Public Submission to the Parliamentary Joint Committee on Corporations and Financial Services - Inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

1. Woodsford Litigation Funding Limited (**Woodsford**) welcomes the opportunity to make submissions in respect of the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (**Bill**).

Woodsford

2. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading global litigation and arbitration funder. Woodsford Australia Limited is an Australian public company (ACN 644 961 446) and a wholly-owned subsidiary of Woodsford. It holds an Australian Financial Services Licence (no. 527367) authorising it, inter alia, to operate litigation funding schemes that are managed investment schemes as a responsible entity. Woodsford has staff in the UK, the US and Australia. It successfully funds representative proceedings in Australia, the UK and the Netherlands as well as numerous other types of meritorious disputes globally.

Woodsford's Submissions in respect of the Consultation Paper

3. As a general point, we respectfully submit that the Bill, if enacted, would have a deleterious impact on access to justice in Australia. The purported intention of the Bill is to "promote a fair and reasonable distribution of class action proceeds in proceedings involving a litigation funder". This Bill, in its current form, is not suited to achieving this intention. As explained further below, if the Bill comes into force as law, it will have the effect of ensuring that class members with smaller, meritorious claims receive no compensation, in circumstances where they would have received compensation, absent the legislation.

Definition of "member" and new s601LF Corporations Act 2001

4. The stated intention of the proposed new definition of "member" in relation to a class action litigation funding scheme is to ensure "a claimant cannot be co-opted into becoming a member of the scheme litigation funding scheme, and therefore subject to the requirements of the scheme such as contributing to the funder's fee or commission, without their active consent."[1] This proposed definition, coupled with the provisions relating to the enforceability of funding agreements at s601LF, are intended to "encourage 'book building' and ensure that actions involving litigation funders are commenced with the genuine support of plaintiffs."[2] This intention is inconsistent with the principles enshrined by Part IVA of the Federal Court Act 1976 (Cth) (**FCA**), and equivalent State legislation, which allow class actions to be pursued on an 'opt-out' basis. Further, it is unclear how the proposed provisions will operate in the context of these State and Federal class action regimes.

5. The Bill leaves open the possibility that class actions could be pursued for the benefit of both those claimants that have agreed to be members of the class action litigation funding scheme, and "passive" claimants who are group members in the class action but who have not actively agreed to become members of the scheme. Passive claimants cannot be compelled to contribute to the funder's costs of funding the litigation, which is unfair on the claimants who have actively sought to enforce their legal rights and creates a "free-rider" problem.

6. It seems likely that the sections of the Bill, designed to encourage book-building, will mean that any class action that is a class action litigation funding scheme will be pursued on behalf of only those claimants who have entered funding agreements and actively applied to join the scheme. Litigation funders will have to require that all claimants become active members of the scheme, in order to ensure that the costs of the funding are borne fairly, i.e., equally by all the claimants who will benefit from the class action. Litigation funders will only be able to facilitate class actions where the group definition includes a requirement that each claimant has signed a funding agreement and agreed to be a member of the scheme. Thus, one unwelcome impact of the Bill, will be that

[1] Explanatory Memorandum at [1.35].
[2] Treasury and Attorney-General joint media release on 30 September 2021 entitled "Ensuring fair and reasonable returns to class action plaintiffs".

Australia's "open" opt-out class action regime will be converted to a "closed" opt-in regime, where a litigation funder is involved. This is an undesirable outcome, and will have a negative impact on access to justice as well as the efficiency in which class actions can be dealt with by the Courts.

7. The government may recall that an opt-out regime was chosen for Part IVA proceedings in the Federal Court because, as the then Attorney-General put it: "It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately."[3]

8. There are numerous benefits of an opt-out class action regime. It has the advantage of ensuring all affected parties are entitled to the remedies sought, not just those with the resources and knowledge to initiate a claim. An opt-out claim also provides financial certainty and finality for a defendant in respect of the defined class and so supports settlement rather, as opposed to an opt-in regime where there is a significant risk of numerous concurrent or consecutive actions being commenced. Where a class action is only pursued for the benefit of claimants that have signed a funding agreement the door is left open for separate groups of claimants to further agitate the same issues that may already be (or have already been) pursued in other class actions. A defendant might have to defend multiple different class actions on behalf of the same types of claimants, but who are represented by different litigation funders.

9. Further, one of the most valuable characteristics of an opt-out regime is that the lead applicant and litigation funder are not put to the expense of establishing the extent of the relevant claimant group that wishes to participate until such time as compensation will be made available to them, either because a defendant has agreed to settle the claim, or because the Court has found in the lead applicant's favour.

10. The provisions of the Bill that are intended to promote "book-building", will have the effect that certain class actions will not be pursued; in particular, those class actions where there are a large number of group members with relatively small individual claims.[4] This is because it would be impractical and too costly for the litigation funder to sign up all group members (or at least a large portion of group members) to litigation funding agreements. Indeed, such an approach undermines the very purpose of an opt-out regime, which is to allow class members to participate in an action passively, not to compel them to actively sign up to funding agreements or otherwise 'opt-in'. Further, book-building is an extremely expensive process, which could ultimately lead to lower net returns to group members, as unnecessary costs are wasted which eat into any recovery that might be available.

Section 601LG

11. The imposition of a rebuttable presumption that the "claim proceeds distribution method" (as defined in the Bill) is not fair and reasonable if more than 30% of the claim proceeds are to be distributed to entities other than members[5] of the scheme, will have at least three negative consequences:

    a. First, only larger value class actions will be economically viable for those that fund them, including Woodsford, which will leave class members who have smaller claims without any recourse notwithstanding that they may have been the victims of serious wrongdoing. By the same token, the wrongdoers that would otherwise be the defendants to those class actions will not be held to account and their future conduct unrestrained. This will seriously fetter access to justice and the rule of law in Australia and harm, rather than help, ordinary Australian who seek to benefit from class actions.

[3] Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174-3175 (Duffy).
[4] See, for example, *Lenthall v Westpac Banking Corporation & Anor*, which is a class action that would likely never have been pursued under the new laws proposed in the Bill.
[5] "Members" now being defined as claimants per the proposed definition of member in s9(b).

b. Second, for cases where economic viability is marginal with a 30% cap, defendants will become further incentivised to run their defence so as to waste time and costs with a view to driving the litigation below a reasonable threshold of economic viability. Defendants with a poor defence often try to distract attention from their weak case by running time consuming and costly arguments about unrelated matters, including the fact that the class action is funded by a third party.

c. Third, Australian legislation designed to discourage bad corporate behaviour can only be effective if those harmed actually have a remedy. The theoretical ability to enforce a legal right is the same as the legislation not existing at all. In many instances this real-world recourse is what litigation funding provides. Without it, the ability to modify future corporate behaviour for the better is for the most part lost, to the detriment of all Australians.

12. Imposing the rebuttable presumption would, in our submission, achieve exactly the opposite of what we understand to be the intended aim: instead of increasing returns to group members, it would likely mean they often get nothing instead.

13. The Bill follows a report on litigation funding and the regulation of the class action industry published by the Parliamentary Joint Committee on Corporations and Financial Services (**PJCCFS Report**) and subsequent consultation. The Explanatory Memorandum to the Bill explains that many of the provisions in the Bill are in response to recommendations made in the PJCCFS Report. As a basis for supporting the imposition of some form of minimum return to class members, the PJCCFS Report stated that there exists "systemic and inappropriate skewing of the proceeds of a successful class action in favour of litigation funders at the expense of class members" and that litigation funders appear to be making windfall profits from Australia's class action system at the expense of class members. In support of this assertion, the PJCCFS cited analysis in the ALRC report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) that when litigation funders were involved in a class action, the median return to plaintiffs was 51 per cent, compared to 85 per cent when a funder was not involved.

14. As noted in the Minority Report by Labor Members incorporated in the final version of the PJCCFS Report (**Minority Report**) "on no reasonable view does it follow that, because median returns to class members are lower when a funder is involved, funders are obtaining windfall profits at the expense of class members. As the Liberal members acknowledge elsewhere in their report, 'in many instances, a class action could not proceed in Australia without a litigation funder'. So if you take the litigation funder out of the equation, that does not necessarily mean higher returns for plaintiffs – in many cases it means **no returns for plaintiffs** because many class actions would not proceed at all."[6] **[our emphasis].**

15. Often where a litigation funder receives 51 per cent or more of the funds available from any settlement it is not because they have made a "windfall" profit but because the legal costs of the litigation were disproportionately high relative to a modest settlement amount. This point is ignored in the PJCCFS Report. The conclusion in the PJCCFS Report also ignores the important role that the Court plays in supervising the distribution of any proceeds in a class action, ensuring that parties only receive what is fair and reasonable in all the circumstances in each fact-specific class action.

16. It should be noted that Recommendation 20 in the PJCCFS Report asked "whether a minimum gross return of 70 per cent to class members, **as endorsed by some class action law firms and litigation funders**, is the most appropriate floor" **[our emphasis]**. Thus, the questions posed by the PJCCFS Report is said to be based on the "endorsement" of a 70 percent return to class members made by some class action law firms and litigation funders. The PJCCFS Report does not reference this endorsement, and it is unclear where the figure of 70 per cent has come from. This is also not explained the explanatory materials accompanying the Bill. As the Minority Report points out, to their knowledge, "no law firm or funder has proposed a 70 per cent 'floor'. Rather, in the spirit of compromise, at least one law firm has proposed amendments to the Corporations Amendment (Litigation Funding) Regulations 2020 so that a litigation funder that guarantees a 70 per cent minimum return to plaintiffs would not have to comply with the managed investment scheme rules."[7]

[6] Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020), p 369.

[7] Parliamentary Joint Committee on Corporations and Financial Services, above, p 368.

17. The PJCCFS Report acknowledges that, "litigation funders ought to be reimbursed for the costs incurred and make a profit which is reasonable and proportionate to the risk undertaken." This comment, when considered together with a proposal to implement the rebuttable presumption, is problematic because the risks a litigation funder takes cannot be viewed in isolation in respect of any one class action. That is, a litigation funder's risks need to be viewed across the entire portfolio of claims it agrees to fund. Higher returns in some class actions than others, acknowledge that litigation funders agree to fund cases result in significant losses for a variety of reasons, including because the claim is unsuccessful, or the defendant is unable to pay an award or settlement due to insolvency. The litigation funder takes all the risk in a class action, i.e., the risk that it will lose its investment/the cash costs of pursuing the litigation and the risk of having to pay the defendant's costs if the class action is unsuccessful, and the class members assume no risk. A litigation funder is at significant risk that they will be left substantially out of pocket in relation to each of the class actions they fund. If a litigation funder is not able to offset the risks of one class action against another in its portfolio, complex or difficult (but meritorious) class actions will not be pursued, to the detriment of class members. In the absence of evidence that the third-party litigation funding market is uncompetitive or otherwise not functioning properly there is no legitimate basis on which an arbitrary cap on returns should be imposed.

18. It is also important to note the PJCCFS Report followed two reports into litigation funding and class actions in Australia, namely the Australian Law Reform Commission report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) (**ALRC Report**) and the Victorian Law Reform Commission report *Access to Justice—Litigation Funding and Group Proceedings* (March 2018) (**VLRC Report**). Neither the ALRC Report, nor the VLRC Report recommended a statutory minimum be imposed in relation to returns to class members in class actions. The VLRC noted that Court determination of the percentage fee meant that statutory caps were unnecessary and that allowing Courts to exercise discretion on the issue of what is an appropriate percentage means that the imposition of inflexible parameters could be avoided.[8]

19. A body of jurisprudence has developed in Australia, in relation to the appropriateness of funding commissions and returns to class members in class actions. Pursuant to s33V of the FCA a representative proceeding may not be settled or discontinued without the approval of the Court. The body of law in Australia in relation to class action settlement approvals shows that the assessment of whether returns to class members are reasonable is a complex exercise, and there is no "one-size-fits-all" approach. Courts assess whether the costs to be deducted from a settlement (including the funder's commission) are reasonable in light of a number of factors.[9] An assessment of these different factors on a case-by-case basis has resulted in Australian courts approving a wide range of relative percentage returns to class members on the basis that those returns are reasonable. As such, neither the commissions a funder is entitled to receive, nor the percentage of gross proceeds that should be made available to class members, are things that should be (or are suitable to be) the subject to fixed rates or rebuttable presumptions.

20. The Australian Courts continue to be best-able and best-placed to assess the reasonableness of litigation funding commissions and protect the interests of class members in class actions and their discretion should not be fettered in this regard, by the imposition of the more inflexible proposed s601LG. As the Full Federal Court explained in *Australian Securities and Investments Commission v Richards*, "the role of the court [in a settlement approval application] is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises."[10] As such, the Court already provides sufficient protection of the interests of class members in determining the reasonableness of the returns they are entitled to receive out of settlements or awards.

21. Litigation funding is required to ensure that victims have access to justice and equality of arms against far better resourced opponents and to provide an effective form of private regulation of large corporations and other defendants. Accordingly, it should be kept in mind, when considering the net return that group members receive from a class action, that absent the litigation funding required to bring the class action, group members would have received nothing.

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[8] Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (March 2018), [3.88], [5.80] – [5.85].
[9] See paragraph 24 below.
[10] [2013] FCAFC 89 [8].

22. In submissions made to the VLRC which were later cited in the VLRC Report, Maurice Blackburn commented that it is almost impossible to secure litigation funding for a class action involving claims of less than $30 million.[11] In the event that this inflexible legislation is implemented, we submit that this claim value will increase, and it will become very difficult for claimants to obtain funding for class actions with claim values less than a number much higher than $30 million.

23. The approval of the costs of litigation by a Court, pursuant to s33V of the FCA and analogous State legislation, is an evaluative process. Imposing a flat, 30 percent maximum which must be rebutted fails to recognise that different claims have different risk profiles and complexities, and fails to recognise that many of the costs incurred in a class action in order to achieve a settlement or award, which often run into many millions of dollars, are out of a litigation funder's control.

24. As stated by Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd*, in deciding whether to approve a settlement "the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole."[12] Part of the process of evaluating whether a settlement is fair and reasonable, is a consideration of the risks associated with the claim. As the Federal Court of Australia's Class Actions Practice Note (GPN-CA) details, the material that may be needed to persuade the Court that the proposed settlement is fair and reasonable and in the interests of class members will usually be required to address, at least (a) the complexity and likely duration of the litigation; (b) the reaction of the class to the settlement; (c) the stage of the proceedings; (d) the risks of establishing liability; (e) the risks of establishing loss or damage; (f) the risks of maintaining a class action; (g) the ability of the respondent to withstand a greater judgment; (h) the range of reasonableness of the settlement in light of the best recovery; (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[13]

25. In the ALRC Report, the Commission noted in relation to the application of s33V by the Court, that it considered that "legislative reform is unnecessary as extensive jurisprudence exists which provides guidance as to the criteria judges are to take into account in approving class action settlements, which criteria are likely to continue to evolve."[14] As such, it is unclear why the addition of s601LG(3) is necessary. The Government has not established any need to interfere with the discretion of the Courts in this regard. On the contrary, the proposed legislation would bring inflexibility and effectively prevent many ordinary Australians from bringing legitimate claims. It would place many corporate wrongdoers above the law.

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16 December 2021

[11]Victorian Law Reform Commission, above n 8, [2.49].
[12] [2015] FCA 1468 [5].
[13] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* [15.5].
[14] Australian Law Reform Commission report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018), p 132.