Ensuring fair and reasonable returns to class action plaintiffs
Exposure Draft Legislation: *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders*

Submission of Johnson & Johnson Family of Companies & Stryker Australia

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Submitted via email: MCDLitigationFunding@treasury.gov.au
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Dear Manager

Submission on Exposure Draft Legislation: *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders*

Thank you for the opportunity to provide a submission on the proposed reforms set out in the exposure draft legislation to promote a fair and reasonable distribution of class action proceeds involving third party litigation funders.

This submission has been prepared by the Johnson & Johnson Family of Companies and Stryker Australia[1]. This submission follows a recent submission made by the Johnson & Johnson Family of Companies to the Parliamentary Joint Committee on Corporations and Financial Services report, Litigation Funding and the regulation of the class action industry on 30 June 2021 (**30 June 2021 Submission**).

We commend the Government's continued commitment to ensuring successful class action plaintiffs are adequately compensated as well as preventing litigation funders and law firms from taking disproportionate fees in the process. We are supportive of the majority of the reforms set out in the exposure draft legislation. However, we have set out below our views on key issues of concern:

1. **Returns to class action plaintiffs**

1.1 We understand that, in principle, the proposed reforms seek to protect plaintiffs and reward litigation funders in a way that is commensurate to their role in class actions. However, we remain concerned that allocating an arbitrary minimum return of gross proceeds to group members risks that minimum becoming the 'norm' and funders defining risk and cost to fit a 30% return regardless of the financial realities of a particular matter.[2]

1.2 In our 30 June 2021 Submission we referenced, by analogy, the requirements placed on the legal profession when charging costs - those being that costs charged are no more than fair and reasonable in all the circumstances and in particular are proportionate, reasonably incurred and of a reasonable amount.[3]

1.3 While we recognise that litigation funders do not provide legal services, we consider that the role of litigation funders in class actions should attract a similar requirement or standard and remuneration ought to be tied to their actual contribution. In this way, our view is that it is necessary that any returns payable to litigation funders are proportionate and reasonable in the context of the class action[4] and so we welcome the graduated approached adopted by the

[1] The Johnson & Johnson Family of Companies and Stryker Australia have made relevant submissions, both individually and as part of a group of healthcare companies (such group referred to in the submissions 2, 3 and 4 that follow), to the (1) Productivity Commission's Inquiry into Access to Justice Arrangements in 2014, the (2) Victorian Law Reform Commission's Inquiry into Litigation Funding and Group Proceedings in 2017, the (3) Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third-Party Litigation Funders in 2018, the (4) Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding and the Regulation of the Class Action Industry in 2020 and the Law Commission of New Zealand in respect of its review of Class Actions and Litigation Funding in 2021. Due to the short consultation period, we have been unable to prepare a joint submission with the balance of the group of healthcare companies.

[2] 30 June 2021 Submission, page 1, paragraph 4.
[3] 30 June 2021 Submission, page 3, paragraph 9.
[4] 30 June 2021 Submission, page 3, paragraph 8.

exposure draft legislation and the list of matters set out in the "*Fair and reasonable test*" proposed in draft section 601LG(3).

1.4 In respect of the matters listed in the "*Fair and reasonable test*", we note the omission of costs relating to the administration of any settlement sum or damages arising from judgment. Given the significance of costs spent on administration of the settlement in distributing funds amongst group members (please see paragraphs 21 to 23 of the 30 June 2021 Submission), those costs should be explicitly acknowledged in the exposure draft legislation and evidence relating to administration costs should be considered by the Court when applying the test.[5]

2. Claim proceeds distribution model

2.1 The proposed draft exposure legislation currently envisages that the Court may make orders to approve or vary the claim proceeds distribution model set out in the class action litigation funding scheme's constitution (see proposed draft exposure sections 601LG(1) and 601GA(5)(b)). In doing so, the Court must be satisfied that the method adopted in the claim proceeds distribution model is "*fair and reasonable when considering the interests of the scheme's general members as a whole*" where, relevantly, the Court is required to consider "*the amount, or expected amount, of claim proceedings for the scheme*" (see proposed draft exposure section 601LG(3)(a)(i)).

2.2 While in certain circumstances, the nature of the claim advanced and the characteristics of group members will allow for a level of certainty about the quantum of the claim that would enable the Court to be provided with evidence relating to the amount or expected amount of claim proceedings in order for it properly to determine if the a claims proceeds distribution model is fair and reasonable, there are a number of circumstances where this is not the case. A key example is in relation to class actions concerning personal injury where the amount or expected amount of claims proceeds is indeterminable before the claim has been heard and determined - more often than not, at the commencement of the proceedings neither the lead plaintiff nor the defendant is able to say with certainty the number of group members captured by the group member definition or the level of loss or damage each of those group members may have suffered. Further, in order properly to consider the quantum of each group members' claim (assuming the matter ran to trial), the Court would need to hear and determine the lead plaintiff's claim, award damages and make findings in respect of questions common to the lead plaintiff and the group members. Individual case assessment would then be carried out, followed by calculation of the fund. During that time, legal and other associated costs would continue to accrue, making it almost impossible to understand with any accuracy deductions that would need to be made to any returns attributed to group members.

2.3 In these circumstances, we cannot see how a Court could be satisfied that a claims proceedings distribution model is fair and reasonable in the interests of the scheme's general members as a whole.

3. Advertising associated with book building

3.1 As noted in the exposure draft explanatory memorandum, a key intention of the exposure draft legislation requires 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.[6] Treasury's joint media release recognises that "[t]*his will encourage 'book building' and ensure that actions involving litigation funders are commenced with the genuine support of plaintiffs*".[7]

3.2 Our concern is that in order to book build, law firms or litigation funders would likely engage in advertising to promote class action claims that may stray outside merely notifying the public of a potential claim. In the context of matters involving therapeutic goods, such advertising can be problematic particularly because it is recognised that patients are likely to be vulnerable as a consequence of their medical condition and may not be able to critically evaluate such advertising.

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[5] 30 June 2021 Submission, page 4, paragraph 16 to 23.
[6] Exposure draft explanatory memorandum, page 3, paragraph 1.6.
[7] https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/ensuring-fair-and-reasonable-returns-class-action

3.3 There are stringent regulations on manufacturers and distributors of pharmaceuticals and medical devices which restrict what can be "advertised" concerning therapeutic goods.[8] Further, it is an offence to advertise therapeutic goods to consumers using restricted representations[9] unless the Therapeutic Goods Administration (**TGA**) has issued a relevant approval or provided permission.

3.4 There is a body of evidence that demonstrates the problems associated with advertisements of therapeutic goods that we can provide further detail on if it would be of assistance. However, we have set out below some relevant examples:

(a) Advertising that suggests potential defects with medical or pharmaceutical products has been shown to lead to greater patient anxiety, and a desire for patients to discontinue treatment or remove an implanted device which is not necessarily in their best interests.[10] A study conducted in 2016 concluded that legal advertising resulted in some patients stopping their therapy and as a result experiencing adverse clinical events, such as stroke.[11]

(b) A recent review from the US Food and Drug Administration of its Adverse Event Reporting System database found 213 reports which identified individuals who saw a lawsuit advertisement, stopped taking their medication, and experienced a health problem.[12] Industry media in the US is blunt about the impact such advertising can have:

> *"Medical lawsuit ads give the clear impression that the products they describe are neither safe nor effective. It would be reasonable for any viewer to conclude that their medication is too dangerous to take when, in fact, it is approved by the FDA, prescribed by a doctor or other health care provider, and saves lives. These advertising tactics create a new group of victims: people whose health has been harmed by the ads*."[13]

(c) Numerous issues have arisen with communications to the public in the context of the COVID-19 pandemic:

(i) in mid-2021, Clive Palmer authorised an anti-vaccination campaign that was advertised to Australians by way of flyer letterbox drop and radio advertisements. Amongst other things, the content of the advertisement picked up information publicly available on the TGA's website. However, critically, it omitted certain relevant context within which that information had been published by the TGA. Following the advertisements, the TGA wrote to Mr Palmer to remind him of his "responsibility" as a public figure and publicly stated it was "seriously concerned about misleading information";[14]

(ii) the TGA has imposed a number of sanctions on Starpharma Holdings Limited for alleged unlawful advertising of its product "Viraleze", one of those fines related to a restricted representation made by Starpharma

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[8] See the Therapeutic Goods Act 1989 (Cth), Therapeutic Goods Regulations 1990 (Cth), the Therapeutic Goods Advertising Code and the AgVet Code in respect of animal health products.
[9] A "restricted representation" is representation that refers, whether expressly or by implication, to a serious form of a disease, condition, ailment or defect. See: Sections 42DE, 42DF and 42DK of the Therapeutic Goods Act 1989 (Cth).
[10] An example arises from the program titled "Heart of the Matter" on ABC's Catalyst - see http://www.abc.net.au/news/2015-06-15/patients-cut-back-on-statins-after-catalyst-story-research/6545026
[11] Burton, P. & Peacock., W.F. (2016) "A Medwatch review of reported events in patients who discontinued rivaroxaban (XARELTO) therapy in response to legal advertising", Heart Rhythm Case Studies, Volume 2, Issue 3, 248-249
[12] https://www.agingresearch.org/app/uploads/2019/05/2019-0206-Harris-Letter.pdf
[13] https://www.statnews.com/2019/05/13/drug-lawsuit-ads-scaring-seniors/
[14] See for example: Walker, T (8 June 2021) "TGA boss warns Clive Palmer", Pharma in Focus, online publication; Piovesan, A (24 June 20-21) "Clive Palmer anti-vaccination flyers blasted as dangerous and misleading", The Australian: https://www.theaustralian.com.au/breaking-news/clive-palmer-antivaccination-flyers-blasted-as-dangerous-and-misleading/news-story/202697cfc4077e4ccbe8f71d9150c0d7

Holdings Limited claiming that Viraleze was an antiviral nasal spray that stops SARS-CoV-2, the virus that causes COVID-19;[15]

(iii) similarly, the TGA fined an individual in relation to an unlawful advertising of a homeopathic medicine with COVID-19 claims because representations relating to COVID-19 are restricted representations and the TGA "*was also concerned that the advertisement may result in Australians delaying vaccination in reliance on an unapproved product*".[16]

3.5 These examples, together with the various permissions and guidelines issued by the TGA in respect of communications that can be made about COVID-19 vaccines,[17] illustrate the importance of ensuring messages to the public about health related issues are regulated and the potential complications that arise when communications regarding health and healthcare are made to the public.

3.6 In the absence of any advertising restrictions or regulations applying to law firms or funders, there is a high risk that advertising to book build may be detrimental to potential group members, public health and healthcare.

[15] https://www.tga.gov.au/media-release/starpharma-holdings-limited-fined-93240-alleged-unlawful-advertising-viraleze-relation-covid-19
[16] https://www.tga.gov.au/media-release/canberra-individual-fined-2664-alleged-unlawful-advertising-homoeopathic-medicine-relation-covid-19
[17] See for example: https://www.tga.gov.au/communicating-about-covid-19-vaccines