outside the bounds of crime cover, despite being rooted in dishonesty or fraud. This highlights the importance of definitions such as "theft" as well as the precise timing of the loss.
- **Claims complexity and coverage challenges:** Questions of employee collusion, intent to deprive, and the nature of the third-party fraud complicate the application of the double directness test.

> *You've got to go back to the causation tests in the wording — that's the heart of it.*
>
> Alexandra Bartlett, Kennedys

> *Proximate cause allows for an intervening step. Double directness does not.*
>
> Katherine Allsop, Kennedys

Latest trends and issues in EPL claims

Employment Practices Liability (**EPL**) cover remains essential for all businesses, with claims in Australia continuing to grow in number, complexity and quantum, resulting in an increase in defence costs, settlement amounts, deductibles and premiums.

Fair Work Commission (FWC)

In recent data from the FWC, 40,190 applications were received in the FY23/24 year, up 27% on the previous period. Unfair dismissals accounted for 37% of claims, with 14% for general protections claims involving dismissals. This data may reflect a growing awareness amongst employees of their rights, and the low-risk to pursing claims in what is effectively a no costs jurisdiction. Only 2% of cases related to bullying and sexual harassment, suggesting these types of claims are not often pursued in this forum. Timely resolution is a feature of FWC claims, with 82% of cases finalised in 8 weeks and 96% of cases in 16 weeks.

Unfair dismissals:

- Compensation cap is 26 weeks' pay or up to $91,550, but less than 0.4% receive the maximum. Median is between 5 and 7 weeks' pay.
- No compensation for pain and suffering, shock, distress, hurt or humiliation.
- Reinstatement is the primary remedy to be considered, followed by compensation if reinstatement is not practicable.

General protections:

- Compensation is less than $10,000 in 75% of cases.
- Cases not resolved by conciliation may proceed to the Federal Court or Federal Circuit Court – these cases are more concerning from an insurance perspective, as they generally concern higher demands for damages and involve significant costs.

In the case of *Leggett v Hawkesbury Race Club (No 3)* [2021] FCA 1658, the employee's damages under the *Fair Work Act 2009* were assessed to be $2.3 million after the court found the longstanding employee had been harassed and bullied by the CEO, leaving them unable to work for a significant period of time. The applicant also had a parallel workers' compensation claim showing a trend of employment of and workers' compensation claims being run at the same time, which makes it even more difficult for insurers to resolve claims.

The general position of the FWC is that parties should bear their own costs, irrespective of the outcome. Despite some high-value claims, there is a risk that defence costs will exceed or be disproportionate to quantum, so early and proactive resolution of matters is key.

Australian Human Rights Commission (AHRC)

The AHRC saw a 6% increase in complaints in FY23/24 to 2708, with most relating to disability discrimination and sex discrimination in the area of employment. Unlike the FWC, matters were handled slowly, with only 56% resolved by conciliation (down from 74% in FY17/18).

A positive duty to prevent sexual harassment in the workplace was introduced in December 2022, requiring employers to shift their focus to actively preventing workplace sexual harassment and discrimination, rather than responding only after it occurs.

Despite the positive duty, we are still seeing a high number of cases, and defending claims is becoming more difficult unless the employer can show they have taken active steps beyond having policies and providing basic training. Confidentiality clauses in workplace sexual harassment settlement agreements can also be a potential barrier to resolving claims and has prompted the AHRC to publish guidelines on their use.

For discrimination claims, there has been a general uptick in damages awarded. While courts had discretion in ordering costs in these matters, a significant change to the *Australian Human Rights Commission Act 1986* under section 46PSA was made in October 2024 to reduce the barrier to justice posed to applicants by the risk of an adverse costs order. Respondents to court proceedings must now be ordered to pay an applicant's costs when the applicant has been successful on one or more grounds.

High-earning employees, and individual respondents

There is also a growing trend of high-earning employees making claims for wrongful termination, discrimination and harassment leading to larger settlements, sometimes purely by reason of the employee's remuneration. We are also seeing a rise in claims being made against individuals (senior staff/managers/directors) in addition to the employer, especially in claims where pecuniary penalties can be imposed.

> *EPL claims are rising, and proactive steps should be taken to defend them.*
>
> Alen Sinanovic, Kennedys

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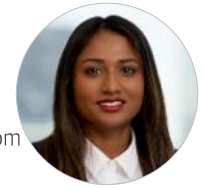

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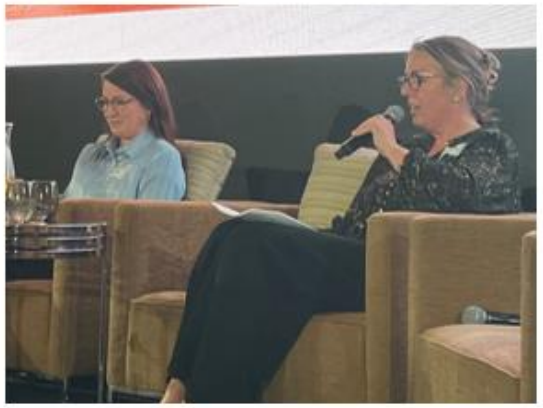


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