

16 November 2021

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
Parliament House  
Canberra ACT 2600

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

Dear Committee Secretary

### **Inquiry into Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021**

We refer to our appearance on 12 November 2021 before the Parliamentary Joint Committee on Corporations and Financial Services regarding the provisions of the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the Bill)*.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with our membership of more than 46,000 being drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

This letter responds to the Committee's request for the AICD to answer questions on notice, as well as providing a supplementary submission on matters raised during the Committee's 12 November hearing.

#### **1. Question on notice: Treasury consultation on minimum returns to class members**

We note the questions from Senator Deborah O'Neill regarding when the AICD received an invitation to be part of Treasury's consultation process, the date on which we received the discussion paper and the date on which we received the exposure draft.

The AICD became aware of the Treasury consultation on guaranteeing a minimum return of class action proceeds to class members on 28 May 2021, being the date when the Treasurer and Attorney General issued a joint media release. Shortly thereafter, we downloaded a copy of the discussion paper from the Treasury website. The AICD lodged a submission to Treasury's consultation on 28 June 2021.

The AICD became aware of the exposure draft consultation following the issue of a joint media release by the Treasurer and Attorney General on 30 September and related media coverage. Shortly thereafter, we downloaded a copy of the discussion paper from the Treasury website. The AICD lodged a submission on the exposure draft consultation on 6 October 2021.

As noted in our oral testimony to the Committee, the AICD did not receive an advance copy of the exposure draft.

## 2. Question on notice: relationship with the US Chamber of Commerce

We note the question from Senator Deborah O'Neill regarding contact between the AICD and the US Chamber of Commerce.

As noted in our oral testimony to the Committee, the AICD has not had any engagement with the US Chamber of Commerce or its representatives on Treasury's consultation on guaranteeing a minimum return of class action proceeds to class members.

We have consulted our calendars and can advise that over the four-year period to November 2021, the AICD has met with the US Chamber of Commerce or its representatives in Australia twice. Those meetings took place on 18 April 2018 and 22 July 2020. There were also a limited number of emails or phone calls over that time (we estimate four or five). For completeness, we note that over this period the AICD has engaged extensively with stakeholders on securities class action issues, including directors, litigation funders, legal experts, insurance brokers and underwriters, and other interested parties.

## 3. Supplementary submission: criteria for judicial consideration

We note that Mr Julian Hill MP during our appearance at the inquiry asked for the AICD to consider providing a supplementary submission on the factors the judiciary should consider when assessing whether a proposed distribution of litigation proceeds to class members is "fair and reasonable".

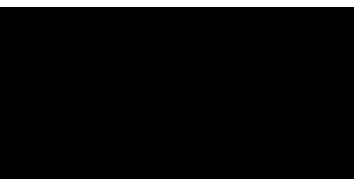
The AICD supports the criteria set out in the Bill as relevant and important factors for the Court to consider. We note, however, that some submissions to the inquiry have raised concerns that the list of factors set out in the Bill is exhaustive and may not allow potentially relevant factors to be considered by the Court, unduly fettering judicial discretion.

With those concerns in mind, the AICD supports amendment to insert a final factor that the Court must consider, being any other factor considered relevant to determining whether the proposed distribution is fair and reasonable. We consider such an amendment would provide the judiciary with appropriate flexibility, while at the same time ensuring that the criteria set out by the legislature in the Bill were considered.

## 4. Next steps

We hope the above information will be of assistance to the Committee. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at [REDACTED]

Yours sincerely,



**Louise Petschler GAICD**

General Manager, Advocacy