Omni Bridgeway Limited
ABN 45 067 298 088
omnibridgeway.com

Corporations Amendment (Litigation Funding) Regulations 2022: Exemptions for litigation funding schemes

Submission by Omni Bridgeway Limited

30 September 2022

Omni Bridgeway welcomes the opportunity to provide a submission to Treasury in response to the exposure draft and explanatory statement for the Corporations Amendment (Litigation Funding) Regulations 2022 (**draft Regulations**).

About Omni Bridgeway

Omni Bridgeway is Australia's largest and most experienced litigation funder and is a global leader in financing and managing legal risks. The company was known as IMF Bentham Limited in Australia until it completed the acquisition of Europe-based Omni Bridgeway in November 2019 and adopted a single global name. The company listed on the Australian Securities Exchange in 2001, specifically to promote transparency in what was at that time a new industry.

Summary of key points: Omni Bridgeway

1. Supports the proposed amendments to provide litigation funding schemes with an explicit exemption from the Managed Investment Scheme (**MIS**) regime.
2. Recommends that, if the Government decides to remove the existing Australian Financial Services Licence (**AFSL**) requirement, it should be replaced by a bespoke licensing regime for providers of litigation funding.
3. Recommends that the regulatory regime should also include minimum onshore capital adequacy requirements and should apply to the activity of funding litigation in the courts of Australia, and not just to professional third-party funders.

Introduction

Omni Bridgeway supports the Federal Government's policy goal of facilitating access to justice for class action plaintiffs and group members. However, to promote confidence in this industry sector, Omni Bridgeway considers that all providers of litigation funding operating in Australia should be subject to an appropriate level of regulation. In Omni Bridgeway's view, a bespoke licencing regime with certain minimum requirements will provide protection for all parties involved in funded litigation, including class action members, as set out in our submissions below.

Exemption from Managed Investment Scheme regime

Omni Bridgeway supports the proposed amendments to subregulation 5C.11.01 of the Corporations Regulations 2001 to provide litigation funding schemes with an explicit exemption from the MIS regime. As explained in the explanatory statement, this amendment is to ensure that the Corporations Regulations 2001 reflect the status of the law following the Full Court of the Federal Court's decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103*.

Omni Bridgeway agrees that the change is necessary to avoid any confusion between the statutory law and the common law and it provides useful clarification that the MIS regime is not applicable to the funding of Australian class actions.

Ensuring interests in litigation funding schemes continue to be 'financial products'

In Omni Bridgeway's view, litigation funding falls within the general definition of a financial product in section 763A(1)(b) of the Corporations Act 2001, as it is a facility through which, or through the acquisition of which, a person manages financial risk. Despite this view, Omni Bridgeway is happy for there to be a specific category of financial product for litigation funding in regulation 7.1.04N of the Corporations Regulations 2001 and supports the proposed amendments to that regulation. As explained in the explanatory statement, these amendments are to simplify the regulation following the removal of the distinction between litigation funding schemes and insolvency litigation funding schemes.

However, Omni Bridgeway considers that a litigation funding scheme is a miscellaneous financial product through which providers manage significant financial risk on behalf of claimants.

Proposed exemption from the Australian Financial Services Licence requirements

In Omni Bridgeway's view, providers of litigation funding in Australia should be subject to an appropriate regulatory regime, to increase transparency and confidence in the class action system and the industry more broadly. Therefore, Omni Bridgeway recommends that, if the Government decides to remove the AFSL requirement, then a fit for purpose, bespoke licensing regime should be developed, that deals solely with the financing of litigation.

In Omni Bridgeway's view, there are significant financial risks of removing the AFSL requirement, and not replacing that requirement with any other licencing regime. There are also potential social impacts. Litigation funding arrangements generally include obligations to pay significant sums. It can be extremely expensive to prosecute large complex actions, particularly class actions on behalf of hundreds, if not thousands, of group members, against well-resourced defendants. Consequently, providers need to have sufficient capital, not only to fund the legal costs as a case proceeds, but also to sustain potential losses that may arise from any adverse findings. The alternative may be that a case could fail because a provider was undercapitalised. This would not only impact the claimant and group

members in that case, but may have the follow-on impact of casting doubt on Australia's litigation funding system more broadly.

Therefore, Omni Bridgeway recommends that the regulatory regime should also include minimum onshore capital adequacy requirements. In Omni Bridgeway's view, the funder should be required to provide evidence that it has arrangements in place to deploy the capital associated with the commitments it has made. Without an appropriate capital adequacy regime, there is no mechanism to guard against the risk of an under-capitalised funder failing to meet its financial obligations. In circumstances where the provider is not able to meet its obligations, this not only puts the prosecution of the claimants' case at risk, but it also exposes them to the risks of adverse costs. The risks of not being able to prosecute a case on a level playing field and adverse costs are often the very things that prevent claimants from commencing proceedings and gaining access to justice. A poorly capitalised provider therefore creates the same or similar risks for claimants that existed before the advent of litigation finance in Australia.

Prudential regulation ensures those promises can be met and offers valuable consumer protections, particularly where a funder is foreign-based or a private company (as opposed to a provider which publishes financial information about their operating entities on a regular and accessible basis). Even with published accounts, a potential claimant may not be able to assess the financial viability of a provider of litigation finance. Therefore, we would recommend a bespoke licensing regime with capital adequacy to give potential claimants the confidence to pursue their claims.

There have been some in the sector who argue that the court provides sufficient protection, and that a regulatory regime is unnecessarily burdensome and duplicative. While the courts do provide valuable oversight and protection to funded parties and class action members once litigation is commenced, and particularly if an application to approve a class action settlement is being considered, most funding arrangements are negotiated and agreed before proceedings are commenced. Therefore, an appropriate regulatory regime is required to be in place from the outset of the funding activity, well before the court is involved.

Once litigation has commenced, the court's role is to manage the case and determine the underlying dispute about matters involving legal rights and obligations. It is not the court's role to assess the financial viability of a funding entity.

Further, to effectively regulate this sector on an equal footing, Omni Bridgeway considers that the regulatory regime should apply to the activity of funding litigation, that is, litigation funding provided by all providers of financial accommodations that manage the financial risks associated with litigation. This would include funding provided by law firms in Victoria under the 'group costs order' contingency fee regime.[1] In addition, the regulation of funding should not be limited to class actions but should apply to all forms of funding provided for

[1] Since 2020, lawyers in Victoria are able to receive a percentage of claim proceeds in exchange for meeting the full costs of the litigation, including adverse costs (see section 33ZDA of the Supreme Court Act 1986 (Vic)).

litigation proceedings before the courts in Australia, such as commercial litigation and insolvency claims.

As outlined above, if the Government decides that the exemptions should be given and the existing AFS licencing regime is to be removed, Omni Bridgeway submits that it should be replaced by a bespoke licensing regime for litigation funding. Omni Bridgeway would be happy to be involved in any consultation on the structure of an appropriate licensing regime to ensure that that all funders of litigation have sufficient capital to provide the miscellaneous financial products that they offer, and not put claimants at risk of potentially adverse outcomes through no fault of their own.