

16 November 2021

Mr Andrew Wallace MP  
Chair  
Parliamentary Joint Committee on  
Corporations and Financial Services  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Chair

**SUPPLEMENTARY SUBMISSION: RESPONSES TO QUESTIONS ON NOTICE –  
CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION  
FUNDING PARTICIPANTS) BILL 2021**

1. The Law Council of Australia appreciates the opportunity to have appeared before the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) at its public hearing in relation to its inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (**Bill**), held via video link on Friday 12 November 2021.
2. During the course of the hearing, representatives of the Law Council agreed to take three questions on notice. The Law Council's responses to these questions are provided below.

**Question 1**

3. The Bill proposes to insert subsection 601LG(3) into the *Corporations Act 2001* (Cth). This subsection sets out the test that the court must apply in determining 'whether the scheme's claim proceeds distribution method, or any variation of that method, is fair and reasonable and lists a set of factors to which the court 'must only have regard'. Mr Hill sought the Law Council's view as to what factors might be added to this list in the event that it remains an exhaustive list.
4. As elaborated at paragraphs 37-41 of the Law Council's primary submission, the Law Council is fundamentally opposed to such restriction on the discretion of the court. It is critical to the rule of law that the court has sufficient discretion to ensure fair, reasonable and just outcomes in the particular circumstances of the case before it. Should the Bill proceed, the word 'only' should be removed from proposed subsection 601LG(3) to ensure that the list of factors is non-exhaustive.
5. However, there are examples of additional highly relevant factors which should be included in a *non-exhaustive* list of factors:

- (a) First, the solvency status of the defendant including its insurance status. This is a critical factor in the decision making of the parties regarding settlement or resolution of an action and is currently absent from the list of factors which the court would be permitted to consider.
- (b) Secondly, an unpredictable factor, but one that may be central to whether a settlement fair and reasonable, is the existence and nature of any non-monetary arrangements or concessions agreed to by a defendant as part of a settlement. Examples include, an apology from a government for human rights abuses, an agreement by a corporate defendant to provide efficient and effective services in the future or acceptance by a corporate defendant of a condition not to do something in future. These elements may contribute to the reasonableness or fairness of a settlement, yet the listed factors in 601LG(3) would prevent the court from taking them into account. These elements would not fall within the concept of 'any other compensation or remedies' in paragraph 601LG(3)(d) as they are neither compensation nor remedies.
- (c) Finally, to ensure the proper discretion of the court is maintained, the Law Council would suggest the inclusion of a factor which allows the court to consider any other factor it deems relevant.

## **Question 2**

- 6. Senator O'Neill requested that the Law Council seek further advice from Mr Justin Gleeson SC regarding the potential constitutional issues identified in his advice provided to the Committee and whether there are any potential remedies to these issues.
- 7. As noted by Mr Emmerig during the hearing, the Law Council was not the organisation that commissioned the advice from Mr Gleeson SC. The Law Council has contacted the Association of Litigation Funders of Australia to alert them to this question.

## **Question 3**

- 8. Mr Hill sought examples of class actions that would not have proceeded if the measures proposed in the Bill had been in place.
- 9. As noted at paragraphs 44-53 of the primary submission, the Law Council is of the view that the Bill, if enacted, is likely to have the effect of reducing the availability of funding and legal services for meritorious cases lower value or higher risk actions (often based on common law causes of action such as arising from faulty products, institutional abuse or property damage consequent upon environmental disaster).
- 10. The Law Council does not wish to speculate on possible examples which would not have proceeded under the measures proposed in the Bill. This question is best directed to the funders and plaintiff law firms with direct knowledge of specific cases.

## Contact

11. If you would like to discuss this matter further, please do not hesitate to contact me directly on [REDACTED] or [jacoba.brasch@lawcouncil.asn.au](mailto:jacoba.brasch@lawcouncil.asn.au). Alternatively, please contact John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at [john.farrell@lawcouncil.asn.au](mailto:john.farrell@lawcouncil.asn.au) if you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jacoba Brasch QC'.

**Dr Jacoba Brasch QC**  
**President**