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International Legal Finance Association (ILFA) responds to Australian Government proposal to impose overbroad regulation

Regulation will add barriers, delays and costs to Australian legal system

Sydney, Australia – 7 October 2021: The International Legal Finance Association (ILFA), today responded to the draft exposure bill released by the Treasury of the Australian Government on 30 September 2021 that seeks to impose further regulation that would add barriers, delays and costs to the Australian legal system.

There is a clear and alarming trend in the recent approach to the regulation of the funding and prosecution of Australian class actions: barriers will be implemented by any means necessary to make it harder for everyday Australians to seek redress in court. The seven-day consultation period for this bill confirms that those who are pushing for these regulations do not want to engage in any meaningful consultation about, or provide evidence in support of, these proposed regulations and whether they will benefit the Australian legal system. That should tell Australians all they need to know about this proposal: the objective is to cut off funding of Australian class actions and create procedural hurdles, red tape and costs that make all class actions harder, longer, and costlier to run against large institutions. It would be unwise for Australians, whom the class action regime is supposed to protect, in their capacity as employees, consumers, shareholders and citizens, to think this proposal is in their best interests.

Several ILFA members, including the largest legal finance companies in the world, have made submissions responding to both prior proposed regulation from the Australian Government regarding a potential cap on litigation costs and litigation funding fees; and a recent exposure draft of a bill that would not only impose such a cap but introduce additional regulations, which has received near universal criticism. Furthermore, when read in the context of other recent regulations imposed relating to the funding of class actions and Australia's continuous disclosure laws, the intention is clear: the ability of everyday Australians are systematically being stripped of their ability to obtain relief through the Australian legal system against those who can afford to defend themselves via costly and protracted litigation.

The proposed regulation purports to be in the interests of Australians who participate in any class action, yet none of the regulations have been requested by those Australians -- being consumers, investors, shareholders, citizens or the law firms who serve those clients. Similarly, there has been no suggestion from Australian courts that their powers to oversee the financing and prosecution of class actions are in any way deficient or require the heavy-handed regulation of the type proposed. Nor has there been any evidence to suggest that Australian courts, to date,

have approved settlements and/or funding agreements in a manner that is not "fair and reasonable" to all group members in class action proceedings. Rather, major corporate and insurance industry interests, led by interest groups (including foreign interest groups), have been lobbying relentlessly for more and more regulation that would only add delay and expense to the Australian legal system. In that light, there is no doubt that this proposed regulation—driven as it is by lobbying interests – is in fact not in the best interests of all Australians.

The sheer scope of the proposed additional regulatory requirements in the draft bill reads like a wish list of procedural hurdles compiled by large institutions, and those who advocate for their interests, to cut off the funding of class actions and make class actions more costly and protracted. The overbroad proposed regulations would also interfere with an individual's right to freely contract with counterparties of their choosing; alter the jurisdiction of Australian state and federal courts; and impose hurdles and significant costs associated with: (i) managing and reporting class actions as managed investment schemes; (ii) the enforceability of funding agreements; (iii) approval and variation of funding agreements; (iv) creating confusion and complications regarding the use of book building and common fund orders in class actions; and (v) mandating costly reviews of, and reporting on, funding arrangements by Court-appointed third parties.

Much like other recent regulations impacting Australian class actions, there has been no evidence provided to support the assertion that any of these proposed regulations will benefit claimants, namely consumers and other parties who have suffered harm but typically have relatively limited financial resources to seek redress. Those pushing for these overbroad regulations are well-aware that a cap will reduce both the number of Australian class actions that are filed; and the amounts that defendants need to pay to settle those that do proceed. By contrast, there has been extensive evidence submitted by stakeholders which demonstrates that the imposition of a 30% cap on the legal fees and funding fees in class actions would actually have the opposite effect – that being of eliminating funding and making many types of class actions economically unviable. Indeed, in March 2021, PwC published a report that analyzed the impact of imposing a statutory minimum return to group members using historic publicly available class action outcomes.[1] PwC found that a statutory minimum return of 70% to group members (that is, a 30% cap on fees) would mean 36% of cases would not have proceeded as the 30% cap would not have covered the litigation costs alone) and a further 91% of cases would have been adversely impacted.

Furthermore, in addition to a proposed cap, the proposed regulation seeks to ram through a suite of other requirements, the effects of which have clearly never been properly considered and/or subject to any cost/benefit analysis. Much like the funder licensing regulations and the requirement that class actions be licensed as managed investment schemes that were imposed on funders in 2020 with no consultation, or an assessment of their potential costs and impacts (and

[1] PwC, *Models for the regulation of returns to litigation funders*, 16 March 2021. Omni Bridgeway commissioned the report to analyze the impact of imposing a statutory minimum return to group members.

were universally recognized as not being fit for purpose), the current proposal is filled with ambiguities and contradictions that will only invite satellite litigation, delay, and increase the costs associated with bringing class action within the Australian legal system.

The Australian Government should hit pause on the draft exposure bill. This proposal is not rooted in evidence, not going to have its intended result, and not in the best interest of all Australians.

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About the International Legal Finance Association (ILFA):
An independent, non-profit trade association, ILFA is the first-ever global association devoted to the growing commercial legal finance industry. ILFA promotes the highest standards of operation and service for the commercial legal finance sector.