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Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback to the Senate Select Committee on Economics (the **Committee**) in response to the inquiry into the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (the **Bill**).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in consumer and commercial class actions.

We note from the inquiry website that:

> *…. submissions made to the PJC inquiry into this bill will be considered as evidence by the Senate Economics Legislation Committee. You are not required to resubmit that material. However, if you have additional information you would like to provide, you are welcome to make a new submission to this inquiry.*

Maurice Blackburn's submissions to both the Treasury and PJC processes[1] outlined the numerous failings of the Bill. The rushed nature of the Bill's development, and lack of time allocated to meaningful consultation on its contents – both through the Treasury and PJC processes – have meant that the Committee is having to deal with a poorly devised and poorly articulated piece of legislation.

Since the PJC process, three obvious issues have emerged which the Committee must now address:

1. There remain unresolved constitutional concerns regarding limitations on the jurisdiction of State Supreme Courts. The Commonwealth has failed to adequately consult with state and territory Attorneys General as to whether the current piece of legislation would jeopardise long standing bilateral arrangements and agreements. There seems little doubt that the Bill, as it stands, would be open to challenges on its constitutional validity.

[1] See: https://www.aph.gov.au/DocumentStore.ashx?id=4637508d-1a0b-4d10-a34d-82c2e2e79985&subId=716914 and https://www.aph.gov.au/DocumentStore.ashx?id=4731bdee-7fbb-457c-b3ec-e6a2d39dd9f4&subId=716914

2. The consultation processes to date have failed to adequately pay heed to the voices of Australians who have been able to achieve access to justice through class actions, and those who stand to be denied access to justice through the provisions of this Bill. Since the PJC process, thousands of Australians have written to their local members and other parliamentarians expressing their concerns at any attempt to limit class action proceedings. Evidence of this was bought to the floor of the House of Representatives during the second reading debate. No departmental or parliamentary inquiry into this Bill has proactively sought to hear the voices of individuals.

3. Despite rushed scrutiny by the PJC, the Bill still contains a number of concerning provisions, which would lead to consequences contrary to the stated aims of the Bill. For example:

    - The proposed reforms will reduce access to justice by limiting the practical availability of litigation funding for meritorious cases;
    - The rebuttable presumption remains deeply problematic for the reasons outlined in our previous submissions;
    - s.601LG still provides an exhaustive rather than inclusive list of factors for a court to consider in relation to the reasonableness of a distribution of proceeds, which still fails to consider the most important factor in determining whether a settlement is reasonable, being the proportion the settlement represents to the group members likely recovery;
    - Ambiguity on the availability of CFOs;
    - Lack of policy or evidence-based rationale for cost-capping funded actions;
    - Confusion regarding finality of matters and the encouragement of increased litigation via copycat actions; and
    - The scope and potential unintended consequences arising from the proposed s.9AAA(2).

We reiterate that the exposure draft of the Bill was so problematic that it required significant rectification of some of the obvious and serious defects in drafting, immediately prior to the PJC process. This only goes to demonstrate that a far more detailed level of scrutiny and consideration of the current form of the Bill is necessary in order to ensure it is workable and to avoid unintended consequences.

The very real and current risk in not enabling proper consideration of the legislation is that it will create unnecessary and unworkable complications within the legal system, across multiple jurisdictions – problems that currently do not exist and which will have a deleterious effect on the proper administration of justice in this country.

In its current form, the proposed legislation, despite its name, actually creates a multitude of additional policy and practical complications, complexities and uncertainty, none of which improves outcomes for participants.

The Bill represents serious change in how access to justice is administered and delivered in the Australian courts system. It is vital that such radical and ideological change receives thorough and careful scrutiny. That has not happened to date. This Committee process is the last chance for thorough scrutiny and consultation, and for the voices of individual Australians to be heard.

Please do not hesitate to contact me and my colleagues at AWatson@mauriceblackburn.com.au if we can further assist with the Committee's important work.

Yours faithfully,

Andrew Watson
Principal
Maurice Blackburn Lawyers