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To:

Manager, Market Conduct Division
The Treasury
Langton Crescent
Parkes ACT 2600

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

Submitted by:

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Level 2, 50 Market Street
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Dear Manager,

RE.: Guaranteeing a minimum return of class action proceeds to class members

We refer to the above inquiry and on behalf of the Therium group of companies are grateful for the opportunity to contribute to this consultation process. Below we have provided our response to the Consultation Questions.

By way of background, Therium was founded in 2009 and is one of the most established litigation funders in the world. We have to date funded claims worldwide to the value of approximately US$36 billion. Therium is presently active in five continents in which it funds litigation and arbitration claims and has been active in the Australian market since 2016. Therium is currently funding various litigation cases in Australia, including a number of class actions.

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

We do not believe that guaranteeing a minimum return to group members involved in class action litigation by way of legislation is the optimal way of protecting those members' collective interests, and financial returns, in class actions.

In our respectful submission, over the course of the last year, it has been curious to witness the intense championing of the rights and interests of group members in class action litigation by those that appear to be the most diametrically opposed to them in this forum (for example - large business trade groups and organisations, insurance companies and defence-side law firms).

We believe that the loudest voices advocating and championing group members' interests in the current class action debate may not in fact have their best interests at heart. Rather, these organisations are advocating for changes to the class action regime, such as the proposed guaranteed return to group members in funded litigation (which is hereafter interchangeably referred to as a "funder cap", as that is what it effectively is), to inhibit the ability of litigation funders to finance class actions by making the actions uneconomical. We believe their advocacy is misinformed and misplaced. If the aim truly is to provide for optimal financial returns to group members in class actions, then there are clearly better and more efficient ways to ensure such an objective is met and we outline them below.

As the funder of numerous current class actions in Australia, Therium has welcomed the relatively recent input of Judges of the Federal Court in exercising oversight of "funding rates", or the returns which Funders are able to derive from successful cases they have funded, pursuant to section 33V of the *Federal Court of Australia Act* 1976 (see for example the settlement outcome in the *Murray Goulburn* class action).

We believe it is the Judges who manage individual class actions who are best placed to oversee returns to the various stakeholders on the plaintiff side in the cases, being the group members, the lawyers and the funders; and to ensure that any returns (when or if received) are distributed fairly and reasonably as between the various stakeholders.

A Judge's power to oversee funding commission rates is advantageous in any class action because it is the Judge alone who is tasked with understanding and adjudicating on the specific facts of the case; assessing the strengths and weaknesses of each party's case; if the case is successful, determining the quantum of the losses of group members; and finally, assessing the risk that was borne by the funder in supporting the group members' claims.

Given the above comments, from our perspective any legislative intervention in this area should be limited to and focused upon enshrining in legislation, if that is necessary, a Judge's power (exercised

to date under section 33V), to oversee and modify or amend as necessary a funder's return in any class action[1].

One other observation on this issue - since Therium entered the Australian market in 2016, it appears to us that the commission rates charged by funders across the industry have fallen, from over 30% to below 20% (being the funder's commission calculated as a percentage of the net amount obtained by the group members by way of settlement or judgement after deducting costs), which we attribute principally to the competition in Australia as between the various funders. Far from a scenario where we expect to regularly make "windfall profits", however such a return is measured (which is unclear to us), rather we believe our returns (which on average are below 20%) are reflective of the significant risk undertaken in financing class actions – see further on this point in our response to Question 4 below.

In summary, the fall in funding commission rates due to competition between funders has been achieved by market forces and absent any statutory intervention. Where it has landed is reflective of and set in a truly competitive marketplace – it is the market we submit which should determine funding rates, rather than any unnecessary statutory intervention.

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

As we note above, we do not advocate for the implementation by legislation of any guaranteed return to group members. There is presently a mechanism which allows Judges to intervene in relation to group members' returns and ensure they are fair and reasonable - and we submit that this is sufficient (or, if absolutely necessary, it be enshrined in legislation).

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

[1] We note also that this was the recommendation of the ALRC (Recommendation 19) in its Final Report into class actions and litigation funding.

As we submit above, we do not believe there is any particular appropriate statutory guaranteed return to group members.

In relation to the figure of 70 per cent that is proposed, in our experience guaranteeing such a level of return to group members would inherently be problematic. Such a guarantee may well effectively eliminate the prospect of "smaller" class actions being funded. In our experience, smaller class actions tend to include consumer cases, such as actions relating to the systemic underpayment of wages to casual employees, or cases that are being pursued on behalf of bank customers as a result of systemic misconduct as was uncovered in the recent royal commission. The group member constituency in these cases can be contrasted with, say, shareholder class actions, where in most cases the majority of group members are institutional investors. In our submission these cases are clearly meritorious, however, for those that are smaller (in the sense that the damages claimed are less than in some shareholder class actions), there is a significant risk of them not being pursued if a funder cap is imposed.

The proposed guaranteed return to group members is problematic in smaller funded class actions because they are very expensive to run. There are a variety of fees and costs payable including the fees of lawyers, barristers and experts and, from August 2020, the costs associated with running a class action as a Managed Investment Scheme. These fees are incurred in each and every case and, given the significant legal and other costs of prosecuting class actions, they now run in some cases to in excess of A$10 million. On top of this, costs are often also incurred to acquire adverse costs insurance so as to provide the Representative Plaintiff with an indemnity from any adverse costs orders. Given these high costs, in any class action where the damages claimed are less than $100 million and the case resolves for an amount of less than say $50 million, the return to a funder may simply be uneconomic given the financial risks taken[2].

If it transpires that due to the imposition of a funder cap smaller class actions are no longer funded, then the intention of the Parliament in establishing the class action framework in this country, so as to allow ordinary Australians to pursue legal claims they otherwise could not, will be subverted.

There is one further risk the imposition of a funder cap may give rise to in smaller class actions. Such a cap potentially provides defendants with a strategic advantage if they seek to run up additional

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[2] We note that funding rates globally have historically been premised on a return of around 3x, being money back plus 2x, that return being considered commensurate with the risks taken in funding the case.

costs through, for example, various interlocutory disputes, thereby changing the dynamic of the case and incentivising a settlement that may in fact undersell the true losses incurred by group members. Where a defendant and its legal advisors are aware that there is a cap in place, they may utilise interlocutory disputes to put pressure on the Representative for the class to settle early, but at a lower figure than is deserved.

4. **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?**

As noted at 1. above, Therium has agreed to fund multiple class actions in Australia since or around 2017. Of these cases, only one has settled and all of the others are ongoing. None of the cases, we respectfully submit, could be in any way considered “straightforward”. In our experience, we note that class actions invariably exhibit the following factors:

- They are complex cases to prosecute, both due to the nature of and factual circumstances behind the claim, and due to the plethora of interlocutory issues which are typically ventilated and decided in the proceedings;

- They do not typically settle early, rather they are conducted against well-resourced defendants and experienced legal counsel who are motivated to continue to prolong the case for as long as is possible. The notion that defendants settle these cases to ‘get rid of them’ is plainly incorrect and belies blind belief in arguments put forward by various parties with vested interests in the further erosion of the effectiveness of the class action regime;

- These cases tend to run for a long time (in our experience, at least 3 to 4 years);

- The fees charged by specialised legal counsel are high (both with regards to solicitors and barristers) and as a result the total legal and other costs of litigating is significant (with the costs to run them frequently uncapped);

- The adverse costs risk in these cases is very high; and

- There is also a recovery risk in many class actions, in the sense that the defendant may not be able to pay; or the defendant does not have any or sufficiently large insurance coverage.

Given the above factors, we have difficulty with the characterisation of some class actions as "more straightforward" than others. In our view such a perception exhibits a lack of true understanding of the complexity and difficulty of prosecuting and resolving these cases successfully.

5. **How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a 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?**

As noted above we do not consider any class action to be straightforward, hence we do consider there is any stage of a class action proceeding where such a classification could be made. As we note above, any assessment of a case's complexity is best considered by the presiding Judge.

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

We respectfully submit that if a statutory guaranteed return to group members is pursued, which acts in effect as a cap on a funder's commission, then a commensurate cap on the legal and other fees and costs chargeable by solicitors retained in funded class actions (both on the plaintiff and defence sides) may be warranted and its implementation should be considered.

We say this because from our perspective, the financial cost of funding class actions is very high, yet the cost base of these cases, being the legal fees incurred by all parties, remains largely unscrutinised by the legislature, whose focus appears to principally be upon funders' returns.

Absent a commensurate cap on fees and costs, it is the funder that will carry nearly all of the financial risk in any class action, including that of cost overruns. In that context, our firm view is that legislating for a guaranteed return to group members in class actions will cause funders to reconsider funding class actions, particularly "smaller" actions, and as a result the ordinary Australians that the class action regime is designed to protect will be significantly adversely affected.