15 November 2021

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Sir/Madam,

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

We welcome the opportunity to make a submission in response to the above Bill.

About AustralianSuper

AustralianSuper is one of Australia's largest superannuation funds with over A$244 billion in assets under management as at 30 September 2021. We are a profit for members superannuation fund with over 2.5 million members representing over one in ten working Australians. At AustralianSuper, we are committed to delivering the best possible retirement outcome to members.

Our approach to participating in shareholder class actions

For context, we reiterate our approach to participating in shareholder class actions from our prior submission for the Parliamentary Inquiry into litigation funding and the regulation of the class action Inquiry dated 11 June 2020 (**2020 Submission**) as follows:

> *We participate in shareholder class actions where companies appear to have failed in their disclosure obligations and see class actions as a cost-effective way to recover members' losses caused by a company's genuine breach of law. Our approach involves considering the merits of each claim and we seek to only participate in class actions as a governance mechanism of last resort. From our viewpoint, where the interplay between the legal system, shareholders and companies is effective, class actions can be a meaningful means to hold companies accountable and enhance better corporate governance, resulting in long term value for our members.*

Summary of AustralianSuper's position

1. If enacted, the Bill would result in a "closed class" or "opt-in" system in Australia, which is a fundamental shift from our current class action system. AustralianSuper opposes this shift as it will result in claimants being required to sign up from the outset, as part of litigation funders' book-building process, therefore potentially without sufficient information to assess the merits of a claim.
2. The Bill reinforces uncertainty as to whether Courts have the power to make common fund orders.
3. We support the prescribed minimum returns for class members.

Opposition to a closed-class system in Australia

The Bill limits the definition of a 'member' of a class action litigation by requiring claimants to consent to becoming members to a class action litigation funding scheme in writing (s.9(b)).

Requiring potential claimants to sign up to the scheme documentation through such positive action would result in a fundamental shift in the Australian class action system from the historical opt-out model, to an opt-in system. This is problematic because:

1. shareholders will not have the opportunity to properly assess the merits of a claim. AustralianSuper conducts an active process in assessing the merits of any claim;
2. shareholders who do not have the time or resources to assess a claim may sign up in any case due to the no-win-no fee model; and
3. The book-building process will become an essential pre-requisite for a class action's viability and in our experience, this is dependent on institutional investor sign up. An unintended consequence of a book-building process is that shareholders who opt to sign up are inaccurately used as a demonstration of institutional investor support and the strength of merit in the allegations raised, but as per point 1., shareholders have minimal information to assess the merits at this stage.

The Bill's Explanatory Memorandum provides that "book-building can ensure that the merits and viability of a claim is assessed more thoroughly before a class action is commenced". We disagree with this as under an opt-in process, shareholders could be put under pressure to sign up out of fear of missing out, rather than being provided with adequate information as the case unfolds (e.g. through the discovery process) in an open-class system.

With litigation funders and lawyers needing to commence actions as closed actions, another knock-on effect is that there is potential for competing claims being commenced in relation to the same set of facts because claimants will need to make an early decision to join an action. For AustralianSuper, it will be an inefficient use of our members' resources in needing to weigh up competing claims, with limited information available at the outset of such claims.

Finally, the Bill in its current form does not provide a process for shareholders to join a class action if they subsequently decide they wish to participate once the action has commenced. Clarifying if they can do so and if so, the process for this would be helpful.

Clarification on court's power to make Common Fund Orders

One of the key recommendations of the Parliamentary Joint Committee (**PJC**) December 2020 *Litigation funding and the regulation of the class action industry report* (the **PJC Report**), was for legislation to clarify the Court's powers to make common fund orders (Recommendation 7). The Bill may create confusion whereby:

- it provides that funding agreements are unenforceable to the extent that it relates to the scheme's claim proceeds distribution method, unless a Court makes a common fund order (sections 601LF(2)-(4)). This suggests that a common fund order may be made; and

- section 601LF(7) provides that, “(t)o avoid doubt, nothing in this section implies that a Court has the power to make a common fund order”.

Without clarification on the Court’s power to make such orders, this will reinforce opt-in class actions as the default model. We believe common fund orders, or funding equalisation orders, are an equitable means of distributing the costs of litigation across class members, which solves the ‘free-rider’ problem. This is a necessary aspect of preserving an open-class system and which as noted as above AustralianSuper supports maintaining.

We are also disappointed that the PJC recommendation hasn’t been adequately addressed by the Bill.

At least 70% return to class members

We are supportive of:

1. the proposed 30% cap on fees paid to funders out of settlement or award proposed by the Bill; and
2. the court’s power to propose distribution to ensure that it is ‘fair and reasonable’,

as we need to ensure the best possible outcomes for our members are achieved through minimizing unreasonable costs in any class action we participate in.

Thank you for the time in considering AustralianSuper’s submission. Please do not hesitate to contact the undersigned should you wish to discuss any aspects of our submission further.

Yours sincerely,

Andrew Gray
Director – ESG & Stewardship
AustralianSuper