
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2021: LITIGATION FUNDING

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
ASIC	Australian Securities and Investments Commission
ALRC	Australian Law Reform Commission
ALRC Report	Report of the ALRC, <i>Integrity Fairness and Efficiency- An Inquiry into Class Action Proceedings and Third-Party Litigation Funders</i>
PJCCFS Report	Report of the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into litigation funding and the regulation of the class action industry

Chapter 1

Litigation Funding

Outline of chapter

1.1 Schedule # to the Bill amends Chapter 5C of the Corporations Act to implement the government response to recommendations 7, 11, 12, 13, 16, 18 and 20 of the PJCCFS Report.

1.2 The amendments introduce additional requirements for the constitutions of managed investment schemes that are class action litigation funding schemes.

1.3 The amendments also provide that a Court must approve, as fair and reasonable, the proposed distribution of the claim proceeds achieved in a class action funded by a class action litigation funding scheme between general members of the scheme and the litigation funder. A Court may vary a proposed distribution to ensure it is fair and reasonable.

1.4 In considering what is fair and reasonable, a Court would assume that a return of the proceeds of the class action to general members that is less than 70 percent of the members' claim proceeds, is not fair and reasonable. The Court must also consider factors such as the relative profit of the funder compared with the costs of the funder incurred in funding the proceedings. When determining if the proposed distribution is fair and reasonable, the Court must also receive and consider a report from a litigation funding fees assessor and arguments of a contradictor, unless it is in the interests of justice to not do so. The litigation funder is required to undertake to pay the fees of such people assisting the Court.

1.5 Litigation funders would not be able to enforce their litigation funding agreements until a Court has made an order to approve or vary the distribution.

1.6 The relevant court would not be able to make orders which extend the funder's fee or commission to class members who are not members of the class action litigation funding scheme (i.e. who have not agreed to become a member of the scheme). This reflects a key intention of the Bill that plaintiffs must consent to become members to a class action litigation funding scheme before a funder can impose a fee or commission on them.

1.7 The amendments also require litigation funding agreements to specifically state they are governed by the law of an Australian jurisdiction with disputes heard in an Australian Court.

1.8 The procedures and powers introduced in Schedule # of the Bill are incidental to class action proceedings in federal jurisdiction. If a litigation funder is funding an action in non-federal jurisdiction, the Court in which the action takes place must either be able to make the orders proposed in the amendments, or be able to make substantially similar orders, for the proposed distribution method to be enforceable by the funder.

Context of amendments

1.9 Third party litigation funding schemes involve an entity that is not a party to a proceeding in a court (a litigation funder) paying the costs of the litigation for a party and indemnifying that party against an adverse cost order, in return for a share of the proceeds if the litigation is successful.

1.10 An interest in a litigation funding scheme or arrangement is a ‘financial product’ under Chapter 7 of the Corporations Regulations. Class action litigation funding schemes are litigation funding schemes which are set up to fund class action proceedings on behalf of a class of plaintiffs. The law regulating class action litigation funding schemes has changed significantly over the past decade.

1.11 In 2009 a majority of the Full Court of the Federal Court determined that a litigation funding scheme falls within the general definition of a managed investment scheme in section 9 of the Corporations Act (see *Brookfield Multiplex Limited v International Funding Partners Pty Ltd* (2009) 180 FCR 11).

1.12 Amendments to Chapter 5C of the Corporations Regulations were made shortly after the *Brookfield* decision to exempt litigation funding schemes from complying with the regulatory framework for managed investment schemes in Chapter 5C of the Corporations Act.

1.13 The *Corporations Amendment (Litigation Funding) Regulations 2020* removed this exemption with respect to class action litigation funding schemes. That instrument, among other things, also amended the Corporations Regulations to require entities that deal in class action litigation funding schemes to hold an Australian Financial Services Licences (AFSL).

1.14 A class action ordinarily involves a group of representative plaintiffs, pursuing a claim on behalf of a larger group that has a substantially similar claim. Without the support of a litigation funder, group members may not have the financial resources to fund the action and would be exposed to liability in the event of an adverse cost order made during the proceedings.

1.15 The ALRC undertook an inquiry into Class Action Proceedings and Third-Party Litigation Funders and tabled its final report in Parliament on 24 January 2019. The report examined the increased prevalence of class action proceedings and the adequacy of regulation around the distribution of proceeds. Recommendation 14 of the ALRC Report endorsed Court approval of third-party litigation funding agreements or percentage-based fee agreements to protect the interests of class members.

1.16 On 21 December 2020, the Parliamentary Joint Committee on Corporations and Financial Services tabled its report on litigation funding and the regulation of the class action industry. The Committee determined that litigation funding plays a vital role in enabling individuals to access the civil justice system by minimising the risk of an adverse cost order.

1.17 The Committee raised significant concerns over the inadequacy of the regulatory arrangements for litigation funders. The Committee was also concerned that the proportion of proceeds obtained by litigation funders is often disproportionate to the cost and risk undertaken by those funders, resulting in a significant reduction of the share to class members.

1.18 The PJCCFS Report consisted of 31 recommendations including recommendation 11 which recommended providing the Court with power to approve litigation funding agreements and reject, vary or amend the terms of agreement in the interests of justice.

1.19 Recommendation 20 of the PJCCFS Report called on the Government to consult on the design of a guaranteed statutory minimum rate of return for class members. Consistent with this recommendation, the Treasury and Attorney-General's Department undertook consultation in June 2021 on design elements of guaranteeing a statutory minimum return to class members.

1.20 Schedule # to the Bill implements the Government's response to recommendations 7, 11, 12, 13, 16, 18, and 20 of the PJCCFS report. To the extent of any inconsistency between those recommendations of the PJCCFS Report, or its discussion of those recommendations, the Government's intention as expressed in the Bill and this Explanatory Memorandum should prevail.

Summary of new law

1.21 Schedule # to the Bill amends Chapter 5C of the Corporations Act to amend the managed investment scheme regime as it relates to class action litigation funding schemes. This measure aims to ensure that under such schemes, the proposed distribution of the proceeds to general members arising from a class action is fair and reasonable.

1.22 The amendments require any litigation funding agreement underpinning a class action litigation funding scheme to state how the claim proceeds would be distributed between the general members of the scheme and the litigation funder. General members are limited to only those claimants in the class action who have agreed in writing to enter the scheme and be bound by the terms of the scheme's constitution.

1.23 For a litigation funding agreement to be enforceable, to the extent that it relates to the distribution of the claim proceeds, the Court must approve the method of distribution to members of the scheme and the litigation funder as fair and reasonable. The Court may vary the litigation funding agreement to ensure the method of distribution is fair and reasonable.

1.24 In determining whether the method of distribution is fair and reasonable, a rebuttable presumption is established that a return to general members of less than 70 per cent of the total claim proceeds for the scheme is not fair and reasonable. A prescribed list of factors is provided that the court must consider when approving or varying the litigation funding agreement.

1.25 These factors are wide ranging, but include the costs incurred by the funder, the conduct of the funder in managing the case, and the commercial return to the funder as a result of providing the funding under the agreement. The Government may make regulations to amend the factors the Court must consider to ensure the test remains effective and provides adequate protection for class members.

1.26 The Court must have regard to the report of a fees assessor and representations of a contradictor representing the interest of the scheme's general members when making the proposed order to approve or vary the agreement. The agreement must also provide that the litigation funder will undertake to meet the reasonable costs of any fees assessor or contradictor appointed by the Court.

1.27 Chapter 5C of the Corporations Act is also amended so that litigation funding agreements must provide that the agreement is subject to the law of a particular Australian state or territory, with disputes regarding the agreement to be heard in an Australian Court. The agreement must also provide that the litigation funder must undertake to meet the reasonable costs of the fees assessor and contradictor.

1.28 Litigation funders cannot enforce the claims proceeds distribution method if, in the relevant class action, the Court makes an order to impose the funder's fee or commission on claimants who are not members of the class action litigation funding scheme (a common fund order). Such orders do not include orders that ensure all claimants (including those who are not members of the class action litigation funding scheme) contribute to the legal costs of the proceeding.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
In a class action litigation funding scheme, the litigation funding agreement must state the way in which the proceeds of the class action would be distributed between general members of the scheme and the litigation funder.	No equivalent
A litigation funding agreement is only enforceable if a court approves the method of distribution of the proceeds under the agreement as fair and reasonable, or varies the agreement to ensure the distribution is fair and reasonable.	No equivalent
When approving or varying a proposed distribution method, the court must only consider certain factors as well as a rebuttable presumption that a share of the proceeds of less than 70 per cent to general members is not fair and reasonable. The court must also consider the report of a fees assessor, and representations of a contradictor unless it is interests of justice to not do so.	No equivalent
The litigation funding agreement must contain an undertaking from the litigation funder that the funder would pay the reasonable costs of the fees assessor and contradictor.	No equivalent
The litigation funding agreement must state that the governing law of the agreement is the law of an Australian jurisdiction, and disputes regarding the agreement are to be heard in an Australian court.	No equivalent
The constitution of the class action litigation funding scheme must provide that the general members of the scheme are only those who have agreed to be members of the scheme.	No equivalent
The claims proceeds distribution method in a litigation funding	All parts of a litigation funding agreement are enforceable if the

agreement would only be enforceable where the action falls under federal jurisdiction, or in a court exercising non-federal jurisdiction, where that court has powers to make substantially similar orders. Additionally, the court must not make an order imposing liability for the funder's fee on claimants in the proceeding who are not general members of the scheme.	associated action is brought in any Australian court subject to the rules of the court.
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Detailed explanation of new law

1.29 The amendments to Chapter 5C of the Corporations Act provide a framework for the court-based regulation of returns of claim proceeds to members of a class action litigation funding scheme.

1.30 Class action litigation funding schemes are regulated by Chapter 5C of the Corporations Act as managed investment schemes. Class action litigation funding schemes must comply with the regulatory scheme of Chapter 5C.

1.31 The basic regulatory requirements for a managed investment scheme are that:

- Schemes must be registered with ASIC where the scheme has more than 20 members or was promoted by a person engaged in a business promoting such schemes
- The scheme must have a responsible entity that operates the scheme and holds the scheme property on trust for scheme members.
- The scheme must have a constitution that is compliant with Part 5C.3 of Chapter 5C of the Corporations Act.

Definitions

1.32 Managed investment schemes are defined by section 9 of the Corporations Act. Previously, a class action litigation funding scheme fell under the definition of a managed investment scheme as a result of the decision of the Full Court of the Federal Court of Australia in *Brookfield Multiplex Limited v International Litigation Funding Partner Pte Ltd* (2009) 190 FCR 11 (see paragraph 1.10).

1.33 The Schedule amends Section 9 of the Corporations Act to confirm that a class action litigation funding scheme is a managed investment scheme. [*Schedule #, item 2, section 9 of the Corporations Act 2001*]

1.34 A **class action litigation funding scheme** is a scheme in which a litigation **funder** seeks to fund a class action proceeding for the benefit of the scheme's general members.

1.35 The funded proceedings may seek a remedy for a class of claimants (that includes the scheme's general members) in a class action proceeding that some or all of the claimants in the proceeding may be legally entitled to.

1.36 Such schemes involve the pooling together of each general member's potential remedy, with the promise by general members to pay a commission or fee to the funder out of their remedy under a litigation **funding agreement**, if the class action is successful. The funder provides for the upfront payment of legal fees and costs associated with the proceeding. *[Schedule #, items 1 and 3, sections 9 and 9AAA of the Corporations Act 2001]*

1.37 A **general member** of the scheme is a person who has a relevant claim to a remedy in the proceeding and has agreed in writing to be a member of the scheme and be bound by the terms of the scheme's constitution (see paragraph 1.44). *[Schedule #, item 1, section 9 of the Corporations Act 2001]*

1.38 In a closed class action, where all potential claimants are known, generally all potential claimants are members of the scheme. This is not the case in an open class action, where group of plaintiffs can undertake a class action proceeding for an unknown number of claimants. In an open class action, those claimants who have not agreed to be bound by a litigation funding agreement are not members of the class action litigation funding scheme.

1.39 **Class action proceedings** are the legal proceedings of a court through which the general members of a litigation funding scheme seek to realise potential legal remedies. The proceedings may also entitle individuals who are not part of the scheme to remedies, due to the nature of the claim being pursued in the proceeding. Each proceeding must comply with the legislation and rules of the court in which the class action is being heard. *[Schedule #, item 1, section 9 of the Corporations Act 2001]*

1.40 The gross amount obtained as a remedy by the general members of the scheme are referred to in the schedule as the **claims proceeds**. Claim proceeds are intended to be only the amount obtained as a remedy to the substantive claims advanced in the proceeding and not any other money obtained during the proceedings, such as an order for the other side to pay costs. *[Schedule #, item 1, section 9 of the Corporations Act 2001]*

Requirements for the constitution of a class action litigation funding scheme

1.41 A registered managed investment scheme must be governed by a legally enforceable constitution that complies with Part 5C.3 of the Corporations Act. ASIC may not register a scheme if the scheme's constitution does not meet the requirements of that Part (see section 601EB of the Corporations Act). If a scheme that is required to be registered is not registered, that scheme may be wound up in accordance with section 601EE of the Corporations Act.

1.42 Each managed investment scheme is operated by a responsible entity. The responsible entity must be a public company that holds an AFSL that allows it to operate a scheme.

1.43 The amendments provide that the constitution of a managed investment scheme that is a class action litigation funding scheme must require a litigation funding agreement under the scheme to specify: *[Schedule #, item 4, section 601GA(5) of the Corporations Act 2001]*

- a general member for the scheme is a person who has agreed in writing to be a member of the scheme and be bound by the scheme's constitution.
- the method for determining the distribution of claim proceeds to general members.
- that the agreement is subject to the law of an Australian jurisdiction, and that disputes in relation to the agreement must be heard in an Australian Court.
- that the litigation funder will pay the reasonable costs of the fees assessor or contradictor appointed by the Court to assist it in determining of the proposed method of distribution is fair and reasonable.
- that the scheme's responsible entity can only receive payment for reasonable costs incurred in managing the scheme.

General member of the scheme

1.44 The constitution of the class action litigation funding scheme must state that the general members of the scheme are only those who have agreed in writing to become members of the scheme and be bound by the terms of the scheme's constitution. *[Schedule #, item 4, section 601GA(5)(a) of the Corporations Act 2001]*

1.45 This requirement is to be placed in the scheme's constitution to directly govern who is and is not considered a member of the class action litigation funding scheme. It ensures that class action members cannot be co-opted into a litigation funding scheme without their active consent.

The method for determining the distribution of claim proceeds

1.46 Generally, litigation funding agreements provide for the upfront payment of all legal costs associated with a class action by the litigation funder, and the assumption of liability to pay costs for the other side. The funder offers these promises in exchange for a fee or commission which is worked calculated as a portion of the remedy obtained by scheme members as a result of the litigation.

1.47 The constitution of a managed investment scheme that is a class action litigation funding scheme must provide that any litigation funding agreement made in relation to the scheme must state the method for determining the distribution of the claim proceeds between parties to the scheme (the ***claim proceeds distribution method***). [*Schedule #, item 4, section 601GA(5)(b) of the Corporations Act 2001*]

1.48 The method should outline the share of the claim proceeds that general members would receive, as agreed between the members and the funder. The share of claim proceeds that are not distributed to members would be available to reimburse the litigation funder's outlay of legal and administrative costs, and beyond those costs form the litigation funder's commission.

1.49 An outline of the claim proceeds distribution method in the litigation funding agreement is required because all parties to the agreement should have a common understanding on forming the agreement of how the claim proceeds are proposed to be dealt with. This is essential to a key intention of the Bill, as stated, that the plaintiffs must consent to become members to a class action litigation funding scheme before a funder can impose a fee or commission on them. It is also important to clearly outline this method as the Court would be required to make a determination on whether the distribution method is fair and reasonable, in order for it to be enforceable under the agreement (see paragraph 1.64).

Jurisdiction

1.50 The constitution of a managed investment scheme that is a class action litigation funding scheme must provide that any litigation funding agreement made in relation to the scheme must state: [*Schedule #, item 4, sections 601GA(5)(c) of the Corporations Act 2001*]

- that the agreement is governed by the law of an Australian jurisdiction (i.e a specific state or territory)
- that any disputes in relation to the agreement must be heard in an Australian Court.

1.51 This requirement implements the Government's response to recommendation 12 of the PJCCFS Report. However, this amendment

would require the litigation funding agreements for all class action litigation funding schemes to state that the governing law of the agreement is that of an Australian jurisdiction. This applies to all class action litigation funding schemes in Australia, not just schemes funding class actions brought in the Federal Court of Australia.

The costs of a fee assessor and contradictor

1.52 When determining if a claim proceeds distribution method is fair and reasonable, the Court must consider, unless it has ordered otherwise, the report of a person appointed to inquire into and report on the fairness and reasonableness of the distribution (a fees assessor). The Court must also consider arguments made by a person appointed by the Court to act as contradictor, regarding the proposed distribution of claim proceeds (see paragraph 1.76).

1.53 The constitution of a class action litigation funding scheme must provide that any litigation funding agreement must contain an undertaking by the litigation funder to pay the reasonable costs of the fees assessor and the contradictor. This requirement only applies to the costs incurred in assisting the Court in making its order as to whether the proposed distribution to the general members of the scheme is fair and reasonable. *[Schedule #, item 4, sections 601GA(5)(d) and 601GA(6) of the Corporations Act 2001]*

1.54 These requirements collectively address the substance of recommendations 13 and 16 of the PJCCFS Report which sought to enhance the use of litigation funding fee assessors as referees. The Bill goes beyond the PJCCFS Report by mandating their use, unless the interests of justice require otherwise, and requiring the funder to meet the costs. This is in recognition of the important role that funding fee assessors play and to uphold the principle that funders should bear responsibility for providing that a proposed claim distribution method is fair and reasonable. Like the governing law requirement (see paragraph 1.76), this requirement goes beyond class actions in the Federal Court and is a requirement for all litigation funding agreements for actions brought in any Australian Court.

1.55 Requiring litigation funders to contribute to the costs of a fees assessor and contradictor is to seek to encourage the funder to structure the method of distribution of the claims proceeds in a way which is fair and reasonable from the outset. A fair and reasonable distribution method from the beginning of the scheme would reduce costs when the court needs to determine whether the method is fair and reasonable.

Costs of the responsible entity

1.56 The amendments provide that the scheme's constitution must provide that the responsible entity is only entitled to be reimbursed its reasonable costs incurred in operating the scheme. *[Schedule #, item 4, section 601GA(5)(e) of the Corporations Act 2001]*

1.57 Many entities that operate as the responsible entity for the scheme are associated entities of litigation funders. This constitutional requirement, in addition to the other duties of the responsible entity in Chapter 5C of the Corporations Act, ensures that responsible entities operating litigation funding schemes only incur reasonable costs.

Enforceability of funding agreements

1.58 The claims proceeds distribution method in a litigation funding agreement is enforceable if, and only if: *[Schedule #, item 5, section 601LF of the Corporations Act 2001]*

- The court approves, as fair and reasonable, a claims proceeds distribution method outlined in the litigation funding agreement;
- The court has varied the claims proceeds distribution method outlined in the litigation funding agreement to ensure that the method is fair and reasonable, and;
- The court in the proceeding does not make a common fund order.

1.59 When considering whether the agreement is, or is as varied, fair and reasonable, the Court must only consider the prescribed test provided for in the amendments (see paragraphs 1.64 to 1.77). *[Schedule #, item 5, sections 601LF(2)(b), 601LF(3)(c) and 601LF(4)(c) of the Corporations Act 2001]*

1.60 If a funded class action proceeding is in federal jurisdiction, these provisions empower the Court hearing that proceeding to make orders to approve or vary the claim proceeds distribution method in a litigation funding agreement, subject to the requirements of the provisions.

1.61 The claims proceeds distribution method would not be enforceable if the Court hearing the proceeding does not possess power to make an order approving the method as fair and reasonable, or varying the method so that it is fair and reasonable, or a substantially similar order. This is particularly relevant for class action litigation funding schemes funding actions in a Court which is not exercising federal jurisdiction. Litigation funders would need to examine the rules of that court to assure themselves that the court can make such orders, in order for the litigation funding agreement's claim proceeds distribution method to be enforceable. *[Schedule #, item 5, section 601LF(1) of the Corporations Act 2001]*

1.62 This provision protects general members of class actions and ensures that the claim proceeds distribution method in each litigation funding agreement is fair and reasonable.

1.63 The claims proceeds distribution method is also unenforceable if the Court has made a common fund order. A common fund order is any

order which the Court makes to order claimants in the proceeding, that are not members of the scheme, to contribute to the funder's fee or commission. This again reflects a key intention of the Bill that plaintiffs must consent to become members to a class action litigation funding scheme before a funder can impose a fee or commission on them. *[Schedule #, item 5, sections 601LF(2)(c), 601LF(3)(d) and 601LF(4)(d) of the Corporations Act 2001]*

Determining whether the proposed method of distribution of claim proceeds is fair and reasonable

Order to approve or vary claim proceeds distribution method

1.64 In order for the litigation funding agreement to be enforceable with respect to claim proceeds distribution method proposed by the agreement, the Court must approve the proposed distribution method as fair and reasonable, or vary the agreement to meet that standard. *[Schedule #, item 5, section 601LF(1) of the Corporations Act 2001]*

1.65 The amendments outline what the Court must and must not consider when determining if a proposed distribution method is fair and reasonable.

1.66 If the Court considers that the proposed claims proceeds distribution method is fair and reasonable, the court may make an order to approve that method. If the Court considers the proposed claim proceeds distribution method in the agreement to not be fair and reasonable, the Court may vary the agreement to ensure the method is fair and reasonable. *[Schedule #, item 4, section 601LG(1) of the Corporations Act 2001]*

1.67 If the Court varies agreement's claim proceeds distribution method, the Court also has the power to declare that the variation has effect from a particular time. *[Schedule #, item 4, section 601LG(7) of the Corporations Act 2001]*

1.68 The Court must consider the prescribed factors, and only those factors, when making an order to approve or vary the claims proceeds distribution method in an agreement. The factors require the Court to turn its mind to themes such as if the litigation funder has run the proceedings efficiently and fairly, and if the litigation funder's return on investment is appropriate to the circumstances. *[Schedule #, item 4, section 601LG(3) of the Corporations Act 2001]*

1.69 A key factor for the Court to consider is the comparative profit of the funder, under the proposed claim proceeds distribution method, compared with the actual costs incurred by the funder in funding the proceeding – the funder's investment. For example, in considering whether a claims proceeds distribution method is fair and reasonable, the Court may consider whether a larger than normal return on investment is fair and reasonable in the circumstances. Other factors also draw the

Court's attention to the nature of the proceeding before it such as the characteristics of the plaintiffs.

1.70 The Court must initially assume that a claims proceeds distribution method which returns less than 70 percent of the total claims proceeds for the scheme to the general members of the scheme is not fair and reasonable. This is a rebuttable presumption which the Court can set aside if, considering the prescribed factors, the claims proceeds distribution method is fair and reasonable. *[Schedule #, item 5, section 601LG(5) of the Corporations Act 2001]*

1.71 The amendments allow regulations to omit, modify or vary the factors the Court must consider when deciding whether the claim proceeds distribution method is fair and reasonable. *[Schedule 1, item 4, section 601LG(4) of the Corporations Act 2001]*

1.72 This modification power is necessary so that the fairness and reasonableness test remains a relevant and appropriate protection for class members into the future. There is a potential for new factors to be relevant to the Court's consideration of the test as the conduct of litigation funding schemes, the types of matters that are funded, and the people involved in such schemes evolve to suit commercial circumstances.

1.73 It is necessary for these changes to be made in regulations so that Government can quickly take action in this regard to protect the interests of general members of the class.

1.74 In order to ensure that the test is always relevant and provides effective protection for general members of the scheme, the Government should be able to respond to new developments by modifying test with respect to factors the Court must consider when conducting the test.

1.75 The modification power only operates on the factors that the Court must consider, it does not operate on the rebuttable presumption. The modification power will be exercised through a disallowable instrument, meaning Parliament can maintain control over the use of this regulation making power. The Court will always determine whether the claims distribution method is fair and reasonable in light of the prescribed factors, which may be modified by regulations, and the rebuttable presumption.

Referee report and representations by contradictor

1.76 In making the order to approve or vary the claim proceeds distribution method, the Court must, unless it is in the interests of justice to not, receive and consider a report from a person who has inquired into the proposed claim proceeds distribution method. The role of the fee assessor is ultimately to assist the Court in determining if the proposed method is fair and reasonable, and to provide their opinion on whether the proposed method requires variation.

1.77 The Court must also consider representations made by a person representing the interests of the general members of the scheme as a contradictor unless it is in the interests of justice to not. This requirement extends only to the representations relevant to the claims proceeds distribution method, and if the method can be considered fair and reasonable. The role of this person is to act in the interests of the general members of the scheme when the Court is considering whether to approve or vary the claims proceeds distribution method. *[Schedule #, item 5, section 601LG(6) of the Corporations Act 2001]*

Application to the Court

1.78 An application to the Court under the new sub-section 601LG(8) may be made by any member of the class action litigation funding scheme, the responsible entity for the scheme, or by the Court on its own initiative *[Schedule #, item 5, section 601LG(8) of the Corporations Act 2001]*

Application and transitional provisions

1.79 The Schedule commences on the day after the Bill receives the Royal Assent.

1.80 For a class action litigation funding scheme that is a managed investment scheme, the amendments in Schedule # apply: *[Schedule #, item 8, section 1688 of the Corporations Act 2001]*

- To a litigation funding agreement in relation to a class action litigation funding scheme entered into on or after the commencement of the Schedule, if
- The managed investment scheme has become a class action litigation funding scheme on and after the commencement of the Bill.