THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC/LLP:JvDPsb210922

21 September 2022

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

Exemptions for litigation funding schemes

The Law Society appreciates the opportunity to contribute to the Law Council of Australia's submission in response to the draft *Corporations Amendment (Litigation Funding) Regulations 2022* (**the Draft Regulations**). The Law Society's Business Law and Litigation Law and Practice Committees have contributed to this submission.

As set out in the draft Explanatory Statement, the purpose of the Draft Regulations is to amend the *Corporations Regulations 2001* to provide litigation funding schemes with an explicit exemption from the managed investment scheme (**MIS**) regime, Australian Financial Services Licence requirements, product disclosure regime and anti-hawking provisions found in the *Corporations Act 2001* (Cth) (**Corporations Act**).

The Draft Regulations are a response to the Full Federal Court's decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 (**the LCM case**), which found that class actions are not managed investment schemes for the purpose of the Corporations Act, thereby reversing previous authority in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd* (2009) 180 FCR 11. Lee J commented that litigation schemes were ill-fitted for the MIS regime, noting that such a characterisation was akin to trying to place 'a square peg in a round hole'.[1]

The Law Society shares the view that the MIS regime was not designed or intended to regulate the litigation funding industry and considers that the Draft Regulations as they relate to MIS regimes provide an appropriate exemption as well as greater certainty for industry in light of the LCM case.

However, in the context of the discussion on the exemptions proposed in the Draft Regulations, the Law Society considers it important to record its view that litigation funders of class action proceedings should be required to comply with a bespoke licencing scheme which should be introduced through amendments to the Corporations Act or the *ASIC Act 2001* (Cth) (**ASIC Act**).

[1] LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103 at [7].

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Bespoke regulation was extensively addressed by the Australian Law Reform Commission's 2018 inquiry[2] (**ALRC Inquiry**). The Law Society considers that the following matters canvassed in the ALCR Inquiry are of importance in a licensing regime, namely that the funder should:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interests;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

The list given above is not intended to be exhaustive, and we consider Treasury should consult widely on the elements of any bespoke licensing regime.

Minimum prudential, conduct, breach reporting and complaint standards should be enshrined in the Corporations Act or the ASIC Act, particularly given the internationalisation of funding and limited asset presence in Australia of some funders.

We agree with the observations of the ALRC that while the Federal Court plays an essential role in the regulation of litigation funders, its powers are neither sufficient nor suited to oversee their conduct throughout the entirety of when oversight is necessary. At present, under the scheme in Part IVA of the *Federal Court of Australia Act 1976* (Cth) and associated Practice Note, the oversight is customarily confined to:

- disclosure of litigation funding agreements with group members to the Court (GPN-CA, Federal Court at [6.1]–[6.3]); and
- the process of court approval under section 33V for distributions from settlements to funders and other third parties (GPN-CA, Federal Court at [16.1]–[16.4].

Class actions run for an extended period. To confine court supervision to the commencement and conclusion of proceedings is to leave supervision to times when it is either too early or too late to diagnose and address concerns. Funders play a considerable role in the conduct of proceedings throughout their lifespan, and are beginning to engage in secondary market transactions whereby their interest in litigation is sold to further third parties.

Thank you for the opportunity to contribute to the Law Council's submission. If you have any questions about this submission, please contact Sophie Bathurst, Policy Lawyer, at Sophie.Bathurst@lawsociety.com.au or on (02) 9926 0285.

Yours sincerely,

Joanne van der Plaat
President

[2] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, December 2018).