

16 November 2021

Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services

By email: Corporations.Joint@aph.gov.au

Dear Mr Hodder

Re: Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the Bill)

Please find **attached**, the Association of Litigation Funders of Australia (**ALFA**)'s responses to the following Questions on Notice which were put by Committee members at the hearing held on Friday 12 November 2021:

- Question on Notice 1- Factors which are not included in section 601LG (3) of the Bill, but which ought to be taken into account by the Court when the Court is considering whether a scheme's claim proceeds distribution method is fair and reasonable.
- Question on Notice 2- Previous cases which would not have proceeded if the proposed amendments in the Bill had been in place at the relevant time when the cases were being considered.

Yours sincerely



John Walker
Chairman
Association of Litigation Funders of Australia

Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the Bill)

Question on Notice 1-

Provide a list of additional factors which are not included in section 601LG (3) of the Bill, but which ought to be taken into account by the Court when the Court is considering whether a scheme's claim proceeds distribution method is fair and reasonable.

ALFA's Response-

- (a) the total costs incurred by the Respondents/Defendants and their insurers in relation to the proceedings.
- (b) the conduct of the Respondents/Defendants in the proceedings, and how that conduct has contributed to the length and complexity of the proceedings.
- (c) the extent of due diligence which the funder was required to undertake, including any costs associated with those investigations, prior to proceedings being commenced.
- (d) In the case of settlement prior to trial:
 - (i) what scheme members would likely have received if the proceedings had not settled but instead had to be determined at trial.
 - (ii) The range of reasonableness of the settlement in light of the likely best recovery.
 - (iii) The range of reasonableness of the settlement in light of all the attendant risks of litigation.
- (e) The capacity of the Respondents/Defendants to satisfy any judgment.
- (f) A comparison of the commercial return to the funder with funding commissions in other, similar proceedings.
- (g) The quantum of adverse costs exposure which the funder would bear if the proceedings were unsuccessful.
- (h) The form and quantum of any security for costs provided by the funder.

- (i) Whether the proceedings would have been brought if the funder had not agreed to provide funding for the proceedings.
- (j) Any substantial objections made by scheme members in relation to any litigation funding charges.
- (k) The extent to which the funding provided by the funder has contributed to persons who are claimants mentioned in paragraph 9AAA(1)(a) for the scheme, but who are not members of the scheme, receiving a share of claim proceeds.

Question on Notice 2-

Provide a sample of cases which would not have proceeded if the proposed amendments in the Bill had been in place at the relevant time when the cases were being considered.

ALFA's Response-

The attached **non-exhaustive** list of class action cases has been provided by the firms and funders who were involved in commencing and funding the relevant proceedings and who have confirmed that the claims would not have been brought if they were required to be brought on a closed class basis.

Given time constraints, ALFA has not been able to provide a further list of cases which would not have been able to be brought on an economic basis, if the current measures in the Bill were in place. The collation of such data would take a number of weeks, if not months.



**Parliamentary Joint Committee on Corporations and Financial Services
Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021**



Association of Litigation Funders of Australia response to Question on Notice at the hearing held on Friday 12 November 2021

Set out below is a non-exhaustive sample of class actions that would not have proceeded on a closed-class basis. Due to the limited time to respond, we have been unable to compile an exhaustive list of cases that would not have been able to proceed economically under the proposed legislation.

No.	Entity providing data	Case/Defendant Name	Court	Court File Number	Filing date	Type of claim	Claimant's Law Firm/s	Funder/s	Claim Description
1	Balance	Asiriffi-Otchere v Swann Insurance (Aust) Pty Ltd	FCA	NSD544/2019	9/04/2019	Consumer	JWS & Bannister Law	Balance	Sale of add-on 'junk' insurance products
2	Balance	Williams & Anor v Toyota Motor Corporation Australia Limited	FCA	NSD1210/2019	20/01/2021	Consumer	Bannister Law, Gilbert & Tobin	Balance	Product defects relating to the diesel particulate filter
3	ICP	CMC Hospitality Pty Ltd v Insurance Australia Limited	FCA	NSD893/2021	1/09/2021	Consumer	S&G	ICP	Failure to indemnify businesses for business interruption insurance claims
4	ICP	Vicki Field Swim School Pty Ltd v The Hollard Insurance Company Pty Ltd	FCA	NSD1048/2021	8/10/2021	Consumer	S&G	ICP	Failure to indemnify businesses for business interruption insurance claims
5	ICP	Boulos v M.R.V.L. Investments	FCA	NSD2168/2019	24/12/2019	Employment	Adero	ICP	Underpayment of wages
6	Maurice Blackburn	Dale Robert Alford, Sebastian Smith, Anne Cooper and Jodie Mitchell v AMP Superannuation Limited and others	FCA	VIC572/2019	30/05/2019	Consumer	Maurice Blackburn	Harbour	Breach of statutory and general law obligations - overcharged administration fees to members of super funds
7	Maurice Blackburn	PTTEP Australasia (Ashmore Cartier) (Montara)	FCA	NSD1245/2016	8/03/2016	Other - Negligence	Maurice Blackburn	Harbour	Indonesian seaweed farmer - damaged crops and losses alleged to be caused by the Montara Wellhead Platform oil spill
8	Maurice Blackburn	Blaigowrie Trading Ltd & Ors v Alloco Finance Group Ltd (recs & mgrs apptd) (in liq) & Ors	FCA	NSD1609/2013	8/08/2013	Shareholder	Maurice Blackburn	ILFP	Breach of continuous disclosure requirements/misleading or deceptive conduct
9	Phi Finney McDonald	Gall v Domino's Pizza Enterprises Limited	FCA	VID685/2019	24/06/2019	Employment	Phi Finney McDonald	Therium	Underpayment of wages
10	Slater & Gordon	Dale Robert Alford & Ors v AMP Superannuation Limited & Ors	FCA	VID572/2019	30/05/2019	Consumer	Slater & Gordon	Therium	Breach by super fund trustee to act in best interests of members
11	Slater & Gordon	Tracy Ghee v BT Funds Management Limited	FCA	VID962/2019	4/09/2019	Consumer	Slater & Gordon	Therium	Breach by super fund trustee to act in best interests of members
12	Slater & Gordon	Keith Kayler-Thomson v Colonial First State Investments Limited	FCA	VID1313/2018	9/10/2018	Consumer	Slater & Gordon	Augusta	Breach by super fund trustee to act in best interests of members
13	Slater & Gordon	Marcel Eugene Krieger and anor v Colonial First State Investments Limited	FCA	VID1141/2019	1/10/2019	Consumer	Slater & Gordon	Augusta	Breach by super fund trustee to act in best interests of members
14	Shine	Stack & Ors v AMP Financial Planning Pty Ltd & Ors	FCA	VID489/2020	23/07/2020	Consumer	Shine	Woodsford	Financial Representatives - failure to act in clients best interests; breach of fiduciary and statutory duties to clients
15	Shine	Thmas & Anor v Commonwealth Financial Planning Limited	FCA	VID559/2020	21/08/2020	Consumer	Shine	Woodsford	Failure to act in best interests of members by placement into insurance policies which were not optimal and charging of excessive insurance premiums
16	Shine	Mallia v Colonial First State Investments & Anor	FCA	VID28/2020	22/01/2020	Consumer	Shine	Woodsford	Superannuation - overcharging fees
17	Shine	Haswell & Anor v Commonwealth of Australia OMMONWEALTH OF AUSTRALIA	FCA	NSD431/2020	15/04/2020	Other - Negligence	Shine	LCM	PFAS contamination causing losses to land owners
18	Shine	Kadam & Ors v Miireorts Group 1 Pty Ltd	FCA	QUD528/2016	13/07/2016	Other	Shine	NWNF	Investor claim - breach of trust
19	Shine	Lenthall & Anor v Westpac Banking Corporation	FCA	NSD1812/2017	12/10/2017	Other	Shine	NWNF	Financial advisers - breach of responsible lending obligations
20	Shine	Street v State of Western Australia	FCA	WAD237/2020	19/10/2020	Human Rights	Shine	LLS	Claims on behalf of Aboriginal and Torres Strait Islander peoples who worked in WA aover many decades in the 20th century under so-called 'protective legislation' for withholding of wages and related claims- known as the 'Stolen Wages' claims
21	Shine	McDonald v Commonwealth of Australia	FCA	VID312/2021	10/06/2021	Human Rights	Shine	LLS	Claims on behalf of Aboriginal and Torres Strait Islander peoples who worked in NT over many decades in the 20th century under so-called 'protective legislation' for withholding of wages and related claims- known as the 'Stolen Wages' claims
22	Shine	Cummings v Commonwealth of Australia	NSWSC	2021/117924	28/04/2021	Human Rights	Shine	LLS	Claims on behalf of Aboriginal and Torres Strait Islander peoples who are survivors of the Stolen Generations, and their descendants, seeking compensation for having been forcibly removed from their families