

Our Ref: GJW.999991  
Your Ref:



28 June 2021

**By Email: MCDLitigationFunding@treasury.gov.au**

Manager  
Market Conduct Division  
Treasury  
Langton Cres  
Parkes ACT 2600

Dear Manager

**Public Submission - Consultation on Recommendation 20 of the Parliamentary Joint Committee report on litigation funding and class actions**

1. Piper Alderman is a national law firm which has significant experience in advising clients on the prospects of obtaining litigation funding for private commercial disputes, specifically in respect of class actions. It acts for group members and also for defendants in funded litigation and class actions.
2. Piper Alderman welcomes the opportunity to comment on the Consultation Paper's Question 2: *How would the suggested mechanism interact with the class action system (including court processes) and the litigation funding regime?*

**Economic inefficiency, access to justice and general deterrence**

3. Piper Alderman submits the recommendation would have the effect of potentially denying access to justice to potential group members in class actions that do not fit within the commercial metrics required by litigation funders.
4. That result is contrary to the High Court's decision in *Campbell's Cash and Carry v Fostif* where the majority endorsed the statement of Mason P that:<sup>1</sup>

*"Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."*

5. Economic efficiency theory suggests that a statutory minimum return to class members will result in fewer funded actions of small, yet meritorious claims, and an increase in deadweight loss comprising group members whose claims would not be advanced. In other words, while

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<sup>1</sup> *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [65] (Gummow, Hayne and Crennan JJ).

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the cap will result in higher returns for group members of some funded claims, group members of other claims that do not have the requisite risk/return profile will be denied the opportunity to access justice through litigation funding, an opportunity that is currently available under the present framework.

6. That market inefficiency was highlighted by PwC's March 2021 report<sup>2</sup> which concluded a cap of 30% gross returns for litigation funders would result in 36% fewer class actions being advanced. That projection was based on cases where the litigation costs alone would not have come within the proposed 30% cap.<sup>3</sup>
7. Without public funding for legal services, greater reliance is placed on the private sector to affect public policy and enforce civil rights. In ASIC's most recent annual report, of 12,355 complaints received only 19% were acted on by the regulator.<sup>4</sup> Similarly, the ACCC reported 312,773 complaints received with only 12 litigated.<sup>5</sup>
8. It is in these circumstances that private sector, funded litigation has been used to increase access to justice and deter corporate misconduct.

#### **Commercial reality of a statutory guarantee of returns to group members**

9. Piper Alderman submits that imposing an arbitrary cap on returns to group members fails to acknowledge the unique and dynamic nature of individual class actions. This can only be equitably addressed through a system which engenders an ad hoc and flexible approach to distributing proceeds of class actions, a system which already exists.
10. The courts are already empowered to manage this issue, as was illustrated by the decision in *Wepar Nominees Pty Ltd v Schofield (No 2)* [2014] FCA 225, where his Honour Besanko J held that a settlement proposal in which the funder received 33.30% and class members received 34.85% was "fair and reasonable having regard to the claims made on behalf of the Group Members."<sup>6</sup> This conclusion was arrived at after considering the risks involved in advancing the claim together with the recovery pool available from the company in liquidation.

Description	Amount	Percentage
Legal costs and disbursements	\$1,035,000	31.85%
Funder's fee	\$1,082,250	33.30%
Balance to Group Members	\$1,132,750	34.85%
Total	\$3,250,000	100%

11. Class members received approximately \$0.35 in the dollar on an investment which in all other respects would have been written off. If a 70% statutory guaranteed return to group members had been imposed in this proceeding, the claim would not have been commercially viable. We note Besanko J's acknowledgement of the benefits to the class

<sup>2</sup> Report of PwC Australia dated 16 March 2021, 'Models for the regulation of returns to litigation funders'.

<sup>3</sup> Ibid, page 16.

<sup>4</sup> ASIC 2019-20 Annual Report, page 218.

<sup>5</sup> ACCC 2019-20 Annual Report, page 127.

<sup>6</sup> *Wepar Nominees Pty Ltd v Schofield (No 2)* [2014] FCA 225, [47].

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and their reception to the proposed settlement was “overwhelmingly in favour of the proposed settlement.”<sup>7</sup> We suggest that this was primarily because they would have otherwise received nothing. In our view, this outcome is consistent with the purpose of representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and the state equivalents, namely access to justice.

Piper Alderman welcomes the opportunity to answer any queries the Manager may have in relation to our Submission.

Yours faithfully  
**Piper Alderman**

Per: 

**Greg Whyte**  
Partner

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<sup>7</sup> Ibid, [46].