Public Submission to the Treasury and Attorney General in respect of the Joint Consultation Paper entitled Guaranteeing a minimum return of class action proceeds to class members (the "Consultation Paper")

1. Woodsford Litigation Funding Limited ("Woodsford") welcomes the opportunity to make submissions in respect of the Consultation Paper. Woodsford's submissions in response to the Consultation Paper, together with some background information about Woodsford, are set out below.

Woodsford

1. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading global litigation and arbitration funder.

2. Woodsford is a founder member of the International Legal Finance Association (ILFA), which is the only global association of commercial legal finance companies and is an independent, non-profit trade association promoting the highest standards of operation and service for the commercial legal finance sector. It also serves as a clearinghouse of relevant information, research and data about the uses and applications of commercial legal finance. Woodsford's Chief Operating Officer, Jonathan Barnes, sits on the Management Committee of ILFA.

3. Woodsford is also a founder member of the Association of Litigation Funders of England & Wales ("ALF") which is an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. Woodsford was actively involved in drafting ALF's Code of Conduct (the "Code"), which sets out the standards by which all Funder Members of ALF must abide, including in relation to their capital adequacy. In particular, the Code requires its members to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. The Code also sets out circumstances in which funders may be permitted to withdraw from a case and outlines the way in which the roles of funders, litigants and their lawyers should be kept separate. ALF also maintains complaints handling procedures. Since ALF introduced its complaints procedure, Woodsford has never been the subject of an ALF complaint. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of ALF.

4. Woodsford Australia Limited, a wholly-owned Australian subsidiary of Woodsford, has recently obtained an Australian Financial Services Licence, issued by ASIC, authorising it to operate litigation funding schemes as managed investment schemes in its capacity as a Responsible Entity.

5. Woodsford has staff in the UK, the United States, Australia, Israel and Singapore. Woodsford has funded and continues to fund class actions in Australia, the United Kingdom, and the Netherlands as well as numerous other types of disputes globally. Woodsford also supports the Public Interest Advocacy Centre in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.

6. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, Australia, the United States, Canada, Ireland, Israel and Singapore, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales.

7. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven has been recognised by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having *"the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation"* and a *"strong commercial grip on the relevant legal provisions and financial aspects of cases."* For his work in international arbitration, the *Legal 500* ranked Steven as *"outstanding"*. Woodsford's Chief Investment Officer for the EMEA and APAC regions, which covers Woodsford's operations in Australia, Charlie Morris, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard. Charlie is a ranked individual in Chambers & Partners directory for litigation funding and praised as "*extremely knowledgeable in financial services matters, possibly more so than the lawyers who run the cases*". Steven Friel, Jonathan Barnes and Charlie Morris have all been recognised in the top 100 leaders in legal finance of 2021, together with three other Woodsford employees.

8. Woodsford has an Investment Advisory Panel ("IAP") that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Our IAP includes Michael Barker, a former Judge of the Federal Court of Australia, Shira A. Scheindlin, a former United States District Court Judge and several former senior partners of major international law firms.

9. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Australia.

Woodsford's Submissions in respect of the Consultation Paper

10. Our submissions address the questions raised in the Consultation Paper.

11. As a general point, we respectfully submit that the premise of the Consultation Paper and the questions posed therein, are flawed. The Consultation Paper seeks to identify "*the best way to guarantee a statutory minimum return of gross proceeds of a class action to class members*". This assumes that imposing a statutory minimum is the best way to ensure class members receive certain amounts of gross proceeds in class actions. For the reasons that follow, imposing a statutory minimum will not necessarily have the effect of ensuring class members receive larger amounts from gross proceeds in class actions than they otherwise would, but it will have the effect of ensuring class members with smaller, meritorious claims receive **no** compensation, in circumstances where they would have received compensation, absent the statutory minimum. That is because imposing a statutory minimum will have the consequence that only larger class actions will be considered economically viable by those that fund them, including Woodsford. If class actions that claim a lower, but still substantial, amount (say, A$75 million or less) are not funded by third party funders, as they are considered to be economically unviable because of the statutory minimum, those class actions will not be pursued at all. This will leave class members who have smaller claims without any recourse notwithstanding that they may have been the victims of serious wrongdoing. By the same token, the wrongdoers that would otherwise be the defendants to those class actions will not be held to account. This will seriously fetter access to justice in Australia and harm, rather than help, Australian class members who seek to benefit from class actions. Imposing a statutory minimum to group members would, in our submission, achieve exactly the opposite of what we understand to be the intended aim: instead of increasing returns to group members, it would likely mean they often get nothing instead.

12. As a basis for supporting the imposition of a statutory minimum return to class members, the PJC Report, states that there exists "*systemic and inappropriate skewing of the proceeds of a successful class action in favour of litigation funders at the expense of class members*" and that litigation funders appear to be making windfall profits from Australia's class action system at the expense of class members. In support of this assertion, the PJC cited analysis in the ALRC report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) that when litigation funders were involved in a class action, the median return to plaintiffs was 51 per cent, compared to 85 per cent when a funder was not involved.

13. As noted in the Minority Report by Labor Members incorporated in the final version of the PJC Report (Minority Report):

> *"on no reasonable view does it follow that, because median returns to class members are lower when a funder is involved, funders are obtaining windfall profits at the expense of class members. As the Liberal members acknowledge elsewhere in their report, 'in many instances, a class action could not proceed in Australia without a litigation funder'. So if you take the litigation funder out of the equation, that does not necessarily mean higher returns for plaintiffs*

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– in many cases it means no returns for plaintiffs because many class actions would not proceed at all."[1]

14. Often where a litigation funder receives 51 per cent or more of the funds available from any settlement it is not because they have made a "windfall" profit but because the legal costs of the litigation were proportionately high relative to a modest settlement amount. This point is ignored in the PJC Report.

What is the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements)?

15. As mentioned above, the premise of the question is flawed in that it assumes that some form of statutory minimum return to group members in class actions is necessary or beneficial for group members. It is not. Currently, Courts overseeing class actions are well equipped to determine whether returns to class members in class actions are fair and reasonable when approving a settlement. If a settlement, and the proposed distribution of a settlement sum, is not considered fair and reasonable by the Court, it would not be approved. This is the best possible safeguard to ensure that all parties, including group members and funders receive what is fair and reasonable in all of the circumstances, as assessed by an independent member of the judiciary who ordinarily has vast experience of such matters.

16. It is important to note in response to this question that the report of the Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* ("PJC Report"), and the subsequent Consultation Paper, follow two reports into litigation funding and class actions in Australia, namely the Australian Law Reform Commission report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) ("ALRC Report") and the Victorian Law Reform Commission report *Access to Justice—Litigation Funding and Group Proceedings* (March 2018) ("VLRC Report"). Neither the ALRC Report, nor the VLRC Report recommended a form of statutory minimum be imposed in relation to returns to class members in class actions. The VLRC noted that Court determination of the percentage fee meant that statutory caps were unnecessary and that allowing Courts to exercise discretion on the issue of what is an appropriate percentage means that the imposition of inflexible parameters could be avoided.[2]

17. In Australia, a body of jurisprudence has developed, in relation to the appropriateness of funding commissions and returns to class members in class actions. Pursuant to s33V of the FCA a representative proceeding may not be settled or discontinued without the approval of the

[1] Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020), p 369.

[2] Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (March 2018), [3.88], [5.80] – [5.85].

Court. The body of law in Australia in relation to class action settlement approvals shows that the assessment of whether returns to class members are reasonable is a complex exercise, and there is no "one-size-fits-all" approach. Courts in Australia assess whether the costs to be deducted from a settlement (including the funder's commission) are reasonable in light of a number of factors including the size of the settlement, complexity of a matter, the significant risk the claim will be unsuccessful resulting in loss of investment, the risk the claim will not result in recovery (in the event the defendant's solvency is questionable), the length of the proceedings, the amount of money contributed by the funder to advance the action, and how many group members are impacted by the decision. An assessment of these different factors on a case-by-case basis has resulted in Australian courts approving a wide range of relative percentage returns to class members on the basis that those returns are reasonable. As such, neither the commissions a funder is entitled to receive, nor the percentage of gross proceeds that should be made available to class members, are things that should be (or are suitable to be) the subject of express statutory limits.

18. We submit that the Australian Courts continue to be best-able and best-placed to assess the reasonableness of litigation funding commissions and protect the interests of class members in class actions. As the Full Federal Court explained in *Australian Securities and Investments Commission v Richards*:

> "*the role of the court [in a settlement approval application] is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises.*"[3]

As such, the Court already provides sufficient protection of the interests of class members in determining the reasonableness of the returns they are entitled to receive out of settlements or awards.

19. Further, statutory intervention in the form of imposing a minimum return to class members risks having a seriously deleterious impact on access to justice in Australia. Often, in the absence of litigation funding, claimants and group members in class actions would not have the means to pursue their claim and would receive nothing, with the defendant wrongdoer suffering no financial consequences. Litigation funding is required to ensure that victims have access to justice and equality of arms against far better resourced opponents and to provide an effective form of private regulation of large corporations and other defendants. Accordingly, it should be kept in mind, when considering the net return that group members receive from a class action, that absent the litigation funding required to bring the class action, group members would have received nothing. It is preferable for a class action to be advanced and for class members to receive something than for a class action not to be advanced and for class

[3] [2013] FCAFC 89 [8].

members to receive nothing. As such, the starting position, when considering the net return that class members receive from a class action, should therefore be that absent the class action, and absent the litigation funding required to bring that class action, group members may have received nothing.

20. In submissions made to the VLRC which were later cited in the VLRC Report, Maurice Blackburn commented that it is almost impossible to secure litigation funding for a class action involving claims of less than $30 million.[4] In the event that inflexible legislation is implemented stipulating a certain percentage of any settlement or award must be received by class members, as proposed by the PJC Report, we submit that this claim value will increase, and it will become very difficult for claimants to obtain funding for class actions with claim values less than a number much higher than $30 million.

How would the suggested mechanism interact with the class action system (including court processes) and the litigation funding regime?

21. As mentioned in our response to the question directly above, the implementation of any statutory mechanism is unnecessary and inappropriate and it is our view that any mechanism would only serve to fetter the Court's discretion in assessing, on a case-by-case basis, what return to class members is reasonable.

Is a minimum gross return of 70 per cent to class members the most appropriate floor for any statutory minimum return? If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?

22. For a variety of reasons, setting a floor for a statutory minimum is inappropriate. As stated above, the approval of the costs of litigation by a Court pursuant to s33V of the FCA and analogous State legislation is an evaluative process. Imposing a flat, 70 percent floor fails to recognise that different claims have different risk profiles and complexities, and also fails to recognise that many of the costs incurred in a class action in order to achieve a settlement or award, which often run into many millions of dollars, are out of a litigation funder's control.

23. It should be noted in response to this question that Recommendation 20 in the PJC report asks "*whether a minimum gross return of 70 per cent to class members,* ***as endorsed by some class action law firms and litigation funders****, is the most appropriate floor"* **[our emphasis]**. Thus, the questions posed by the Consultation Paper is said to be based on the "endorsement" of a 70 percent return to class members made by some class action law firms and litigation funders. The PJC Report does not reference this endorsement, and it is unclear where the figure of 70 per cent has come from. As the Minority Report points out, to their knowledge, *"no law firm or funder has proposed a 70 per cent 'floor'. Rather, in the spirit of compromise, at least one law firm has*

[4]Victorian Law Reform Commission, above n 2, [2.49].

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proposed amendments to the Corporations Amendment (Litigation Funding) Regulations 2020 so that a litigation funder that guarantees a 70 per cent minimum return to plaintiffs would not have to comply with the managed investment scheme rules."[5]

24. The PJC Report acknowledges that, "*litigation funders ought to be reimbursed for the costs incurred and make a profit which is reasonable and proportionate to the risk undertaken*." This comment, when considered together with a proposal to implement a 70 per cent statutory minimum return to class members, becomes problematic for two reasons.

25. First, the impact of setting a statutory minimum will mean that in many circumstances, litigation funders do not even receive reimbursement for the legal costs of the applicants, which they have paid. Take the following hypothetical example of a class action that runs for 5 years, with the Defendant making interlocutory applications at every stage of the proceedings. It ends up costing the lead applicant $10m in legal fees and disbursements (all of which are funded) and results in a settlement of $30m where the best-case outcome if the applicant went to trial would have been $60m. If the statutory minimum to class members was imposed at 70 per cent, this would result in the class members receiving $21m and the litigation funder, who had spent $10m funding the claim, recovering only $9m of those costs (i.e. a loss of $1m). Although the more likely scenario will be that the class action was never commenced in the first place, as the statutory minimum would mean it was not economically viable to proceed with funding, and so class members would have received nothing. In either scenario, the outcome could not be considered fair and reasonable, as the party that had assumed the vast majority of the risk – the funder – makes a loss while group members would receive a significant windfall having incurred no cost or risk.

26. The second reason why the statement that a litigation funder's return should be proportionate and reasonable to the risk undertaken is problematic is because the risks a litigation funder takes cannot be viewed in isolation in respect of any one class action. That is, a litigation funder's risks need to be viewed across the entire portfolio of claims it agrees to fund. Higher returns in some class actions than others, acknowledge that litigation funders agree to fund cases that do not result in any recoveries for a variety of reasons, including because the claim is unsuccessful, or the defendant is unable to pay an award or settlement due to insolvency. The litigation funder takes all the risk in a class action, and the class members assume no risk. A litigation funder is at significant risk that they will be left substantially out of pocket in relation to each of the class actions they fund. If a litigation funder is not able to offset the risks of one class action against another in its portfolio, complex or difficult (but meritorious) class actions will not be pursued, to the detriment of class members.

[5] Parliamentary Joint Committee on Corporations and Financial Services, above n 1, p 368.

Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?

27. The evaluative process that Courts undertake when considering a settlement approval under s33V of the FCA and analogous State legislation shows that a graduated approach as set by statute, would be unworkable. In any event, the Court already undertakes a process of considering the risks and complexity of a litigation in deciding on settlement approval applications and has the necessary statutory powers to perform this function appropriately.

28. As stated by Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* in deciding whether to approve a settlement "*the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole."*[6] Part of the process of evaluating whether a settlement is fair and reasonable, is a consideration of the risks associated with the claim. As the Federal Court of Australia's Class Actions Practice Note (GPN-CA) details, the material that may be needed to persuade the Court that the proposed settlement is fair and reasonable and in the interests of class members will usually be required to address, at least:

    a. the complexity and likely duration of the litigation;

    b. the reaction of the class to the settlement;

    c. the stage of the proceedings;

    d. the risks of establishing liability;

    e. the risks of establishing loss or damage;

    f. the risks of maintaining a class action;

    g. the ability of the respondent to withstand a greater judgment;

    h. the range of reasonableness of the settlement in light of the best recovery; the range of reasonableness of the settlement in light of all the attendant risks of litigation;

    i. the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[7]

29. In the ALRC Report, the Commission noted in relation to the application of s33V by the Court, that it considered that *"legislative reform is unnecessary as extensive jurisprudence exists which*

[6] [2015] FCA 1468 [5].

[7] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* [15.5].

provides guidance as to the criteria judges are to take into account in approving class action settlements, which criteria are likely to continue to evolve." As such, it is unclear what further legislation could assist the Court (or is necessary) in this regard, or what exactly would be proposed by the third bullet point of Recommendation 20 of the PJC Report.

30. In addition, the assumption that there are more straightforward cases than others is somewhat flawed in that it assumes that the Defendant's conduct in any given class action is predictable, which it is not. If a case was straightforward, it is likely that it would not be necessary to litigate by way of class action. Presumably in cases where Defendant wrongdoing is self-evident or straightforward, the Defendant would voluntarily compensate the affected parties, without the need to pursue a court proceeding. A class action is pursued because there is a fundamental dispute between an applicant and a defendant which needs to be resolved, and the defendant's approach to that dispute is completely unpredictable and often unreasonably tenacious regardless of the merits of the claim.

How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.

31. For the reasons stated above, any kind of legislative graduated approach which attempts to prescribe appropriate returns based on a classification of cases is doomed to be unfit for purpose and is incapable of adding anything to the evaluative approach the Court is already taking in deciding whether returns to different parties are fair and reasonable.

What other implementation considerations would be relevant to the issues raised in this consultation paper? Please provide examples

32. As is clear from the above, in our submission the Court is best placed to determine the reasonableness of costs associated with class actions. In line with this, the Federal Government should consider expressly providing Courts hearing class actions with the power to make Common Fund Orders at the beginning of a class action.

33. A CFO is an order made in Australian class actions which requires group members (who have not opted out of the proceeding) to contribute a percentage of any award or settlement to the litigation funder irrespective of whether the group member has signed a litigation funding agreement. The High Court of Australia, in *BMW Australia Ltd v Brewster*[8], recently determined that Australian courts did not have power to make CFOs at interlocutory stages of proceedings. The High Court's decision brings into question the efficacy of a class action regime in which a litigation funder can provide funding which benefits class members

[8] [2019] HCA 45.

throughout a proceeding and not know whether it will be entitled to a return from those group members until after a resolution has been reached. In our view, it would be beneficial to confer onto courts an express statutory power to make CFOs upon an interlocutory application by a party at an early stage of a proceeding. Leaving this question uncertain risks stifling access to justice, as litigation funders may feel less inclined to fund opt-out class actions, particularly where there are a large number of group members with relatively small individual claims and it would be impractical for the litigation funder to sign up all group members (or at least a large portion of group members) to litigation funding agreements. Indeed, such an approach undermines the very purpose of an opt-out regime, which is to allow class members to participate in an action passively, not to compel them to actively sign up to funding agreements or otherwise 'opt-in'.

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25 June 2021