WOODSFORD

Public Submission to the Treasury and Attorney-General in respect of the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders

1. Woodsford Litigation Funding Limited (**Woodsford**) welcomes the opportunity to make submissions in respect of the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders (**Draft Bill**). Woodsford's submissions in response to the Draft Bill, together with some background information about Woodsford, are set out below.

2. At the outset we want to make clear that we consider the time provided by the Treasury and Attorney-General for stakeholders to consult on the Draft Bill is grossly inadequate. Stakeholders have been provided 7 days to respond, and in most cases only 4 business days given it was a public holiday in many Australian States on Monday, 4 October 2021. The Draft Bill raises complex issues, some of which cut across decades of class action jurisprudence in Australia. We suggest that the government extends the consultation period to give stakeholders appropriate time to respond to these issues. Given the very limited time available, we have only been able to engage with some (but not all) of the proposed provisions of the Draft Bill below.

Woodsford

3. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading global litigation and arbitration funder.

4. Together with Omni Bridgeway (ASX:OBL), Burford Capital (NYSE: BUR) and others, Woodsford is a founder member of the International Legal Finance Association (**ILFA**).

    a. ILFA is the only global association of commercial legal finance companies and is an independent, non-profit trade association promoting the highest standards of operation and service for the commercial legal finance sector.

    b. It also serves as a clearinghouse of relevant information, research and data about the uses and applications of commercial legal finance.

5. Woodsford's Chief Operating Officer, Jonathan Barnes, sits on ILFA's Management Committee.

6. Woodsford is also a founder member of the Association of Litigation Funders of England and Wales (**ALF**) - an independent body charged, since 2011, by the Ministry of Justice with the self-regulation of litigation funding in England and Wales. Woodsford was actively involved in

drafting ALF's Code of Conduct (the **Code**), which sets out the standards by which funder members of ALF must abide.

c. The Code requires that funder members maintain adequate financial resources at all times in order to meet their obligations to fund all the disputes they have agreed to fund, and to cover aggregate funding liabilities under all their funding agreements for a minimum of 36 months.

d. The Code also prescribes the circumstances in which funders may withdraw.

e. ALF also has complaints handling procedures. Woodsford has never been the subject of a complaint to ALF.

7. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of ALF's board.

8. Woodsford Australia Limited is an Australian public company (ACN 644 961 446) and a wholly-owned subsidiary of Woodsford. It holds an Australian Financial Services Licence (no. 527367) authorising it, inter alia, to operate litigation funding schemes that are managed investment schemes as a responsible entity.

9. Woodsford has staff in the UK, the United States and Australia. It successfully funds representative proceedings in Australia, the UK and the Netherlands as well as numerous other types of meritorious disputes globally.

10. Woodsford supports the Public Interest Advocacy Centre in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.

11. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in a number of jurisdictions, including England & Wales, Australia, and the United States, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales.

12. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven was recognised by every annual edition of the Legal 500 published in his last eight years in private practice. For commercial litigation work, he is praised as having "the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation" and a "strong commercial grip on the relevant legal provisions and financial aspects of cases." For his work in international arbitration, the Legal 500 ranked Steven as "outstanding". Woodsford's Chief Investment Officer for the EMEA and APAC regions, which covers Woodsford's operations in Australia, Charlie Morris, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard. Charlie is a ranked individual in Chambers & Partners directory for litigation funding

and praised as "extremely knowledgeable in financial services matters, possibly more so than the lawyers who run the cases". Steven Friel, Jonathan Barnes and Charlie Morris have all been recognised in the top 100 leaders in legal finance of 2021, together with three other Woodsford employees.

13. Woodsford has an Investment Advisory Panel that contributes to its investment decision making process and brings together senior figures, from the world of both litigation and international arbitration, with direct experience spanning many areas of law. It includes Michael Barker, a former Judge of the Federal Court of Australia, Shira A. Scheindlin, a former United States District Court Judge and several former senior partners of major international law firms.

14. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Australia.

Woodsford's Submissions in respect of the Consultation Paper

15. Our submissions address some of the contents of the Draft Bill.

16. As a general point, we respectfully submit that the Draft Bill, if enacted, would have a deleterious impact on access to justice in Australia. The purported intention of the Draft Bill is to "promote a fair and reasonable distribution of class action proceeds in proceedings involving a litigation funder". This Draft Bill, in its current form, is not suited to achieving this intention. As explained further below, if the Draft Bill comes into force as law, it will have the effect of ensuring that class members with smaller, meritorious claims receive **no** compensation, in circumstances where they would have received compensation, absent the legislation.

Section 601GA

17. The stated intention of the proposed s 601GA(5)(a) and (b) is to ensure "that class action members cannot be co-opted into a litigation funding scheme without their active consent" and to ensure 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] This proposed provision, coupled with the provisions relating to the enforceability of funding agreements[2] are intended to "encourage 'book building' and ensure that actions involving litigation funders are commenced with the genuine support of plaintiffs."[3] This intention is inconsistent with the principles enshrined by Part IVA of the Federal Court Act 1976 (Cth) (**FCA**), and equivalent

[1] Exposure Draft Explanatory Memorandum to the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funding at [1.45] and [1.49].

[2] Section 601LF of the Draft Bill.

[3] Treasury and Attorney-General joint media release on 30 September 2021 entitled "Ensuring fair and reasonable returns to class action plaintiffs".

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State legislation, which allow class actions to be pursued on an 'opt-out' basis. Further, it is unclear how the proposed provisions will operate in the context of these State and Federal class action regimes.

18. The Draft Bill leaves open the possibility that a class action litigation funding scheme could be pursued for the benefit of both those claimants that have agreed to be members of the class action litigation funding scheme, and "passive" claimants who are group members in the class action but who have not actively agreed to become members of the scheme. Passive claimants cannot be compelled to contribute to the funder's costs of funding the litigation.

19. It seems likely that this provision of the Draft Bill, designed to encourage book-building, will mean that any class action that is a class action litigation funding scheme will be pursued on behalf of only those claimants who have entered funding agreements and actively applied to join the scheme. This is because litigation funders will need to incentivise claimants to become active members of the scheme, in order to ensure that the costs of the funding are borne equally by all of the claimants who will benefit from the class action. Litigation funders will achieve this by only pursuing class actions where the group definition includes a requirement that the claimant has signed a funding agreement and agreed to be a member of the scheme. Thus the effect of imposing these provisions in the Draft Bill, will be that Australia's "open" opt-out class action regime will be converted to a "closed" opt-in regime, where a litigation funder is involved. This was common before the advent of the Common Fund Order (**CFO**), but we submit is an undesirable outcome, and one that will have an impact on access to justice as well as the efficiency in which class actions can be dealt with by the Courts.

20. The government may recall that an opt-out regime was chosen for Part IVA proceedings in the Federal Court because, as the then Attorney-General put it prior to the implementation of Part IVA:

> *It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.*[4]

21. There are numerous advantages of an opt-out class action regime. It has the advantage of ensuring all affected parties are entitled to the remedies sought, not just those with the resources and knowledge to initiate a claim. An opt-out claim also provides finality for a <u>defendant</u> in respect of the defined class, as opposed to an opt-in regime where there is a significant risk of numerous concurrent or consecutive actions being commenced. Where a

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[4] Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174-3175 (Duffy).

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class action is only pursued for the benefit of claimants that have signed a funding agreement the door is left open for separate groups of claimants to further agitate the same issues that may already be (or have already been) pursued in other class actions. This has the potential to cause a defendant to have to defend multiple different class actions on behalf of the same types of claimants, but who are represented by different litigation funders.

22. Further, one of the most valuable benefits of an opt-out regime is that the lead applicant and litigation funder are not put to the expense of establishing the extent of the relevant claimant group that wishes to participate until such time as compensation will be made available to them, either because a defendant has agreed to settle the claim, or because the Court has found in the lead applicant's favour.

23. The provisions of the Draft Bill that are intended to promote "book-building", will have the effect that certain class actions will not be pursued; in particular, those class actions where there are a large number of group members with relatively small individual claims. This is because it would be impractical and too costly for the litigation funder to sign up all group members (or at least a large portion of group members) to litigation funding agreements. Indeed, such an approach undermines the very purpose of an opt-out regime, which is to allow class members to participate in an action passively, not to compel them to actively sign up to funding agreements or otherwise 'opt-in'. This was one of the problems the advent of the CFO helped cure. It allowed the opt-out regime to operate, as intended, by sharing the costs of the litigation (including the legal fees and funder's costs) across all group members who benefitted from the class action, with oversight from the Court as to whether such an order was appropriate in all the circumstances.

24. The proposed s601GA(5)(e), states that "the scheme's constitution must provide that the scheme's responsible entity must not be paid any amount in relation to the scheme that is greater than the entity's reasonable costs for managing the scheme." The provision suggests it will be unlawful for a responsible entity to make a profit in relation to its role overseeing litigation funding schemes. This ignores the fact that the responsible entity of a litigation funding scheme is a business in its own right, which takes on potential liabilities pursuant to its agreement to act as responsible entity, and which provides a different service to the litigation funder, who is a member of the litigation funding scheme. We can see no basis as to why the proposed provision is necessary and it will have the effect of limiting the number of responsible entities available to oversee litigation funding schemes in the market, which will in turn impact the avenues available to claimants to pursue redress through class action litigation funding schemes.

Section 601LF

25. The imposition of a rebuttable presumption that the "claim proceeds distribution method" (as the term is defined in the Draft Bill) is not fair and reasonable if less than 70% of the claim

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proceeds for the scheme are to be distributed to the scheme's general members as a whole, will have at least three negative consequences:

a. First, only larger class actions will be considered economically viable by those that fund them, including Woodsford. If class actions that claim a lower, but still substantial, amount are not funded by third party funders, as they are considered to be economically unviable because of the rebuttable presumption, those class actions will not be pursued at all. This will leave class members who have smaller claims without any recourse notwithstanding that they may have been the victims of serious wrongdoing. By the same token, the wrongdoers that would otherwise be the defendants to those class actions will not be held to account. This will seriously fetter access to justice in Australia and harm, rather than help, Australian class members who seek to benefit from class actions.

b. Second, for cases where economic viability is marginal with a 30% cap, defendants will become further incentivised to run their defence so as to waste time and costs with a view to driving the litigation below a reasonable threshold of economic viability.

c. Third, Australian legislation designed to discourage bad corporate behaviour can only be effective if those harmed actually have a remedy. The theoretical ability to enforce a legal right is the same as the legislation not existing at all. In many instances this real-world recourse is what litigation funding provides. Without it, the ability to modify future corporate behaviour for the better is for the most part lost, to the detriment of all Australians.

26. Imposing the rebuttable presumption would, in our submission, achieve exactly the opposite of what we understand to be the intended aim: instead of increasing returns to group members, it would likely mean they often get nothing instead.

27. The Draft Bill follows a report on litigation funding and the regulation of the class action industry published by the Parliamentary Joint Committee on Corporations and Financial Services (**PJCCFS Report**) and subsequent consultation. The Explanatory Memorandum to the Draft Bill explains that many of the provisions in the Draft Bill are in response to recommendations made in the PJCCFS Report. As a basis for supporting the imposition of some form of minimum return to class members, the PJCCFS Report stated that there exists "systemic and inappropriate skewing of the proceeds of a successful class action in favour of litigation funders at the expense of class members" and that litigation funders appear to be making windfall profits from Australia's class action system at the expense of class members. In support of this assertion, the PJCCFS cited analysis in the ALRC report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) that

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when litigation funders were involved in a class action, the median return to plaintiffs was 51 per cent, compared to 85 per cent when a funder was not involved.

28. As noted in the Minority Report by Labor Members incorporated in the final version of the PJCCFS Report (**Minority Report**):

    > "on no reasonable view does it follow that, because median returns to class members are lower when a funder is involved, funders are obtaining windfall profits at the expense of class members. As the Liberal members acknowledge elsewhere in their report, 'in many instances, a class action could not proceed in Australia without a litigation funder'. So if you take the litigation funder out of the equation, that does not necessarily mean higher returns for plaintiffs – in many cases it means **<u>no returns for plaintiffs</u>** because many class actions would not proceed at all."[5] *[Emphasis added.]*

29. Often where a litigation funder receives 51 per cent or more of the funds available from any settlement it is not because they have made a "windfall" profit but because the legal costs of the litigation were proportionately high relative to a modest settlement amount. This point is ignored in the PJCCFS Report. The conclusion in the PJCCFS Report also ignores the important role that the Court plays in supervising the distribution of any proceeds in a class action, ensuring that parties only receive what is fair and reasonable in all the circumstances in each fact-specific class action.

30. It should be noted that Recommendation 20 in the PJCCFS Report asked "whether a minimum gross return of 70 per cent to class members, **as endorsed by some class action law firms and litigation funders**, is the most appropriate floor" **[our emphasis]**. Thus, the questions posed by the PJCCFS Report is said to be based on the "endorsement" of a 70 percent return to class members made by some class action law firms and litigation funders. The PJCCFS Report does not reference this endorsement, and it is unclear where the figure of 70 per cent has come from. This is also not explained the explanatory materials accompanying the Draft Bill. As the Minority Report points out, to their knowledge, "no law firm or funder has proposed a 70 per cent 'floor'. Rather, in the spirit of compromise, at least one law firm has proposed amendments to the Corporations Amendment (Litigation Funding) Regulations 2020 so that a litigation funder that guarantees a 70 per cent minimum return to plaintiffs would not have to comply with the managed investment scheme rules."[6]

31. The PJCCFS Report acknowledges that, "litigation funders ought to be reimbursed for the costs incurred and make a profit which is reasonable and proportionate to the risk undertaken." This comment, when considered together with a proposal to implement the

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[5] Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020), p 369.

[6] Parliamentary Joint Committee on Corporations and Financial Services, above n 1, p 368.

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rebuttable presumption, is problematic because the risks a litigation funder takes cannot be viewed in isolation in respect of any one class action. That is, a litigation funder's risks need to be viewed across the entire portfolio of claims it agrees to fund. Higher returns in some class actions than others, acknowledge that litigation funders agree to fund cases that do not result in any recoveries for a variety of reasons, including because the claim is unsuccessful, or the defendant is unable to pay an award or settlement due to insolvency. The litigation funder takes all the risk in a class action, and the class members assume no risk. A litigation funder is at significant risk that they will be left substantially out of pocket in relation to each of the class actions they fund. If a litigation funder is not able to offset the risks of one class action against another in its portfolio, complex or difficult (but meritorious) class actions will not be pursued, to the detriment of class members. In the absence of evidence that the third party litigation funding market is uncompetitive or otherwise not functioning properly there is no legitimate basis on which an arbitrary cap on returns should be imposed.

32. It is also important to note the PJCCFS Report followed two reports into litigation funding and class actions in Australia, namely the Australian Law Reform Commission report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) (**ALRC Report**) and the Victorian Law Reform Commission report *Access to Justice—Litigation Funding and Group Proceedings* (March 2018) (**VLRC Report**). Neither the ALRC Report, nor the VLRC Report recommended a form of statutory minimum be imposed in relation to returns to class members in class actions. The VLRC noted that Court determination of the percentage fee meant that statutory caps were unnecessary and that allowing Courts to exercise discretion on the issue of what is an appropriate percentage means that the imposition of inflexible parameters could be avoided.[7]

33. A body of jurisprudence has developed in Australia, in relation to the appropriateness of funding commissions and returns to class members in class actions. Pursuant to s33V of the FCA a representative proceeding may not be settled or discontinued without the approval of the Court. The body of law in Australia in relation to class action settlement approvals shows that the assessment of whether returns to class members are reasonable is a complex exercise, and there is no "one-size-fits-all" approach. Courts assess whether the costs to be deducted from a settlement (including the funder's commission) are reasonable in light of a number of factors including the size of the settlement, complexity of a matter, the significant risk the claim will be unsuccessful resulting in loss of investment, the risk the claim will not result in recovery (in the event the defendant's solvency is questionable), the length of the proceedings, the amount of money contributed by the funder to advance the action, and how many group members are impacted by the decision. An assessment of these different factors on a case-by-case basis has

[7] Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (March 2018), [3.88], [5.80] – [5.85].

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resulted in Australian courts approving a wide range of relative percentage returns to class members on the basis that those returns are reasonable. As such, neither the commissions a funder is entitled to receive, nor the percentage of gross proceeds that should be made available to class members, are things that should be (or are suitable to be) the subject to fixed rates or rebuttable presumptions.

34. We submit that the Australian Courts continue to be best-able and best-placed to assess the reasonableness of litigation funding commissions and protect the interests of class members in class actions and that their discretion should not be fettered in this regard, by the imposition of the proposed s601LF. As the Full Federal Court explained in *Australian Securities and Investments Commission v Richards*:

> *"the role of the court [in a settlement approval application] is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises."*[8]

As such, the Court already provides sufficient protection of the interests of class members in determining the reasonableness of the returns they are entitled to receive out of settlements or awards.

35. Imposing the rebuttable presumption risks having a seriously deleterious impact on access to justice in Australia. Often, in the absence of litigation funding, claimants and group members in class actions would not have the means to pursue their claim and would receive nothing, with the defendant wrongdoer suffering no financial consequences. Litigation funding is required to ensure that victims have access to justice and equality of arms against far better resourced opponents and to provide an effective form of private regulation of large corporations and other defendants. Accordingly, it should be kept in mind, when considering the net return that group members receive from a class action, that absent the litigation funding required to bring the class action, group members would have received nothing. It is preferable for a class action to be advanced and for class members to receive something than for a class action not to be advanced and for class members to receive nothing. As such, the starting position, when considering the net return that class members receive from a class action, should therefore be that absent the class action, and absent the litigation funding required to bring that class action, group members may have received nothing.

36. In submissions made to the VLRC which were later cited in the VLRC Report, Maurice Blackburn commented that it is almost impossible to secure litigation funding for a class action involving claims of less than $30 million.[9] In the event that this inflexible legislation is

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[8] [2013] FCAFC 89 [8].

[9] Victorian Law Reform Commission, above n 2, [2.49].

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implemented, we submit that this claim value will increase, and it will become very difficult for claimants to obtain funding for class actions with claim values less than a number much higher than $30 million.

37. For a variety of reasons, imposing the rebuttable presumption is inappropriate. As stated above, the approval of the costs of litigation by a Court pursuant to s33V of the FCA and analogous State legislation is an evaluative process. Imposing a flat, 70 percent floor which must be rebutted fails to recognise that different claims have different risk profiles and complexities, and also fails to recognise that many of the costs incurred in a class action in order to achieve a settlement or award, which often run into many millions of dollars, are out of a litigation funder's control.

Section 601LG

38. As demonstrated above, in considering whether to approve settlements pursuant to s33V, courts take into account various factors. As such, the prescriptive "fair and reasonable" test intended to be imposed by s 601LG (3) is unnecessary and unreasonable. The Government should not interfere with the discretion of the Courts in this regard, because, as we submit, the Courts are best-placed to take into account all the various factors relevant to the exercise of settlement approval discretion.

39. As stated by Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* in deciding whether to approve a settlement *"the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole."*[10] Part of the process of evaluating whether a settlement is fair and reasonable, is a consideration of the risks associated with the claim. As the Federal Court of Australia's Class Actions Practice Note (GPN-CA) details, the material that may be needed to persuade the Court that the proposed settlement is fair and reasonable and in the interests of class members will usually be required to address, at least:

    a. the complexity and likely duration of the litigation;

    b. the reaction of the class to the settlement;

    c. the stage of the proceedings;

    d. the risks of establishing liability;

    e. the risks of establishing loss or damage;

    f. the risks of maintaining a class action;

[10] [2015] FCA 1468 [5].

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g. the ability of the respondent to withstand a greater judgment;

h. the range of reasonableness of the settlement in light of the best recovery; the range of reasonableness of the settlement in light of all the attendant risks of litigation;

i. the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[11]

40. In the ALRC Report, the Commission noted in relation to the application of s33V by the Court, that it considered that *"legislative reform is unnecessary as extensive jurisprudence exists which provides guidance as to the criteria judges are to take into account in approving class action settlements, which criteria are likely to continue to evolve."* As such, it is unclear why the addition of s601LG(3) is necessary.

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6 October 2021

[11] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* [15.5].

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