PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND

FINANCIAL SERVICES

AUSTRALIAN INDUSTRY GROUP

ANSWERS TO QUESTIONS ON NOTICE

Question:

> **"Senator O'NEILL:** Could I thank the witnesses for attending and for your submissions and for your answers to Mr Hill's questions so far. Perhaps you could provide us with the date on which you received an invitation to be part of the consultation process, the date on which you received the discussion paper and the date on which you received the exposure draft.
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> **Mr Smith:** Yes. We'd be happy to do that.
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> **Senator O'NEILL:** Thank you, and it would be helpful, if there were any special meetings that you had with ministers, for us to be advised of those as well…."

Answer:

On 1 June 2021, the Treasury and the Attorney-General's Department released a consultation paper titled 'Guaranteeing a minimum return of class action proceeds to class members'. Ai Group did not receive an advance copy of the consultation paper. We obtained a copy through the Treasury website.

On 30 September 2021, the Treasury commenced a consultation process in relation to:

- An Exposure Draft of the *Treasury Laws Amendment (Measures for Consultation) Bill 2021* and associated explanatory memorandum; and
- An Exposure Draft of the *Corporations Amendment (Litigation Funding) Regulations 2021* and associated explanatory statement

Ai Group did not receive an advance copy of the Exposure Drafts. We obtained a copy through the Treasury website.

On 27 October 2021, the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* was introduced into Parliament. We viewed the Bill for the first time on 27 October by downloading a copy from the Parliament of Australia website. We did not receive an advance copy.

On 28 October 2021, Ai Group received a letter from the Secretary of the Parliamentary Joint Committee on Corporations and Financial Services advising of the inquiry into the Bill and inviting Ai Group to make a submission.

Ai Group has not met with any Ministers to discuss the Bill.

Question:

> **Senator O'NEILL:** Could you take on notice to provide any lobbyists that have been engaged on behalf of the US Chamber of Commerce to engage with the Ai Group with regard to this legislation.

Answer:

Ai Group has not had any discussions about the Bill with the US Chamber of Commerce or any lobbyists for the US Chamber of Commerce.

Question:

> **Senator O'NEILL:** We are very mindful that you're representing member companies and companies should be able to operate and get a profit from the work that they do. I put to you that litigation funders have a right to do that too. I'll go through a series of four propositions and ask you and Mr Gergis to respond in turn. These are concerns that were set out in paragraph 11 of the Law Council's submission. Could you give me indication of if you share the concern; if not, why not and if you do share the concern how you think that might be addressed? The first one is the assertion by the Law Council that inactive measures in the bill would encourage 'significant "satellite" litigation over the validity, proper interpretation and effect of the proposed provisions'—given the lack of clarity and doubts about constitutionality. How do you respond to that? Mr Smith first.
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> **Mr Smith:** We'd be very happy to take that question on notice and respond in whatever time frame is necessary.
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> **Senator O'NEILL:** Thank you very much. The second one I would seek your responses to is—and again this is from paragraph 11 of the Law Council submission—the measures in the bill would mark 'a return to multiple closed class actions combined with lawyer run no win, no fee open class actions'. Their conjecture is that it will increase overall cost significantly and make settlement more difficult. They say this is because funders won't be able to run open class actions. How do you respond to that?
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> **Mr Smith:** I think it's probably best that we take that matter on notice as well and respond in our response to the first item. It may well be appropriate to respond to the other two assertions as well.

Answer:

Paragraph 11 of the Law Council's submission states:

> *11. Due to its complexity and in some cases ambiguity, the Bill, if enacted, is likely to have effects that are prejudicial to defendants (typically, corporations, company directors and government entities) and their insurers. Those potential consequences include:*
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> *(a) encouraging significant 'satellite' litigation over the validity, proper interpretation and effect of the proposed provisions;*

(b) *a return to multiple closed class actions combined with lawyer run no-win-no fee open class actions which will increase costs significantly and make settlement more difficult and uncertain;*

(c) *settlement amounts being driven higher so funders reach an amount which meets the 70/30 presumption while meeting costs and providing a reasonable return to the funder;*

(d) *cases being run against defendants' wishes and despite best efforts to settle because the settlement amount proposed will not deliver a 70 per cent return to members while meeting reasonable costs which have been incurred; and*

(e) *cases which would otherwise settle, not settling for low amounts (where for instance insurance moneys are largely used up) and so the 70/30 presumption cannot be met with the result being that plaintiffs will pursue individual company directors including through to bankruptcy.*

Ai Group response to paragraph (a):

Ai Group does not agree that these potential consequences are likely to arise.

With regard to the Constitutional validity of the Bill, in evidence given at the public hearing on 12 November 2021, Dr Smrdel of the Attorney-General's Department confirmed that the Government had obtained advice from the current Solicitor-General on this issue and the advice was that the Bill is Constitutional.

With regard to the other possible consequences, it is not uncommon for provisions in new legislation to be tested, particularly by those who oppose legislative reform. This is not a valid argument against the sound policy reasons behind the Bill.

We note that the former President of the Law Council of Australia, Mr Stuart Clark AM, provided a submission to the inquiry expressing strong support for the Bill.

Ai Group response to paragraph (b):

Ai Group does not agree that the reforms are likely to lead to a significant increase in costs or that settlements will be more difficult or uncertain.

The prohibition against entering into funding agreements without the consent or knowledge of all class members is an appropriate reform protecting individuals from signing away valuable rights pertaining to individual actions.

With regard to the potential for multiple competing class actions, Courts are commonly presented with competing class actions and use their powers to avoid this leading to adverse consequences by, for example:

- Hearing elements of competing actions together;
- Staying one or more class actions; and
- Requiring multiple plaintiffs to use the same Counsel.

Ai Group response to paragraphs (c) and (d):

Ai Group does not agree that these potential consequences are likely to arise.

The above points incorrectly assume that in most (if not all) cases, in order to provide a reasonable return to the funder in addition to costs, the settlement sum will need to be inflated. We contend that this is unlikely given the already grossly excessive returns often being received by litigation funders.

The policy justification for the Bill accepts that funders are currently receiving unreasonably high returns on their investment in representative proceedings. Once this premise is accepted, it should be uncontroversial that inflating the settlement sum will not be necessary to achieve a fair and reasonable return.

Moreover, the minimum 70 per cent return to plaintiffs is merely a presumption. The presumption is rebuttable in order to ascertain whether the distribution method is fair and reasonable.

Ai Group response to paragraph (e):

Ai Group does not agree that this potential consequence is likely to arise. There is no evidence to support such an assertion.

Question:

> **Mr HILL:** Us too. Throughout this discussion I've been listening to, there's been a lot of reliance on circling back and saying, 'But, hey, it's only a rebuttable presumption.' Many of the submissions, particularly from those who are legally qualified, analyse in quite compelling detail the flaws in the way the legislation is drafted. Can I ask you to take this on notice, to turn your mind to it and to come back to us, addressing these particular points. You don't need legal qualifications if you have a look at them. The critique is that the rebuttable presumption is subject to an exhaustive list of criteria, and that critical criteria are deliberately excluded. So, in effect, courts will not be able to do justice. And litigation funders, who might otherwise take on very worthy cases—particularly, I'd say, to the AICD for non-shareholder class actions—will be deterred because of this fact. The most important factor, which many submitters point out as being excluded, is an assessment of whether a set of victims or plaintiffs were able to obtain their best-case damages. They've given sensible examples of non-shareholder class actions where there were significant legal costs, a lot of expert testimony, a lot of resistance from the defendant and eventually a successful judgement—and the pool might be around 50 per cent, not 70 per cent. But they point out that that's 100 per cent of the best-case damages. Those things would not be able to be taken into account under this legislation in the way it is drafted. So I would ask you to actually read those submissions and provide us with your considered response to them.
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> I understand that you're a champion for this legislation—and many of us aren't, and that's fine—but it is very rushed to be able to deal with the detail. So I challenge you on some of the blithe assertions when you haven't actually read all of the detail that we're looking at. I encourage you to do so and ask you to get back to us on that point. You place great reliance throughout all of your testimony on this issue that it's a rebuttable presumption, yet witness after witness after witness is saying that that's just not true for so many cases, most of which don't involve the AICD, and I think

we're seeing that important distinction starting to be teased out. Perhaps the government, in its rush to help its corporate mates and directors to be shielded from shareholder class actions, whether or not that's a sensible thing, is inadvertently—to be kind about it—perhaps deliberately, going to deny justice to millions of Australians who suffer harm on non-shareholder class actions because of the way this is drafted.

Mr Gergis: Mr Hill, may I briefly respond to that?

Mr HILL: Sure.

Mr Gergis: I would probably take issue with the reference to 'blithely' referring to those other submissions. As I've said, we've looked at some of the submissions; we haven't been able to look at all of them. With respect to this point around the exhaustive list, we have an open mind on that. We think the factors that are enumerated in the bill are reasonable factors. I note the Law Council, in fact, just said, 'Maybe don't make it an exhaustive list, maybe don't say "only these factors", and maybe have a more general kind of discretionary final factor.' I think that's probably a sensible approach. So I think that would be the basis for our submission.

Mr HILL: That's really helpful. Could I ask you, given the invitation, to turn your mind to that issue and have a look at those half dozen or so submissions that do address that. Can I invite you, if that's your view, to provide a supplementary submission, perhaps sharpening that up, if you've had a chance to reflect. I understand the phrase 'open mind'. Given we're going to need to report by mid next week, an open mind doesn't give us as much to work with. I think the case has been made out, but I can see you're a person of fair mind; you're representing your organisation's interests and have steered away from the non-shareholder class actions. Reading the submissions, I'm genuinely troubled about the impact on victims of non-shareholder class actions. So I'd invite you, if that's your view, to sharpen it up in a supplementary submission.

CHAIR: Mr Smith, did you want to respond to that question? Mr Hill, I'm assuming that was question was posed to both witnesses?

Mr HILL: Sure.

Mr Smith: Yes, we're happy to take that question on notice and respond by whatever time frame the committee requires.

Answer:

The ‘fair and reasonable’ test already requires the Court to consider whether a scheme’s claim proceeds distribution method (or any variation thereof) is fair and reasonable when considering the interests of the scheme’s members as a whole. The test has, as its focus, the wellbeing of the members of the scheme.

Existing considerations assist the court in determining whether the settlement distribution method is so ‘fair and reasonable’ utilising information which should be reasonably obtainable. The additional consideration proposed for inclusion in s. 601LG(3)(a) would require a Court to engage in an unhelpful degree of speculation in determining whether claimants are able to obtain ‘best case damages’. This would require examining multiple variables which are unlikely to be apparent at the time a Court is required to employ the fair and reasonable test.

In the event that genuine issues arise regarding the implementation of the ‘fair and reasonable’ test, the regulation making powers under s.601LG(3)(f) and (4) may be utilised to make necessary modifications.