Submission to the Senate Economics Legislation Committee concerning the Corporations Amendment (Improving or Litigation Funding Participants) Bill 2021

1 This submission is made on a personal basis. Given the period of review and the time of year, it was not possible to circulate this submission within the Firm for comment. Hence, the personal submission.

2 Litigation funded class actions are here to stay. Whatever criticism can be made of such actions, they do provide a means whereby a wide group of individuals can pursue a claim. Difficulties emerge in the commercial objectives of litigation funders, lawyers and, at times, the process itself. It is disappointing to many that the true basis for the litigated dispute is often clouded in competing actions, funding disagreements and inter-class disputes.

3 The proposed legislation is the latest in several governmental attempts at trying to control the parameters of the class action genie by seeking to legislate for a minimum return to claimants. In most respects it succeeds.

4 Perhaps some introductory remarks.

5 The submissions received by the Committee make interesting reading. They largely repeat themes from prior reviews into this area. Everyone agrees that access to justice is important. It is perhaps the terms of such access that excite comment. The proposed legislation considers the return to the class of 70% is important, whereas the arguments for funders seem to come from the space of ensuring the opportunity for a claim so that, in the terms of the PJCCFS report as approved by Woodsford Litigation Funding Limited (**Woodsford**) "*litigation funders ought to be reimbursed for the costs incurred and make a profit which is reasonable and proportionate to the risk undertaken*".

6 That last point is important. Woodsford usefully set out the risks in [17] of its submission – "*the risk 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.*"

7 Justice Murphy made a similar point in [30] of *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719 in looking at the actual risks of the funder in the circumstances of the case

8 So, the answer to the access to justice issue appears to lie in considering the risks of funders in relation to the matters that they determine to fund.

9 As to risk, Justice Murphy in *Endeavour Energy (No 2)* [2020] FCA 968 did approve a premium of 25% meaning a return on investment of the funder of 502%, see [41 – 42].

10 Most funders take out After the Event (or ATE) insurance against adverse costs orders. Such insurance is quite prevalent now. Usually, the premium is deducted from any settlement as an expense of the funding. So, the risk of an adverse costs order may be low. Indeed, the vast bulk of civil matters settle, often early and before a trial or even a judgment. The risks identified by Woodsford seem to be getting smaller.

11 It will also depend on the matter itself. Previously, publicly listed funders would publish the number of queries they received each quarter compared to the number they actually funded. The numbers of take ups were very low compared to the queries received. Possibly, the investment criteria (and expected risk/return ratios) of the respective funders determined only a small percentage received available capital for funding. It would be interesting to see these figures presented to the Committee.

12 So, let's turn to the proposed legislation.

13 Many of the proposed changes outlined in the Bill draw little comment. That is not surprising as they are largely uncontroversial.

14 The first provision that is contentious is the proposed s601LF, which, in effect sets out permissible funding agreements. The issue of contention is the prohibition on common fund orders. Not surprisingly, funders disagree. Such an order allows the funder's terms and conditions to be applied across the whole class, notwithstanding only a few people are signed to an agreement.

15 The debate seems to be as to whether the proposed provision will drive more "closed" classes being those who are subject to a book build or have signed up with the funder as a managed investment scheme **(MIS)**. To some extent, that should be the end of the issue. Until the *Multiplex* decision is altered (which appears to be the object of the funder's appeal in the *Stanwell* case to the Full Federal Court), under the current legislation, schemes that are not grandfathered have to be subject to the MIS regime (but see the transitional provision of proposed s1688).

16 The provision seems to do no more than implement what the current regime requires. If not grandfathered you must sign onto the MIS requirements and, there, no common fund order is required, because all the terms and conditions have been agreed.

17 I do agree, that for current or grandfathered cases, there will be some uncertainty for some funded schemes. They are not subject to the MIS regime but may be caught between the provision and the unknown impact of the High Court's *Brewster* decision on approved settlements. Personally, *Brewster* seems clearly against such orders.

18 The impact is one of uncertainty. For the plaintiff class, the uncertainty will play into any settlement – should they seek a common fund order? For a defendant, they do not care. They have agreed a settlement sum and its distribution is really a matter for the Court and the plaintiff. However, if the defendant wants a release of claims, there will be an impact depending on whether the class is "open" or "closed" – are they still at risk of a claim from someone outside the closed class.

19 The plaintiff will always have the risk regarding common fund orders until the Courts determine the issue. The Government has made its mind up. For ongoing matters, no such orders are possible. It is only those older cases that have the quandary, which will always exist until a final judicial determination is made.

20 As for defendants, the risk of another claim on similar terms will exist if closed classes occur. However, for that risk, they probably will pay less in a settlement. A closed class means you can have a better stab at working out quantum. What may be saved in a payment could be kept for any follow-on claims. The data on such eventualities is very limited.

21 This issue of a common fund order leading to a closed or open class seems to be the main discussion point on this proposed provision. However, the benefits of a system of "opt in" v "opt out" has been raised. If the legislative change forces funders to book build by having people sign up funding agreements as common fund orders are not possible, it will lead to smaller closed classes as people have to "opt in" as opposed to the "opt out" intentions behind the *Federal Court Act* Part IVA regime.

22 The criticism is understandable. However, the intention behind the proposed change appears to be more encouraging class claimants to agree to a relationship by signing a funding agreement rather than having litigation conducted on their behalf, possibly without their knowledge. It is this concept that the proposed provision appears to be driving at – knowledge of one's rights (especially where you are agreeing to a premium) rather than the need to take steps to opt out.

23 I am supportive of this view. Access to justice should be open and voluntary not clouded in the device of common fund orders. The rationale behind common fund orders is more to allow funders to avoid the need to book build (and avoid "free riders") whereas I would prefer people

who are entering a Court case understand what they are doing and agreeing to a set of terms and conditions, especially what will be paid to a funder.

24 The terms of s601LG appears to excite the most comment. The introduction of a fair and reasonable test for the Court is clouded by criticism of the indica of such a test in sub-paragraph (3) and the rebuttable presumption of (5), in that class proceed returns above 30% are not fair and reasonable.

25 Let's break up the test. There seems little objection to the "fair and reasonable" test itself. Woodsford at [24] note Justice Moshinsky's comment in *Camilleri* about the expression. The issue seems to be more of the limitation in (3) that "*the Court **must only have regard** to the following factors….*" (emphasis added). The Law Council of Australia (**LCA**) was against the provision for limiting judicial discretion in settlement approvals (see [37 - 38] of its submission) and the AICD in its submission suggested inserting a final factor to consider - "*any other factor considered relevant*".

26 Of course, the authors of the provision had in mind confining the judiciary to the factors set out in (3). Indeed, they are quite wide – the amount of the claim proceeds, management of the proceedings, its complexity and duration, costs incurred, returns, risks etc. The LCA considered the solvency status of the defendant and non-monetary factors may not fit into the width of (3). I am not so sure. However, if the intent is that the judiciary does consider these factors (rather than concentrate on others which the AICD proposal may achieve) perhaps the word "*only*" could be deleted and replaced by *",at the very least,"*. This would have the effect of allowing some discretion to the Court (which seemed the LCA concern) but require the Judges to at least consider the matters in (3), which seemed the authors intent.

27 We then come to the vexed question of the percentage. It is appreciated how the 30% came about, but the limitation has excited much commentary. I have a different view to many.

28 Such a limitation will lead to even more settlements and they would be quicker. Funders will not want to pay money to lawyers when it could go to them. Many defendants would prefer the certainty of a quicker settlement. I can see many claims being made with a statement of claim quickly followed by an expert report and a mediation. Perhaps a Defence will be needed. But it is possible that the large rigours of discovery that burden many defendants may be curtailed. Certainly, the costs of doing it for defendants and the costs of reading so much material will eat at any premium for a funder.

29 One factor that may change is the funder rate of return. If a funder sees 30% as a maximum and it makes settlements higher to match such financial expectations, then you could see settlement amounts increase. However, given the defendants will be alive to the ceiling and the old adage that you must be persuaded to pay money or go to an expensive trial, one suspects funders would prefer a lesser settlement now than see money evaporate over time in legal fees.

30 Perhaps a system of compulsory conferences will evolve before proceedings are issued (as in family law and personal injuries matters) in an endeavour to resolve matters earlier. I only mention this possibility because it will not be the business model of funders with a ceiling to allow matters to go over years. Currently, most matters settle and funders and lawyers take their fees and expenses in full out of any settlement sum before a distribution to the class claimants. If there is a ceiling on how much can be given, funders (and lawyers) will be very conscious of that figure and seek earlier resolution of matters.

31 There is some suggestion in the submissions that smaller matters will go without funding but perhaps that will be the space of no win no fee lawyers as they are excluded from the proposed changes. Alternatively, the sights of funders may be lowered.

32 The final observation regards the wording of the proposed s601LG(6) dealing with the appointment of contradictor and an assessor. I support the provision. Judges need assistance, especially where the defendant is largely done with the matter given it has agreed to a settlement sum, so a Court has little by way of an opposition.

33 There has been little comment on this change. It should be implemented.

34 I would be willing to assist the Committee if further information or comment is required.