

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for Consultation) Bill 2021: Litigation
funders**

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule 1	The day after this Act receives the Royal Assent.	

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Schedule 1—Litigation funders

Corporations Act 2001

1 Section 9

Insert:

claim proceeds, for a class action litigation funding scheme, means the total money obtained as remedies for one or more of the scheme's general members, as a result of a judgment made, or settlement approved, by a Court in relation to class action proceedings for the scheme.

Note: This is referring to the total (gross) money obtained for the scheme's general members before any reductions for the costs for the proceedings.

claim proceeds distribution method, for a funding agreement for a class action litigation funding scheme, has the meaning given by paragraph 601GA(5)(b).

class action litigation funding scheme has the meaning given by section 9AAA.

class action proceedings, for a class action litigation funding scheme, means legal proceedings in a Court to seek remedies for each of the scheme's general members, whether or not remedies are also sought in the proceedings for one or more other persons.

funder, for a class action litigation funding scheme, means a person mentioned in paragraph 9AAA(d).

funding agreement, for a class action litigation funding scheme, means an agreement mentioned in paragraph 9AAA(d).

general member, for a class action litigation funding scheme, means a person who:

- (a) is a claimant mentioned in paragraph 9AAA(a) for the scheme; and
- (b) complies with the requirement mentioned in paragraph 601GA(5)(a) and set out in the scheme's constitution.

Note: This requirement is about agreeing to be a member of the scheme and to be bound by the scheme's constitution.

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1 *legal costs*, for class action proceedings for a class action litigation
2 funding scheme, means the legal costs (including any
3 disbursements) incurred by the funder for the scheme in relation to
4 the proceedings.

5 **2 Section 9 (after paragraph (a) of the definition of *managed***
6 ***investment scheme*)**

7 Insert:

8 (aa) a class action litigation funding scheme; or

9 **3 After section 9**

10 Insert:

11 **9AAA Meaning of *class action litigation funding scheme***

12 A scheme that has all of the following features is a ***class action***
13 ***litigation funding scheme***:

- 14 (a) the dominant purpose of the scheme is to seek remedies to
15 which one or more persons (the ***claimants***) may be legally
16 entitled arising out of:
- 17 (i) the same, similar or related transactions or
18 circumstances that give rise to a common issue of law or
19 fact; or
 - 20 (ii) different transactions or circumstances but the claims of
21 the claimants can be appropriately dealt with together;
- 22 (b) the possible entitlement of each of the claimants to remedies
23 relates to transactions or circumstances that occurred before
24 or after the first funding agreement (dealing with any issue of
25 interests in the scheme) is finalised;
- 26 (c) the steps taken to seek remedies for each of the claimants
27 include one or more lawyers providing services in relation to:
- 28 (i) making a demand for payment in relation to a claim; or
 - 29 (ii) lodging a proof of debt; or
 - 30 (iii) commencing or undertaking legal proceedings; or
 - 31 (iv) investigating a potential or actual claim; or
 - 32 (v) negotiating a settlement of a claim; or
 - 33 (vi) administering a deed of settlement or scheme of
34 settlement relating to a claim;
- 35 (d) a person (the ***funder***) provides funds or indemnities, or both,
36 under an agreement (the ***funding agreement***) (including an
37 agreement under which no fee is payable to the funder or

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1 lawyers if the scheme is not successful in seeking remedies)
2 to enable the claimants to seek remedies;

- 3 (e) the funder is not a lawyer or legal practice that provides a
4 service for which some or all of the legal fees or
5 disbursements, or both, are payable only on success.

6 **4 At the end of section 601GA**

7 Add:

- 8 (5) For a managed investment scheme that is a class action litigation
9 funding scheme:

- 10 (a) the scheme's constitution must provide that, for a claimant
11 mentioned in paragraph 9AAA(a) for the scheme to be a
12 general member of the scheme, the claimant is required to
13 agree in writing to:

14 (i) be a member of the scheme; and

15 (ii) be bound by the terms of the scheme's constitution; and

- 16 (b) the scheme's constitution must provide that each funding
17 agreement for the scheme must include a method (a *claim*
18 *proceeds distribution method*) for determining the amount of
19 any claim proceeds for the scheme that is to be paid or
20 distributed to the scheme's general members; and

- 21 (c) the scheme's constitution must provide that each funding
22 agreement for the scheme must:

23 (i) include words to the effect that the agreement is subject
24 to the law in force in a particular State or Territory; and

25 (ii) include words to the effect that the only courts in which
26 the agreement can be enforced are the courts of the
27 Commonwealth or the courts of a particular State or
28 Territory; and

- 29 (d) the scheme's constitution must provide that each funding
30 agreement for the scheme must require the funder for the
31 scheme to pay the reasonable costs of a person mentioned in
32 subsection (6) for any class action proceedings for the
33 scheme in a Court, unless the Court orders otherwise; and

- 34 (e) the scheme's constitution must provide that the scheme's
35 responsible entity must not be paid any amount in relation to
36 the scheme that is greater than the entity's reasonable costs
37 for managing the scheme; and

- 38 (f) any other agreement, or arrangement, relating to the scheme
39 is not enforceable and has no effect to the extent that it is

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1 contrary to a matter mentioned in paragraph (a), (b), (c), (d)
2 or (e).

- 3 (6) For the purposes of paragraph (5)(d) the persons are as follows:
4 (a) any person to whom the Court refers the agreement for
5 inquiry and report in relation to the remuneration (however
6 described) that the funder for the scheme will be entitled to
7 receive under the scheme; and
8 (b) any person appointed by the Court to assist the Court, as a
9 contradictor by representing the interests of the scheme's
10 general members, in deciding to make any order to approve
11 or vary the agreement's claim proceeds distribution method.

12 **5 After Part 5C.7**

13 Insert:

14 **Part 5C.7A—Class action litigation funding** 15 **schemes** 16

17 **601LF Enforceable funding agreements etc.**

18 *Funding agreements*

- 19 (1) If class action proceedings for a class action litigation funding
20 scheme that is a managed investment scheme are commenced in a
21 Court, each funding agreement for the scheme is not enforceable
22 and has no effect to the extent that it relates to the agreement's
23 claim proceeds distribution method, unless subsection (2), (3) or
24 (4) applies to the proceedings.
- 25 (2) This subsection applies to the proceedings if:
26 (a) the Court is a federal court; and
27 (b) in the proceedings, the Court approves or varies, under
28 section 601LG, the funding agreement's claim proceeds
29 distribution method; and
30 (c) in, or in relation to, the proceedings, the Court does not make
31 an order (a *common fund order*) for the purposes of:
32 (i) fixing the remuneration (however described) of the
33 funder for the scheme as a portion of the total money
34 obtained as remedies for one or more persons as a result

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- 1 of a judgment made, or settlement approved, by the
2 Court in relation to the proceedings; and
3 (ii) requiring one or more persons who obtain such a
4 remedy, but who are not general members of the
5 scheme, to contribute to the funder's remuneration.
- 6 (3) This subsection applies to the proceedings if:
7 (a) the Court is a court of a State or Territory; and
8 (b) in the proceedings, the Court is exercising federal
9 jurisdiction; and
10 (c) in the proceedings, the Court approves or varies, under
11 section 601LG, the funding agreement's claim proceeds
12 distribution method; and
13 (d) in, or in relation to, the proceedings, the Court does not make
14 a common fund order.
- 15 (4) This subsection applies to the proceedings if:
16 (a) the Court is a court of a State or Territory; and
17 (b) in the proceedings, the Court is not exercising federal
18 jurisdiction; and
19 (c) in the proceedings, the Court approves or varies the
20 agreement's claim proceeds distribution method under any
21 powers or procedures of the Court that are substantially
22 similar to those in section 601LG; and
23 (d) in, or in relation to, the proceedings, the Court does not make
24 a common fund order.
- 25 *Other related agreements or arrangements*
- 26 (5) Any other agreement, or arrangement, relating to the scheme is not
27 enforceable and has no effect to the extent that it is contrary to the
28 funding agreement's claims distribution method so approved or
29 varied by a Court as described in subsection (2), (3) or (4).

30 **601LG Approval or variation of funding agreement for a class** 31 **action litigation funding scheme**

32 *Order to approve or vary claim proceeds distribution method*

- 33 (1) The Court may, in class action proceedings for a class action
34 litigation funding scheme that is a managed investment scheme,
35 make an order to:

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- 1 (a) approve the claim proceeds distribution method in a funding
2 agreement for the scheme if that method is fair and
3 reasonable when considering the interests of the scheme's
4 general members as a whole; or
5 (b) vary that method (by varying the funding agreement) to
6 ensure that method is fair and reasonable when considering
7 the interests of the scheme's general members as a whole;
8 if subsection (2) applies to the proceedings.
- 9 (2) This subsection applies to the proceedings if:
10 (a) the Court:
11 (i) is a federal court; or
12 (ii) is a court of a State or Territory that, in the proceedings,
13 is exercising federal jurisdiction; and
14 (b) the proceedings are sufficiently progressed to enable the
15 Court to determine whether that claim proceeds distribution
16 method, or any variation of that method, is so fair and
17 reasonable.
- 18 *Fair and reasonable test*
- 19 (3) For the purposes of subsection (1), in considering whether the
20 funding agreement's claim proceeds distribution method, or any
21 variation of that method, is fair and reasonable when considering
22 the interests of the scheme's general members as a whole, the
23 Court must only have regard to the following factors:
24 (a) in relation to the proceedings, the following:
25 (i) the amount, or expected amount, of claim proceeds for
26 the scheme;
27 (ii) the legal costs for the proceedings incurred by the
28 funder and the extent to which those legal costs are
29 reasonable;
30 (iii) whether the proceedings have been managed in the best
31 interests of the general members to minimise the legal
32 costs for the proceedings;
33 (iv) the complexity and duration of the proceedings;
34 (b) the extent of the commercial return to the funder for the
35 scheme in comparison to the costs incurred by the funder in
36 relation to the scheme;
37 (c) the risks accepted by the parties to the agreement by
38 becoming parties to the agreement;
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- 1 (d) the sophistication and level of bargaining power of the
2 general members in negotiating the agreement;
3 (e) any other compensation or remedies obtained by any of the
4 scheme's general members in relation to the transactions or
5 circumstances referred to paragraph 9AAA(a) or (b);
6 (f) any other factors prescribed by regulations made for the
7 purposes of this paragraph.

8 (4) Regulations made for the purposes of this subsection may provide
9 that this section applies as if subsection (3) were omitted, modified
10 or varied as specified in the regulations.

11 (5) A rebuttable presumption that the claim proceeds distribution
12 method is not so fair and reasonable arises if less than 70% of the
13 claim proceeds for the scheme is to be paid or distributed to the
14 scheme's general members as a whole.

15 Note: The rebuttable presumption relates to the percentage of the claim
16 proceeds to be paid or distributed to the scheme's general members as
17 a whole, not between the scheme's general members.

18 *Referee report and representations by contradictor*

19 (6) Before the Court makes an order under subsection (1), in relation
20 to a funding agreement for a class action litigation funding scheme,
21 the Court must:

- 22 (a) receive and consider a report from a person to whom the
23 Court has referred the funding agreement for inquiry and
24 report in relation to the remuneration (however described)
25 that the funder for the scheme will be entitled to receive
26 under the scheme; and
27 (b) consider the representations made by a person appointed by
28 the Court to assist the Court, as a contradictor by
29 representing the interests of the scheme's general members,
30 in deciding to make any order to approve or vary the
31 agreement's claim proceeds distribution method;

32 unless it is not in the interests of justice to do so.

33 *Effect of variation*

34 (7) If the Court makes an order under subsection (1) to vary the
35 funding agreement's claim proceeds distribution method, the Court
36 may declare the agreement to have had effect, as so varied, at and
37 after the time when the agreement was made, or at and after a
38 specified later time.

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Application to the Court

- 1
- 2 (8) The Court may make an order under subsection (1) in relation to a
- 3 funding agreement for a class action litigation funding scheme that
- 4 is a managed investment scheme:
- 5 (a) on its own initiative; or
- 6 (b) on the application of:
- 7 (i) a party to the funding agreement; or
- 8 (ii) the responsible entity of the managed investment
- 9 scheme.

10 **6 In the appropriate position in Chapter 10**

11 Insert:

12 **Part 10.61—Transitional provisions relating to the**

13 **Treasury Laws Amendment (Measures for**

14 **Consultation) Act 2021**

15

16 **1688 Application of amendments relating to class action litigation**

17 **funding schemes**

18 The amendments made by Schedule 1 to the *Treasury Laws*

19 *Amendment (Measures for Consultation) Act 2021* apply in relation

20 to a funding agreement for a class action litigation funding scheme

21 that is a managed investment scheme if all of the following apply:

- 22 (a) the funding agreement is entered into on or after the
- 23 commencement of that Schedule;
- 24 (b) the managed investment scheme becomes a class action
- 25 litigation funding scheme on or after the commencement of
- 26 that Schedule, whether the managed investment scheme came
- 27 into existence before or after that commencement;
- 28 (c) if class action proceedings for the scheme are commenced in
- 29 a Court—those proceedings are commenced in the Court on
- 30 or after the commencement of that Schedule.

31 Note: The amendments made by that Schedule do not apply in relation to a

32 managed investment scheme that becomes a class action litigation

33 funding scheme before the commencement of that Schedule.