

# WOODSFORD

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## LITIGATION FUNDING

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### **Public Submission to the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) in respect of its Inquiry into Litigation funding and the regulation of the class action industry in Australia (the Inquiry)**

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1. Woodsford Litigation Funding Limited (Woodsford) welcomes the opportunity to make submissions to the Committee in relation to the Terms of Reference of the Inquiry. Woodsford's submissions in relation to some of the Terms of Reference, together with some background information about Woodsford, are set out below.

#### **Woodsford**

2. Founded in 2010, Woodsford is one of the most well-established litigation and arbitration funders in the world. Headquartered in London, and with offices in the United States, Israel and Singapore, Woodsford is a truly global funder.
3. Woodsford has funded class actions in Australia previously and continues to do so. Woodsford also supports the [Public Interest Advocacy Centre](#) in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.
4. Woodsford is a founder member of the [Association of Litigation Funders](#) of England & Wales (the ALF), an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales, and Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of the ALF. Woodsford was actively involved in drafting ALF's [Code of Conduct](#) (the Code), which sets out the standards by which all Funder Members of the ALF must abide, including in relation to their capital adequacy. In particular, the Code requires its members to maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. The Code also sets out circumstances in which funders may be permitted to withdraw from a case, and outlines the way in which the roles of funders, litigants and their lawyers should be kept separate. The ALF also maintains complaints handling procedures. In the six years since ALF introduced its complaints procedure, Woodsford has never been the subject of an ALF complaint.
5. Woodsford's [executive team](#) blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, Australia, the United States, Canada,

Ireland, Israel and Singapore, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales.

6. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven has been recognised by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having "*the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation*" and a "*strong commercial grip on the relevant legal provisions and financial aspects of cases.*" For his work in international arbitration, the *Legal 500* ranked Steven as "*outstanding*". Steven has also been recognised as one of the [top 100](#) leaders in legal finance of 2020. Woodsford's Chief Investment Officer for the EMEA and APAC regions, which covers Woodsford's operations in Australia, Charlie Morris, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard.
7. Woodsford has an Investment Advisory Panel (IAP) that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Our IAP includes John Beechey, a past President of the International Court of Arbitration of the ICC, Fidelma Macken, the first female judge to be appointed to the Court of Justice of the European Union and Shira A. Scheindlin, a former United States District Court Judge.
8. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Australia.

#### **Woodsford's Submissions to the Committee in relation to the Inquiry**

9. Our submissions to the Committee follow the Terms of Reference below. These submissions echo in large part the submissions made by Woodsford to the recent inquiry by the Australian Law Reform Commission (ALRC) into Class Action Proceedings and Third-Party Litigation Funders, which was carried out over an extensive period and resulted in extensive recommendations being made. As a summary position, Woodsford concurs with and supports the recommendations made by the ALRC following that inquiry, insofar as they relate to litigation funding and class actions, and encourages their implementation.

*What evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income?*

10. Given that the resolution of class actions brought under Part IVA of the Federal Court Act 1976, including the distribution of any proceeds generated by class actions, requires the Court's approval, there is a wealth of information publicly available as to the relative proportions of settlement and judgment sums that have been used to pay fees, costs and funder commissions.

11. Woodsford funded the lead applicant in *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2) [2020] FCA 579*, the settlement of which was approved by Moshinsky J in the Federal Court of Australia in Victoria by Order dated 4 May 2020. This was a securities class action in which it was alleged that Vocus Group Limited, represented by Herbert Smith Freehills, made false and misleading disclosures to the stock market in respect of its future profit guidance. Following a mediation in December 2019, the parties reached an agreement in principle to settle the claim in the amount of A\$35 million. Only approximately 11% of the A\$35 million settlement sum was used to pay both Woodsford's and the claim manager's commissions. Other fees and costs amounted to approximately 9% of the settlement sum, which left the claimant group with a very significant approximately 80% of the settlement sum. This figure is particularly high given that claimants did not have to take any risk, financial or otherwise, to achieve that result, which occurred within 12 months of the commencement of legal proceedings. Without litigation funding, the case likely would not have been brought at all and the claimant group would have received no compensation.
12. By way of further example, Woodsford is currently funding another securities class action in Australia (*Yong v Westpac Banking Corporation*) which, if successful, would result in the claimants receiving an even higher proportion of any resolution sum than in *Vocus*. The funding commission in this case is as low as it is as a direct result of the increased competition that has occurred in recent times in the Australian litigation funding market. Two global litigation funders – Woodsford and Burford Capital – funded separate but overlapping claims against Westpac and the potential group members had a choice of which action to join. The market ultimately determined the preferred action, including by reference to the price of the proposed commission. Such competition between funders generally leads to better, more remunerative outcomes for claimants. If significant barriers to entry to the litigation funding market are introduced, such as overly complex regulation and/or licensing regimes, this healthy competition between an increased number of funders will likely diminish and result in funding commissions increasing to former (higher) levels and worse outcomes for claimants.
13. The appropriateness of funding commissions has recently garnered some commentary in claims being heard in the Competition Appeals Tribunal in England. In *Walter Hugh Merricks v MasterCard Incorporated & Others* an argument was put forward by the proposed defendants that the Tribunal was not in a position to determine whether the price for litigation funding obtained by the proposed class representative in that case was appropriate. Citing the case of *Essar v Norscot*, another English case funded by Woodsford, the Tribunal disagreed, finding “as for the supposed difficulty of the lack of expertise of the Tribunal in deciding what is an appropriate price for litigation funding, on which Mr Williams sought to rely, that is no less novel a task than the process of approving a collective settlement under sects 49A or 49B Competition Act. There is now a developing market in litigation funding, and the Tribunal can if necessary hear evidence as to what would represent

*an appropriate return. We note that this appears to be what Sir Philip Otton did as the arbitrator faced with such a question in the Essar Oilfields case.”* Similarly, we submit that the Australian Court is both well-able and well-placed to assess, and where appropriate alter, the level of litigation funding commissions and net returns to group members.

*The impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders*

14. As noted above in respect of the *Vocus* matter, without litigation funding, there would have been no class action, group members (i.e. the victims of the wrongdoing) would have received nothing and *Vocus* would have suffered no financial consequences for its wrongdoing. Litigation funding is required to ensure that victims have access to justice and equality of arms against far better resourced opponents. In this way, class actions perform a crucial role in privately regulating the conduct of big corporations and ensuring that they act lawfully and are brought to account when they do not.
15. The starting position, when considering the net return that group members receive from a class action, should therefore be that absent the class action, and absent the litigation funding required to bring that class action, group members may have received nothing.
16. In our submission, Australia already has the two most important tools required to keep a check on the price of litigation funding and to ensure that claimants in class actions get a fair share of the proceeds of litigation. First, there is a competitive litigation funding market, with several local and international litigation funders, including Woodsford, which encourages funders to price as competitively as possible. Second, Australia has one of the most sophisticated judiciaries in the world, well able and demonstrably willing to exercise oversight of class actions, settlements and litigation funding returns.

*The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers’ duties to their clients*

17. Woodsford, like all other litigation funders operating in Australia, are required (by ASIC Regulatory Guide 248) to maintain and comply with a conflicts of interest policy, aimed at avoiding (and dealing with) any conflicts between the interests of a funder, the lawyers and the claimants in any funded proceeding. Our policy can be found [here](#) and we ensure that we comply with this policy at all times. Further, our standard litigation funding agreements provide that where the claimants’ interests and/or instructions diverge from the funder’s interests and/or instructions, the lawyers give preference to the clients’ interests. In our experience, that is a standard provision in most (if not all) funding agreements in relation to Australian class actions. Taken together, Regulatory Guide 248, lawyers’ own professional

obligations, and the relevant provisions of our litigation funding agreement are, in our view, sufficient to ensure that the relationships between funder, lawyers and claimants do not impact on the claimants' lawyers' duties to their client, including the duty to act in the best interests of their clients.

*The Australian financial services regulatory regime and its application to litigation funding*

18. The current Australian financial services regulatory regime is, in our submission, not well suited to any potential regulation of litigation funding or class actions. Class actions are unlike most (if not all) other types of Managed Investment Scheme covered by the Australian financial services regulatory regime. Class actions are a collective litigation process, which in our submission is best overseen and monitored (or 'regulated') by a Court that is familiar with the litigation process. We therefore support the ALRC's recommendation to continue to leave the 'regulation' of litigation funding and class actions in the hands of the Court.

*The regulation and oversight of the litigation funding industry and litigation funding agreements*

19. We support the ALRC's findings on this point. Further regulation of litigation funders would be inappropriate and unnecessary. We note also the previously stated position of ASIC that it considers it appropriate to leave the 'regulation' of litigation funders (and funding) to the Courts, as they are best placed to assess and monitor any issues that might arise. Litigation funders already operate in a hyper-scrutinised environment: (1) funders (including Woodsford) are, for the most part, staffed with lawyers that have their own regulatory obligations; (2) class action lawyers are subject to their own regulatory obligations; and (3) funded matters are heard before Courts and Tribunals that are capable of monitoring and assessing the conduct of litigation funders and responding accordingly (for example by making costs orders against funders and/or reducing the amount of a funder's commission if considered necessary).
20. Further, despite third-party funding of litigation and arbitration now being a well-established industry, there have been remarkably few disputes (for example, between funders and their funded counterparts) or reported problems when compared to other financial industries. We would therefore urge caution when deciding whether or not to regulate an industry which has demonstrated no need for regulation.

*The application of common fund orders and similar arrangements in class actions*

21. Woodsford is strongly in favour of the Court having the power to grant Common Fund Orders (CFO). CFOs have been granted in a relatively large number of cases since the 2016 decision in *Money Max v QBE* and they have resulted in the class actions funding market in Australia becoming more competitive, which in turn has led to more competitive pricing and a greater net return to group members. CFOs also ensure that 'opt-in' style 'bookbuilding' of claimant

groups is not required, which is particularly important for collective redress regimes that are based on an 'opt-out' or 'open class' model and that seek to compensate an entire class of victims of a wrong doing rather than just those claimants that choose to 'opt-in'.

22. The recent decision of the Australian High Court of Australia in *BMW v Brewster* has cast doubt on whether the Court has a power to make CFOs at the resolution of a class action under section 33V of the Federal Court Act. Some Federal Court judges have since formed the view that such a power does exist (for example, Murphy J in *Pearson v State of Queensland (No 2) [2020] FCA 619* and *Uren v RMBL Investments Ltd & Anor (No 2) [2020] FCA 647*, Beach J in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3) [2020] FCA 461* and Moshinsky J in *Vocus*, but others have reached a contrary view (for example, Foster J in *Cantor v Audi Australia Pty Limited (No 5) [2020] FCA 637*). We submit that urgent clarity is required, ideally through the introduction of legislation expressly permitting the Court to make CFOs.

#### *Factors driving the increasing prevalence of class action proceedings in Australia*

23. If class actions are increasingly prevalent in Australia (which appears uncertain based on the [research carried out recently by professor Vince Morabito](#)), we consider that to be a sign of claimants having increased access to justice (in part through increased access to funding), which allows claimants to bring defendants that misconduct themselves to account. If any class actions are unmeritorious (and funded actions rarely are given that funders only receive a return in the event of success), the Court acts as a safeguard by denying the claim and ensuring that a defendant is suitably protected and compensated in respect of the costs it may incur in defending such a claim.

#### *The effect of unilateral legislative and regulatory changes to class action procedure and litigation funding*

24. In our submission, the introduction of the mooted legislative and regulatory changes to class action procedure and litigation funding would hinder access to justice for millions of Australians and dampen competition in the Australian litigation funding industry, ultimately resulting in worse outcomes for claimants.

#### *The potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic*

25. This Term of Reference is premised on the (we say incorrect) assumption that Australian class actions involve Australian individuals on claimant side and Australian businesses on defendant side. However, it is not only Australian consumers, employees and 'mum and dad' investors that benefit from Australia's class action regime and the availability of litigation funding. Businesses, including SMEs and institutional investors, benefit from it too, where they (very commonly) suffer losses at the hands of much larger companies and/or banks. Using litigation

funding, such SMEs can 'unlock' viable and meritorious litigation claims that might otherwise be stymied due to a lack of funds and 'level the playing field' against the better-resourced adversaries that have wronged them. For example, in the case of *Essar v Norscot*, Woodsford funded a small business that had suffered significant loss at the hands of a much larger business. It was a paradigm example of a 'David v Goliath' contest, which the claimant would not have been able to pursue absent litigation funding. Funding afforded the claimant in that case 'equality of arms' and resulted in it making a significant recovery from the defendant.

26. In any event, Australian businesses are only likely to face class actions if they misconduct themselves. If they conduct themselves lawfully, they are not likely to face class actions. If an unmeritorious class action is pursued against them, the Courts have the power to ensure that they are suitably protected in respect of the costs they may incur (including by making orders that security for costs be posted and by making costs orders against any litigation funders that support such unmeritorious actions).

*Evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders*

27. One of the most significant developments in the class action and litigation funding space since the ALRC's Inquiry concluded was the High Court's decision in *BMW v Brewster*. As per our submission at paragraph 22 above, we consider that legislation expressly empowering the Court to make Common Fund Orders is urgently required.

**11 June 2020**