

Thursday 16 December 2021

Committee Secretary  
Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
via email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Committee Secretary

## **Inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021**

Thank you for the opportunity to provide further comments on the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (**Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with 47,000 members drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

As the Committee will be aware from our appearance before the Parliamentary Joint Committee on Corporations and Financial Services inquiry (**PJC Inquiry**) on 12 November 2021, the AICD supports the measures proposed in the Bill.

We understand that our evidence to the PJC Inquiry will be considered by the Committee. We provide brief comments below as well as commentary on further issues raised in the November PJC hearing.

### **1. Reasonable, proportionate and fair returns for class action members**

As previously noted, the AICD acknowledges the important role that class actions play in providing access to justice, and the support that litigation funders provide in facilitating class actions.

The AICD's submission to this inquiry reflects our concerns about regulatory settings and incentives driving Australia's attractiveness for securities class actions specifically, rather than class actions in general.

Commercial litigation funders play a key role in instigating, funding and directing securities class actions. We remain concerned about the high percentage of litigation proceeds flowing to litigation funders and plaintiff lawyers - as noted by many reputable bodies, most notably the PJC and Australian Law Reform Commission (**ALRC**)<sup>1</sup>.

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<sup>1</sup> Final Report of the Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, 21 December 2020, available [here](#); Final Report of the Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018), [here](#).

The AICD supports the Government's proposal to enhance the powers of the Court to approve and/or vary the method of distribution of gross class action proceeds as between class members and litigation funders. This will require detailed and subjective analysis which, in our view, is a better mechanism than legislating a rigid level of minimum return. It is appropriate that the Court be the forum where such considerations are assessed and ultimately determined.

We consider there could be a range of outcomes depending on the risk, complexity, length and size of the claim. We also recognise the legitimate business model of commercial litigation funders, who should be able to pursue a reasonable and proportionate financial return.

Accordingly, we support the Bill's proposal to include a rebuttable presumption that returns less than 70 per cent of the total claim proceeds for class members are not fair and reasonable.

As a general principle, we consider that the majority of litigation proceeds should be received by class members. If class members do not receive at least a substantial majority of any recovery, it cannot be said that the action was brought for class members or in the interests of justice.

We consider these important safeguards should apply to those using our courts to make a commercial profit, and will increase transparency and certainty for all parties.

## 2. Criteria for judicial consideration

The AICD supports the criteria set out in the Bill as relevant and important factors for the Court to consider. We note, however, concerns raised that the list of factors set out in the Bill is exhaustive and may not allow all potentially relevant factors to be considered by the Court.

With those concerns in mind, the AICD supports amendment to insert a final factor that the Court must consider, being *any other factor considered relevant* to determining whether the proposed distribution is fair and reasonable. We consider that such an amendment would provide the judiciary with appropriate flexibility, while ensuring that the criteria set out by the legislature in the Bill were considered.

## 3. Next steps

We hope our response will be of assistance. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at [REDACTED] or Laura Bacon, Senior Policy Adviser at [REDACTED].

**Louise Petschler GAICD**

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