

MEDIA RELEASE

Draft Bill to cap class action fees threatens access to justice

Sydney, 30 September 2021 -- Federal Government plans to limit legal fees attached to class actions will threaten access to justice for millions of Australians according to the peak body representing funders of shareholder and consumer class actions.

Plans to limit fees are set out in a Draft Exposure Bill released by Treasurer Josh Frydenberg and Attorney General Michaelia Cash today.

Under the proposed Bill a presumed cap of 30% will be placed on the payout of fees to litigation funders and lawyers involved in successful class actions. The Bill also proposes to eliminate Common Fund Orders, which automatically bring all potential claimants under the umbrella of a class action.

Chair of the Association of Litigation Funders of Australia (ALFA), John Walker, said that while the Government claimed the Bill would increase returns to claimants its effect would be the opposite.

"To be clear, this Bill is about making life easier for company directors and executives by shielding them from the legal consequences of negligence or wrongdoing resulting in financial or physical harm to Australians," Mr Walker.

"From a funders' and lawyers' perspective, class actions are expensive and risky. For claimants, they are usually the only legal recourse available, and many claimants come from highly disadvantaged groups.

"The effect of this legislation will be to make many class actions unviable and therefore to limit the number of actions filed. That suits the business lobby but leaves consumers and retail shareholders defenceless in the face of corporate wrongdoing. It is easy to conclude that is actually the Government's intention," he said.

PwC research into recent class action settlements cited in ALFA's submission to the Government ahead of the draft Bill being prepared shows that:

- a cap of 30% on total costs would have had implications for 91% of cases, where total costs (both the litigation and funding costs) exceeded 30% of gross proceeds
- in 36% of cases, litigation costs alone exceeded 30% of gross proceeds, which would make these claims unviable if the proposed Bill takes effect.

In its submission ALFA argued that the proposed Bill would diminish access to justice and therefore enforcement of our laws, diminish the deterrent effect created by the laws, increase unlawful Corporate and Government behaviour; and increase the damage caused to millions of Australians by this behaviour.

ALFA argued that if a cap on payouts is to be introduced it should only be set by reference to net proceeds – that is, after the deduction of all litigation costs - rather than on the basis of gross returns. It should also not apply to wholesale or sophisticated claimants or in closed class actions commenced on behalf of people who have entered into funding agreements on an informed basis.

“Fees attached to class actions are reducing naturally as a result of heightened competition among funders and law firms in class actions. This competition is serving the market and bringing about the outcome the Government says it wants, but without undermining the viability of the industry overall,” Mr Walker said.

“There are significant consequences – intended or otherwise - for ordinary Australians and access to justice arising from this proposed Bill. The Government should shelve the bill and start again,” he said.

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**Media contact: Nick Owens, Sefiani Communications Group, 0421 977 062,
nowens@sefiani.com.au**

About ALFA

The Association of Litigation Funders of Australia is a professional body established in April 2018 to enhance the Australian litigation funding market by providing training, education and information about the litigation funding industry, engaging with Government and policymakers to help shape the legal and regulatory framework for litigation funding in Australia and promoting best practice and ethical conduct among litigation funders.

ALFA members comprise: Investor Claim Partner, Litigation Lending Services, Augusta Ventures, Vannin Capital, Balance Legal Capital, Southern Cross Litigation Finance, Ironbark Funding, CASL, Court House Capital and Premier Litigation Funding.