

6 October 2021

Manager  
Market Conduct Division  
Treasury  
Langton Cres  
Parkes ACT 2600

via email: [MCDLitigationFunding@treasury.gov.au](mailto:MCDLitigationFunding@treasury.gov.au)

Dear Treasury

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

Thank you for the opportunity to provide a submission on the Exposure Draft *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders (Exposure Draft)*.

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 of more than 46,000 reflects the diversity of Australia's director community, drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

#### **1. Background**

The AICD welcomes the Government's consultation on proposed measures which give effect to key recommendations of the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry's (**PJC**) final report into Litigation Funding and the Regulation of the Class Actions Industry (**PJC Report**).

The AICD participated in both the Australian Law Reform Commission's (**ALRC**) Inquiry into Class Action Proceedings and Third-Party Litigation Funders in 2018 and the PJC's Inquiry into Litigation Funding and the Regulation of the Class Actions Industry in 2020.

We acknowledge the important role that litigation funding can play in providing access to justice, through financing the often high costs of litigation. However, the AICD has long held concerns about the regulatory settings and commercial incentives driving Australia's attractiveness for securities class actions, and the high percentage of judgement and settlement proceeds flowing to litigation funders and plaintiff lawyers.

The AICD supports the intent of the reforms proposed in the Exposure Draft to rebalance these regulatory settings.

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

The AICD notes the short period for consultation on the Exposure Draft. The reforms proposed are significant and the AICD encourages adequate consultation with stakeholders, including legal practitioners, experts and litigation funders. Given the short period for consultation the opportunity to canvass governance stakeholder views on the proposal has been limited.

Notwithstanding this, our submission provides high-level comments in support of the following proposals in the Exposure Draft, which we recognise are intended to promote proportionate litigation funding arrangements and equitable returns to class members:

### **1. Requirements for the constitution of a class action litigation funding scheme**

The AICD supports the Exposure Draft's proposed amendments to the requirements of a managed investment scheme's constitution, in particular the requirement for any litigation funding agreement to state how the claim proceeds would be distributed between general members of the scheme and a litigation funder.

### **2. Enforceability of a litigation funding agreement**

The AICD supports proposals to enhance the powers of the Court to:

- approve the method of distribution to members of the scheme and a litigation funder as fair and reasonable for a litigation funding agreement to be enforceable; and/or
- vary the litigation funding agreement to ensure the method is fair and reasonable

As previously submitted during the earlier Treasury consultation, we do not have a fixed view on a precise level of minimum return. A rigid figure will not be appropriate in all cases given there could be a range of outcomes depending on the risk, complexity, length and size of the claim.

However, as a general principle, it is our view that litigation funders should be able to pursue a financial return that is reasonable and proportionate to the risk they undertake, but the majority of judgment or settlement proceeds should be received by class members. It is otherwise difficult to say that justice has been served if most of the litigation proceeds flows through to lawyers and funders.

Accordingly, in assessing whether the distribution method is fair and reasonable, we consider a rebuttable presumption that returns less than 70 per cent of the total claims proceeds for class members, which the Court can set aside if it considers the alternative method fair and reasonable, is a sensible mechanism. This would provide funders with the opportunity to explain why a higher proportion is appropriate in all the circumstances.

We further support the Exposure Draft's proposed criteria for determining whether a method of distribution is 'fair and reasonable'. These factors will require detailed and subjective analysis which, in our view, is best undertaken by the Court.

### **3. Referee report and representations by contradictor**

The AICD supports proposed amendments to require:

- the Court to have regard to the report of a fees assessor and representations of a contradictor in determining whether to approve or vary a litigation funding agreement; and
- a litigation funding agreement to contain an undertaking that the costs of a fees assessor and contradictor are met by the litigation funder.

The appointment of an independent fees assessor and contradictor representing the interests of class members to assist the Court are important additional safeguards to ensure equitable financial outcomes. This would further reduce the risk that excessive fees are extracted by funders from litigation.

#### 4. Exclusive jurisdiction for the Federal Court

As previously submitted during the earlier Treasury consultation, the AICD supports recommendations made by both the ALRC's (recommendation 7) and PJC (recommendation 30) for exclusive jurisdiction to be conferred on the Federal Court with respect to civil matters commenced as class actions under the Corporations Act and *Australian Securities and Investments Commission Act 2001*.<sup>1</sup> As noted by the PJC, doing so would ensure procedural efficiency and consistency in the Federal Court's oversight of the fees, operation and conduct of litigation funders.

We encourage the Government to give further consideration to implementing these recommendations as part of the Exposure Draft's proposed reforms.

#### 3. Next steps

We hope our submission will be of assistance to Treasury's consultation. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au) or Laura Bacon, Senior Policy Adviser, at [lbacon@aicd.com.au](mailto:lbacon@aicd.com.au).

Yours sincerely,



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General Manager, Advocacy

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<sup>1</sup> AICD submission, *Guaranteeing a minimum return of class action proceeds to class members* (28 June 2021), available [here](#).