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# Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders

## Submission by Omni Bridgeway Limited

6 October 2021

Omni Bridgeway welcomes the opportunity to provide a submission to Treasury in response to the release of the exposure draft and explanatory memorandum for the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders (**Bill**).

The draft legislation and explanatory memorandum were issued on Thursday 30 September 2021 and any responses required by Wednesday 6 October 2021. As Monday 4 October 2021 was a public holiday in New South Wales this has given three clear business days to respond. Omni Bridgeway requested a two-day extension, but that request was denied. Three days is an insufficient period to properly consider the exposure draft. Further consideration of the Bill may uncover other matters about which Omni Bridgeway may wish to provide comment.

**About Omni Bridgeway**

Omni Bridgeway is Australia's largest and most experienced litigation funder and is a global leader in dispute resolution finance. 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.

As the only litigation funder presently funding more than one class action proceeding through a managed investment scheme (**MIS**) structure[1], Omni Bridgeway is uniquely placed to comment on the impact of the Bill.

**A summary of Omni Bridgeway's views**

- The Bill will reduce the availability of funding for claimants.
- The Bill strips plaintiffs of the ability to obtain funding to pursue class actions for breaches of state and general law in State courts.
- The Bill does not directly address the primary cause of cost blow-outs in litigation, the legal fees invoiced by the lawyers to the plaintiff. Further, the Bill will add to the costs of class action litigation.
- The Bill's application to certain types of litigation funding is unclear.
- The 70% figure for the rebuttable presumption is arbitrary and the restriction placed on the court in terms of the factors it is permitted to consider in determining the

[1] The company is presently funding six class actions through a MIS structure.

reasonableness of funding costs is excessive. The combination of these two measures is counter-productive to the promotion of access to justice.

While Omni Bridgeway accepts the application of the MIS regime to funded class actions, that acceptance is conditional on appropriate modifications to the MIS regime, including the changes to the Bill recommended below.

**Reduction in the availability of funding**

The Bill creates risks which will disincentivise funders from providing finance for class actions in Australia. This will result in a reduction in the availability of funding and opportunities for claimants to obtain access to justice.

Under the proposed s601LF, the Court must approve the claim proceeds distribution method (**CPDM**) in a funding agreement in a class action litigation funding scheme for the CPDM to be enforceable. An order to approve a CPDM can only be made once a proceeding is "sufficiently progressed to enable the Court to determine whether the claim proceeds distribution method, or any variation of that method, is fair and reasonable". In determining whether the CPDM is "fair and reasonable" the Court can only have regard to the factors set out in the Bill. The factors can be varied at any time by regulation.

The effect of this provision is that a funder will continue to take all of the many risks of financing class actions but will have further reduced certainty as to the level of its return. Presently, funders are beholden to the courts to determine that a class action distribution scheme is fair and reasonable. Whilst this comes at the end of a class action, funders have been prepared to carry the risk of an uncertain return during the life of a class action investment due to the court's adherence to precedent. Under the proposals, the government will limit the factors the court can take into account when determining a CPDM and will have the power to amend the prescribed factors by regulation *after* a funder has made its investment.

By reserving to the responsible Minister the ability to change what the Court can and cannot consider when determining if a CPDM is fair and reasonable, the provisions circumvent the Court's discretion and provide far too much power to the government of the day. Who is to say that a future government which is a defendant to funded litigation would not seek to stymie the litigation by amending the list of factors?

The courts should not be hamstrung by an exhaustive list of factors and commercial investors should not be subject to post investment political goalpost shifting.

**Recommendation:** the list of factors in s601LF(3) be made non-exhaustive so that the Courts can consider any relevant factor and are not limited to those prescribed by regulations.

**Impact on funding in State courts**

The Bill will block the right of Australians to obtain funding to pursue claims in State courts arising under state and general law.

Section 601LF(4) provides that a CPDM is "not enforceable and has no effect" if the underlying proceeding is brought in a State court which is not exercising federal jurisdiction unless the State "court approves or varies the [funding] agreement's claim proceeds distribution method under any power or procedures of the Court that are substantially similar to those in section 601LG". As of the date of the submission, there are likely no "powers or procedures" of State courts that are substantially similar to those in section 601LG.

There are many types of claims which arise other than in federal jurisdiction, including breach of contract, torts including negligence, nuisance, trespass, and misrepresentation, claims in equity including breach of trust, and claims arising from state legislation.

As a result, without law reform from the States, s601LF(4) will strip claimants of the ability to obtain litigation funding for a wide range of claim types and pursue those claims in State courts. The Bill will force the States to choose between adopting the reforms or permitting their citizens to be stripped of their ability to access justice. The constitutionally appropriate way to address the government's policy objectives would be to consult the States and enact nationally consistent reforms. This section is an inappropriate, and potentially constitutionally invalid, vehicle to seek to force the states to adopt legislation consistent with Federal legislation.

**Recommendation:** s601LF(4) be removed from the Bill.

**Case Study: Prawn White Spot**

The introduction of prawn white spot disease in 2016 has hit the Queensland seafood industry hard[2]. Impacted businesses have banded together to hold the Commonwealth of Australia to account for its allegedly negligent conduct in allowing infected prawns to be imported into Australia.

Omni Bridgeway is proud to provide funding to businesses in Queensland and across Australia to allow them to repair the financial damage caused by alleged actions of the Commonwealth's former Department of Agriculture and Water Resources. The proceeding is proposed to be run as a class action in the Queensland Supreme Court. The claims are common law claims, being negligence and public nuisance. Therefore, the Queensland Supreme Court will not be exercising Federal jurisdiction.

The Prawn White Spot Litigation Funding Scheme has already been registered. If these laws had been passed sooner, aquaculture businesses in Queensland and across Australia would have been denied the funding they require to pursue their claim in the Queensland Supreme Court.

This element of the Bill is not just a minor technicality or annoyance for the funding industry, it will have a real and immediate impact on claimants all over Australia.

[2] *Seafood industry on alert as tests show deadly white spot virus rife in southeast QLD*, Courier Mail, 2 July 2018, https://tinyurl.com/93s2ra82

**Failure to address costs**

The Bill seeks to address the amount of legal and funding fees visited upon claimants by controlling what can and cannot be deducted from the claim proceeds at the conclusion of the proceeding. This does not prevent costs being incurred, it merely leaves the funder and/or lawyers to carry the costs in the event approval is not granted. The funder has limited control over the costs incurred, which are significantly influenced by how the defendant conducts its case.

In Omni Bridgeway's view, the key to ensuring a viable funding industry and increasing returns to group members is to address legal costs *before* they are incurred. Omni Bridgeway would welcome the opportunity to provide the government with information about successful reforms undertaken in England and Wales known as the 'Jackson Reforms'. These reforms include the introduction of 'costs budgeting' whereby plaintiffs and defendants are required to submit their legal costs budget to the Court at the *commencement* of the proceeding. This compares to the arrangements in Australia and those contemplated in the Bill where the Court usually considers the legal costs at the *conclusion* of the proceeding, after they have been incurred by the parties. We believe that a pro-active, rather than reactive, review of costs by the Court and costs assessors will more effectively achieve the aim of increasing returns to group members.

Furthermore, this Bill will add to costs which have already been increased by the application of the MIS, by requiring experts and contradictors, rather than leaving it to the Courts discretion to determine if it is appropriate to appoint these people. There will be more interlocutory hearings, more appeals, and a greater time delay for the resolution of cases.

**Recommendation:** the government investigate and consult on measures to control legal costs through costs budgeting and other procedures. This will actively promote access to justice.

**Law-firm funding**

With the introduction of the 'group costs order' contingency fee regime in 2020[3], lawyers in Victoria are now able to receive a percentage of claim proceeds in exchange for meeting the full costs of the litigation including adverse costs. The Supreme Court of Victoria has recognised that group costs orders are a form of litigation funding[4].

The Bill provides that a class action litigation funding scheme as defined in the proposed s9AAA is a MIS. By definition, a group costs order-funded proceeding would not be a class action litigation funding scheme if the funder is also "a lawyer or legal practice that provides a service for which some or all of the legal fees or disbursements or both are payable only on success". In the case of a group costs order, the relevant Victorian legislation allows the "legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award of settlement that may be recovered"[5].

[3] See section 33ZDA of the Supreme Court Act 1986 (Vic)
[4] Fox v Westpac [2021] VSC 573 at [12]
[5] See section 33ZDA of the Supreme Court Act 1986 (Vic)

The Bill arguably includes group costs order litigation funding in the definition of a class action litigation funding scheme. This is because the Victorian legislation sets out *how* legal costs are to be paid, not *when* they become payable as required by the words "payable only on success" in the proposed s9AAA. However, the position is not free from doubt and this may lead to expensive and wasteful satellite litigation as defendants challenge group cost order funded litigation which does not comply with the MIS regime.

In Omni Bridgeway's submission, third party litigation funding and law-firm group costs order litigation funding are sufficiently similar and should be subject to one consistent set of rules and regulations. Inconsistent regulation would create regulatory arbitrage and encourage funders and lawyers to use the group costs order regime to sidestep these regulations. This cannot be the desired effect of the Bill and should be clarified before the Bill is submitted to the parliament.

**Recommendation:** regulation of litigation funding apply on the same terms to all types of litigation funding, including group costs order law firm funding.

**70% figure for rebuttable presumption**

The proposed s601LF(5) provides for a rebuttable presumption that a proposed CPDM is not fair and reasonable if less than 70% of the claim proceeds is paid to the scheme's general members.

As Omni Bridgeway stated to Treasury in its 5 July 2021 submission to the consultation preceding the Bill, the company has striven to return at least 50 per cent of the gross proceeds to group members. This has not been designed to arbitrarily change the amount going to successful group members across the board (in the majority of cases group members receive more than 50 per cent in any event) but rather to operate as a backstop to protect group members in the event that, despite settlement, the gross proceeds are materially smaller than was expected at the point of funding. In that context and recognising the importance of ongoing public confidence in the class action system, Omni Bridgeway has previously recommended a 50 per cent minimum return to claimants, intended to operate as guidance to the court or a rebuttable presumption.

In keeping with this previous submission and for the reasons stated therein, Omni Bridgeway believes the introduction of a 70 per cent minimum would be an arbitrary measure and is not supported by reference to any analysis of the negative implications for the funding of class actions or the risks being assumed by litigation funders.

**Recommendation:** the 70% return to scheme members rebuttable presumption be changed to 50%.