LCM
EXPERIENCE COUNTS

SENATE ECONOMICS LEGISLATION COMMITTEE INQUIRY INTO THE CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION FUNDING PARTICIPANTS) BILL 2021

SUBMISSION OF LITIGATION CAPITAL MANAGEMENT LIMITED
17 December 2021

PART A: LITIGATION CAPITAL MANAGEMENT LTD

1. Litigation Capital Management Limited and its subsidiaries ("LCM") is a provider of litigation finance products and from that perspective makes the following submission in response to the Senate Economics Legislation Committee Inquiry ("Inquiry") into the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* ("Bill").

2. Founded in 1998, LCM was one of the first professional litigation funders in Australia, and it is one of the longest-standing litigation funders globally. LCM holds an Australian Financial Services Licence and is a publicly listed Australian company, headquartered in Sydney and with offices in Melbourne, Brisbane, Singapore and London.

3. Since its inception, LCM has continued to assist claimants to pursue meritorious claims and recover funds from the legal avenues and actions available to them. LCM funds commercial, insolvency and arbitral proceedings, as well as representative actions.

PART B: SUBMISSIONS TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES INQUIRY

4. LCM notes that this Inquiry shall consider as evidence all submissions made to the Parliamentary Joint Committee on Corporations and Financial Services ("PJC") Inquiry into the Bill ("PJC Inquiry"). Therefore, LCM does not restate those submissions here, save as to note that LCM made two submissions (on 5 November 2021 ("PJC Submission") and 16 November 2021) and to summarise that by those submissions LCM outlined its position that:

    4.1. Proscribed minimum returns for class members are a wolf in sheep's clothing. On their face, they appear to offer group members added protection, while in reality they take away those group members' very ability to seek redress for wrongs that they have suffered.

    4.2. A disciplined, evidence-based analysis of the proposed changes would show that they will undoubtedly prevent hundreds of thousands of Australians from pursuing their meritorious claims.

    4.3. The reality of class actions is that they are expensive to progress – they often cost between $5million and $10million to finalise. Sometimes less, often more. Because of this, a proscribed 70% return to class members will mean that most class actions that seek less than $100million in damages will be uncommercial to fund and will not obtain funding from reputable funders. The Bill will thereby shut the door on funding for the bulk of meritorious class action claims that have historically progressed with the benefit of funding assistance.

    4.4. The court already possesses sufficient power to oversee and control legal and funding fees in class actions and readily exercises its supervisory jurisdiction in ways which are flexible and case specific in order to ensure that outcomes in class actions are fair for all participants.

    4.5. Limiting the claimants' costs is not the answer. It is not 'fair'. If claimants try to restrict their costs in order to squeeze their claim into the funding model imposed by the Bill, they will be at a colossal tactical disadvantage when facing

a well-heeled defendant with unlimited resources and large, highly skilled legal teams. The Bill would create a situation where the claimants are simply 'out-gunned'.

4.6. LCM has long advocated for relevant and effective regulation of the litigation funding industry. However, the managed investment scheme regime is not relevant and it is not effective for the funding of class actions. At best, the regime produces no discernible benefit to group members and, at worst, it is impossible or impractical to comply with.

4.7. The Bill encourages 'closed' class actions, to the detriment of claimants, defendants and Court processes.

4.8. The Bill otherwise unreasonably fetters judicial discretion, introduces impossibly vague civil penalty provisions and incorporates provisions that are open to Constitutional and other challenges.

4.9. The Bill has not had the benefit of sufficient consideration and meaningful consultation. It needs finessing in some parts and it needs fundamental rework in others.

PART C: FURTHER SUBMISSION

5. LCM wishes to supplement its PJC evidence as follows. For ease and consistency of reference, LCM does so by using the headings and Part numbers from its PJC Submission.

Part B of PJC Submission: Minimum returns to class members

6. By its very title, the Bill is said to promote improved outcomes for class members.

7. However, by its PJC Submission, LCM asserted that:

> *"… if 70% minimum returns were to be introduced, class action schemes with claims that are smaller than* [$125million to $375million, depending on budget] *simply will not be able to obtain funding from reputable funders.*
>
> *Empirical evidence further shows that this would affect the bulk of class actions that have historically progressed with the benefit of funding assistance."*

8. On 16 November 2021, in response to Questions on Notice which were put by the PJC Members at the hearing on 12 November 2021, the Association of Litigation Funders Australia ("ALFA") provided a non-exhaustive list of past and current funded cases which would not have proceeded if the proposed amendments in the Bill had been in force when those cases were being considered for funding.

9. LCM submits that the list provided by ALFA offers further support for LCM's PJC Submission. Further, LCM notes that the cases in which LCM has been involved that would not have obtained funding if the Bill was law include claims that assert:

9.1. Damage to the fishing industry as the result of dredging of the Gladstone Port;

9.2. Losses to landowners due to PFAS contamination on properties in the vicinity of numerous Department of Defence bases;

9.3. Excessive charges levied on toll road users in Queensland;

9.4. Breaches of duty by the Suncorp superannuation trustee in relation to conflicted remuneration; and

9.5. Misleading financial statements relied on by shareholders of Quintis.

10. It simply cannot be said that a Bill would be improving outcomes for class members if that Bill would prevent claimants in the above actions (and ones like them) from pursuing the sole realistic avenue available to them to obtain any redress at all.

11. LCM further notes that at [2.146] of the PJC Inquiry Report (dated November 2021), in support of the introduction of minimum returns to class members the PJC noted that:

"… the agreements under which litigation funders continue to operate have too often resulted in profits that are disproportionate to the risks and costs they bear. The committee is mindful that median returns to plaintiffs in cases involving litigation funders remain well below those received by class members in non-funded actions."

12. With respect, LCM is astonished that after the numerous inquiries that the industry has engaged in, the PJC Report still continues to repeat above conclusion.

13. Firstly, there is no evidence provided for the statement that funders receive "profits that are disproportionate to the risks and costs they bear". The funding industry and respected members of academia have provided numerous comprehensive industry-wide reports, lists, schedules and figures on historical funder returns, but all of this data continues to be ignored in favour of the Government pointing to the same well-worn singular examples of higher-than-average profits. There has been no attempt to engage in a comprehensive evidence-based analysis of historical funder outcomes and their proportionality to the costs and risks faced.

14. Secondly, LCM repeats that class actions are conducted under Court supervision and it is an explicit requirement of all Australian class action regimes that a proceeding cannot be resolved or discontinued without the Court's approval. This means that every payment to a litigation funder has been carefully considered by a Court, which exercised a supervisory and protective role over the class members. No payment has been made to a funder without a Court considering all of the claim's circumstances and concluding that the funder's return is "fair and reasonable".

15. Finally, the PJC Report again refers to the (obvious) fact that group members receive a greater proportion of the settlement award in unfunded matters (comparing a 51% median in funded against an 85% median in unfunded claims). LCM submits that this is simply not an accurate, or relevant, comparison. A very small percentage (if any) of actions that are unable to obtain funding would ultimately proceed unfunded. And if the action is not funded and therefore does not proceed, the comparison is not between 85% and 51% of a settlement, it is between 51% of a settlement and 100% of nothing.

Part C of PJC Submission: Definition of managed investment scheme

16. The Bill seeks to amend the *Corporations Act 2001 (Cth)* definition of "managed investment scheme" in order to include a "class action litigation funding scheme", thereby deeming all "class action litigation funding schemes" to be managed investment schemes ("MIS").

17. By its PJC Submission, LCM asserted that:

> *"…there are many considerations that tell strongly against the inclusion of a funded class action within the definition of an MIS…*
>
> *…the overall picture is that there are a significant number of important aspects of the substantive regime governing the MIS which at best produce no discernible benefit to group members and at worst are impossible or impractical to comply with."*

18. After the closing date for submissions to the PJC, on 17 November 2021 His Honour Justice Beach handed down a decision in *Stanwell Corporation Limited v LCM Funding Pty Ltd* [2021] FCA 1430 ("*Stanwell*").

19. *Stanwell* considered whether a class action (funded by LCM) brought against two Queensland state owned coal fired power companies (Stanwell Corporation Limited and CS Energy Limited) was "grandfathered" for the purpose of the *Corporations Amendment (Litigation Funding) Regulations 2020* and, therefore, exempt from compliance with the MIS regime.

20. In this context, Beach J considered the application of *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 ("*Brookfield*"), being the only decision that had (prior to the Bill) characterised a litigation funding scheme as an MIS.

21. Relevantly, His Honour found that *Brookfield* may have been wrongly decided and gave detailed judicial commentary <u>against</u> the proposition that litigation funding schemes should be treated as MIS (see [16]-[20] and [160]-[215] of the decision).

22. By way of example, LCM highlights the following conclusions reached in *Stanwell*:

    22.1. At [19]:

    > "…*it is arguable that the majority [in* Brookfield*] mischaracterised litigation funding arrangements as an investment by group members of property to achieve benefits, when such arrangements principally provide a mechanism for persons who share commonality in their unlitigated and separate choses in action to secure the payment for legal services necessary to vindicate those choses on a contingent basis*".

    22.2. At [175]:

    > *"…there is a strong case for arguing that it is appropriate for a Full Court to reconsider the majority decision in* Brookfield*"*

    22.3. At [179]:

    > *"…with considerable respect to the views expressed by the majority in* Brookfield*, there are problematic aspects of their reasoning"* (which His Honour went on to discuss at length at [180] to [215] of the judgment)

23. LCM submits that *Stanwell* again canvasses many important reasons why the Bill and, in particular, its intention to deem class action litigation funding schemes to be MIS, must be carefully reconsidered.

24. LCM further notes that at [2.152] of the PJC Report, the PJC concluded that:

"The committee acknowledges concerns raised regarding the application of the MIS regime to litigation funding, but notes this has already been achieved through the Corporations Amendment (Litigation Funding) Regulations 2020*, which came into effect in August 2020."*

25. LCM submits that the above is simply not an answer to the concerns that have been raised. The fact that a mistake has already happened is not a reason not to correct it.

26. The fact that the Regulations were enacted does not offer any response whatsoever to the very considerable issues that the industry has continued to raise about the MIS aspect of the Regulations and the Bill. One needs to only look at the level of relief that ASIC has had to grant in response to the Regulations to see that their existence does not in any way ameliorate the concerns about the application of the MIS regime to class actions. The Bill only serves to further exacerbate those issues.

27. LCM reiterates that it has long supported fit-for-purpose, effective and meaningful regulation of the litigation funding industry. However, the Bill's deeming of class action litigation funding schemes to be MIS is a missed opportunity to offer the industry and, importantly, the claimants, a framework that actually works and that actually assists them.

Part D of PJC Submission: Curtailing 'open' class actions and converting to 'opt-in' model

28. By its PJC Submission, LCM asserted that:

"… it is a key intention of the Bill that claimants must consent to become members to a class action litigation funding scheme in writing. The requirement for this positive action shifts class actions from an 'opt-out', to an 'opt-in' model.

This change reverses the approach to class member participation that has been a cornerstone of Australian class actions since its inception, which will have far-reaching consequences and will negatively impact fair and equitable outcomes for plaintiffs."

29. In *Stanwell*, Beach J also touched upon this aspect of class actions. At [6], His Honour noted that the relevant class action should properly have been brought as an 'open' class action as "that is consistent with the philosophy of Part IVA of the [Federal Court of Australia] Act". His Honour went on to note that:

"…the proceeding dispels the myth of the so called advantages of book building in a case of this type. The book building here has resulted in an unnecessary, costly and inefficient delay of seven months in order that over 50,000 retail customers be separately signed up to individual funding agreements. There is little justification for such a barrier to entry so to speak or justice.

… to allow the proceeding to remain closed will incentivise others to launch parasitic actions to cover the balance of the universe of electricity consumers. So the potential for and the vice of a multiplicity of proceedings."

30. As the funder in the subject action, LCM notes that the decision was made to bring the action as a 'closed' class due to the considerable uncertainty regarding the availability of common fund orders. The Bill exacerbates that uncertainty and, further, explicitly requires funders to book-build. LCM submits that by doing so, the Bill not only fails to

improve outcomes for class members but instead, consistent with Beach J's comments, further impairs those outcomes.

Part E of PJC Submission, sub-section: Prospect of Constitutional and other challenges

31. By its PJC Submission, LCM asserted that:

"LCM notes that it is arguable that some or all of the Bill may be open to Constitutional and other challenges on a number of grounds."

32. Firstly, LCM notes and refers (respectfully, with support) to the Joint Opinion of the former Solicitor-General, Justin Gleeson SC, Sebastian Hartford-Davis and Myles Pulsford regarding potential Constitutionality concerns in relation to the Bill. This advice was in evidence before the PJC as Submission No 20 and LCM highlights its conclusion (at [2]) that:

"It appears to us that insufficient attention has been given to the source of Commonwealth legislative power to sustain the Bill and, in our opinion, some provisions may be beyond power"

33. Secondly, LCM notes that in *Stanwell*, Beach J made the following relevant comments regarding the Bill:

"[The Bill] may need to be modified to bring its scope within the referral contemplated by paragraph 51(xxxii) of the Constitution bestowed by the States under the Corporations Agreement 2002 (as amended), assuming that the approval of the Forum constituted thereunder has not been sought, and also assuming that the concept of "managed investment schemes" under clause 507(1)(a) is limited to its objectively ascertained meaning as at the inception of that clause, which pre-dated Brookfield *and was also not affected by or considered under the 2017 amendments. It may need to be modified to address direct or indirect conflicts with the provisions of Pt IVA of the FCA Act or at least to deal with the arguable conceptual incoherency in seeking to shoe-horn the statutory model for managed investment schemes under the Corporations Act into a funding mechanism designed to facilitate access to justice under the open class regime enshrined in Pt IVA, where class actions are controlled by representative applicants, with external legal representation and advice, and by the Court, rather than by group members exercising their democratic rights under a so called managed investment scheme, or by funders or any other entity expediently nominated as a responsible entity."*

PART D: CONCLUSION

34. LCM submits that any changes to Australia's litigation funding industry and class actions regime must be carefully considered and structured, with the benefit of genuine and broad stakeholder consultation. It is LCM's submission that meaningful consideration and consultation has not taken place in the very short time that the Bill has been developed. LCM submits that the Bill is, therefore, premature and underdone. It needs finessing in some parts. And it needs fundamental rework in others.
