CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

25 January 2012

The Hon Bill Shorten MP
Minister for Financial Services and Superannuation
The Treasury
Langton Crescent
PARKES ACT 2600

Email: classactions@treasury.gov.au

Dear Minister Shorten

Revised draft Corporations Amendment Regulations 2012 (No.)

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our Members are all involved in governance, corporate administration and compliance with the Corporations Act (the Act), with primary responsibility to develop and implement governance frameworks in public listed and public unlisted companies, as well as in private companies.

CSA welcomes the opportunity to comment on the revised draft of the Corporations Amendment Regulations 2012 (No.) relating to funded class actions.

CSA notes from the Explanatory Commentary that the government's main objective in introducing these regulations is to ensure that consumers do not lose this important means of obtaining access to the courts. The government should also be mindful that participants in funded class actions may often be very vulnerable and emotional individuals who require protection and need to be made clearly aware of the consequences facing them of being involved in a funded class action.

As set out in our original submission to the exposure draft, IMF (Australia) Ltd explains the type of conflicts of interest that may arise in the case of a funded class action as follows:[1]

> Conflicts of interest may arise between the funder and the funded litigant which may lead to the litigant's legitimate interest being subordinated to those of the funder or being ignored altogether (for example the funder forces an early and cheap settlement on the litigant in order to improve the funder's cash flow or the litigant refuses to accept a reasonable settlement offer when the funder believes that it would be prudent to do so)....The tripartite relationship between funder, client and lawyer has the potential to create numerous conflicts. This may be of particular significance in multi-party proceedings, where claimants could be more vulnerable to both the funder taking control of the proceedings and to lawyers who fail to sufficiently protect and promote the claimants' interests above their own. This includes the lawyer giving advice on the benefits and risks of the funding proposal — which might be seen to be

[1] IMF (Australia) Ltd ,'Policy Issues in Litigation Funding', Supreme and Federal Court Judges Conference, Hobart, January 2009

> an ethically perilous undertaking if the lawyer is financially dependent on the funder for the litigation to proceed. Further, not only does the lawyer face potential conflicts between the funder's and the client's' interests, there is also a potential conflict between duties owed to different clients if the lawyer is retained by the funder and not directly by the litigants.

As such, CSA again expresses its preference that promoters of funded class actions should be regulated and encourages the government to continue to look at this issue.

In respect of the drafting of the regulations at hand, CSA's submission concentrates on the drafting of Regulation 7.6.01AB which deals with the obligation to maintain written procedures to manage conflicts of interest. While the section is quite detailed, there are a few issues we wish to raise, namely:

- Only 'adequate' arrangements for managing conflicts of interests must be maintained. This is the obligation applying to all AFS licensees providing financial services to retail clients, so litigation funders will be held to the same level as licensees. This appears to CSA to be an inappropriately low threshold requirement. There is a general overall regulatory regime covering a whole range of issues for AFS licensees. In the absence of any such overall framework for litigation funders, CSA believes this would justify the existence of a higher threshold. CSA is of the view that it would be more appropriate to have a requirement to have a higher standard requiring 'reasonable' or 'effective' arrangements to be put in place.

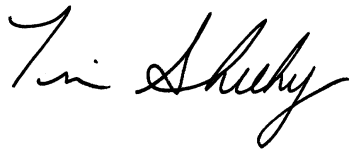
- The regulations require persons to have written procedures for identifying and managing conflicts of interest and for those procedures to be 'effectively' implemented and be reviewed 'regularly'. There is no guidance as to the extent of the procedures or what 'effective' or 'regularly' mean in this context and it is left to senior managers or partners of the entity in question to decide what they may mean. Nor is it clear what level of compliance review or supervision will be taking place to ensure that these requirements are being met.

As set out in our original submission, CSA believes there should also be an obligation to report any material or systemic breaches of these procedures. There should be a requirement that the funder is obliged to lodge with the Australian Securities and Investments Commission (ASIC) a confirmation that they have all those procedures in place (both on an initial and an ongoing basis), so that the regulator can assess the ongoing adequacy of them.

In addition, in terms of notification on an ongoing basis that effective procedures have been maintained, consideration could be given to requiring an independent review, such as an external AUS 810 review by an external auditor that is a special purpose report on the effectiveness of control which is designed to provide a level of assurance or a report of factual findings about the design and operating effectiveness of the procedures.

CSA would be more than happy to discuss this issue further with you.

Yours sincerely



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