

Committee Secretary
Senate Standing Committees on Economics
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Canberra ACT 2600

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17 December 2021

Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

The Committee is invited to accept for consideration the submission of Litigation Lending Services Ltd (**LLS**).

A. Summary of submissions

Whilst we are supportive of class action reform, LLS has substantial concerns:

1. the Government has provided no financial analysis of the impact of the legislation on the economics of:
 - 1.1. The different costs of a shareholder versus a non-shareholder class action including the costs of a bookbuild for shareholder versus a non-shareholder class action.
 - 1.2. The impact of a guaranteed minimum return on the ability for cases to be run.
 - 1.3. The impact of restricting a plaintiff to a budget whilst allowing a defendant to have unlimited resources to hire the best legal and technical teams;
2. how anyone making a submission can have confidence that the Government is conducting a consultative process when Treasury and the Attorney General have not adopted into the Bill that was read in the House of Representatives, the recommendation from their own Parliamentary Joint Committee on Corporations and Financial Services (PJC) in November 2021 that the Chair concluded that “The committee recommends the bill be passed subject to the deletion of the word ‘only’ from s601LG(3)”; and
3. that there are credible concerns that the Bill is unconstitutional.

We draw the Committee’s attention to LLS’s previous submissions to the PJC as well as the Treasurer and Attorney General’s consultation in July and October 2021.

B. Key Submissions

For ease of reference we have adopted the same numbering as in the Summary above.

1. The Government has ignored the financial analysis of the economic impact of the legislation

Despite being referenced in several submissions, the government has largely ignored the findings in the PwC Report titled “*Models for the regulation of returns to litigation funders*” dated 16 March 2021 (**PwC Report**). Among others, the PwC Report made findings that include:

- There are no traditional economic indicators of a market failure in the litigation funding industry.¹ More specifically:
 - the four commonly accepted situations in which market failures exist are not present within the litigation funding industry.² The existence of these factors is a necessary, but not sufficient condition of government intervention. On this basis it is important to query why intervention is now being made. The Committee should consider this carefully and, if necessary, use the PwC Report to conduct its own enquiries.
 - rather than the traditional economic factors creating the need for government intervention, the issues underpinning Recommendation 20 in the “PJCCFS report” appear to be two-fold, being that:
 - the litigation industry is still an immature market;³ and
 - there is a (less than severe) information asymmetry generally, but a more narrow information asymmetry in respect of settlements of class actions.⁴
 - neither of the above two issues are adequately addressed by imposing a standardised cap on litigation funding returns for class actions.⁵
- Third party litigation funding is uniquely risky, over and above ‘normal’ financial investments, which is reflected in the rate of return.⁶ These risks include:

¹ PwC Report, p.9.

² The indicators of market include the existence of “public goods”, “severe information asymmetries”, “externalities”, “spillover” effects of transactions, or “natural monopolies” – see PwC Report at p.9.

Note: the PwC Report stressed that “*There is nothing unusual about the asymmetry of information available to a supplier and a consumer. Many products are complex, difficult to compare, have considerable importance for the well-being of consumers or are provided over a long period of time.*”

³ PwC Report, pp.9-10.

⁴ PwC Report, pp.10-13.

⁵ PwC Report, pp.13 and 17.

⁶ PwC Report, p.20.

- the funding is a non-recourse advance of funds: if the case is lost, the lender loses the entire amount, while the borrower does not owe anything;
- there is no secondary market in the litigation funding industry;
- the litigation funder is not only exposed to losing its investment, but is also exposed to magnified downside risk in the form of an adverse costs (i.e. a court order requiring a party to court proceedings to pay the other party's or parties' costs in relation to court proceedings - which may include fees, disbursements, expenses and remuneration.
- the cost base is uncertain as it is, in part, driven by other parties' actions (ie. the defendant, and the court).⁷ This is also illustrated in in section 1.1 below (see also **Figure 1**).

1.1. The different costs of a shareholder versus a non-shareholder class action, including the costs of a bookbuild for shareholder versus a non-shareholder class action

- LLS provided further information to the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) on 15 November 2021. This was in response to the PJC's request to provide examples of class actions that are either currently before the courts, or have been in the courts in recent years that would, in our view, be unlikely to proceed under the proposed Bill. Included as Attachment A to this information was the outreach program that the legal team conducted for the Mervyn Street v State of Western Australia class action which was court ordered. For ease of reference we have included a copy of Outreach Program Schedule as **Attachment A**.

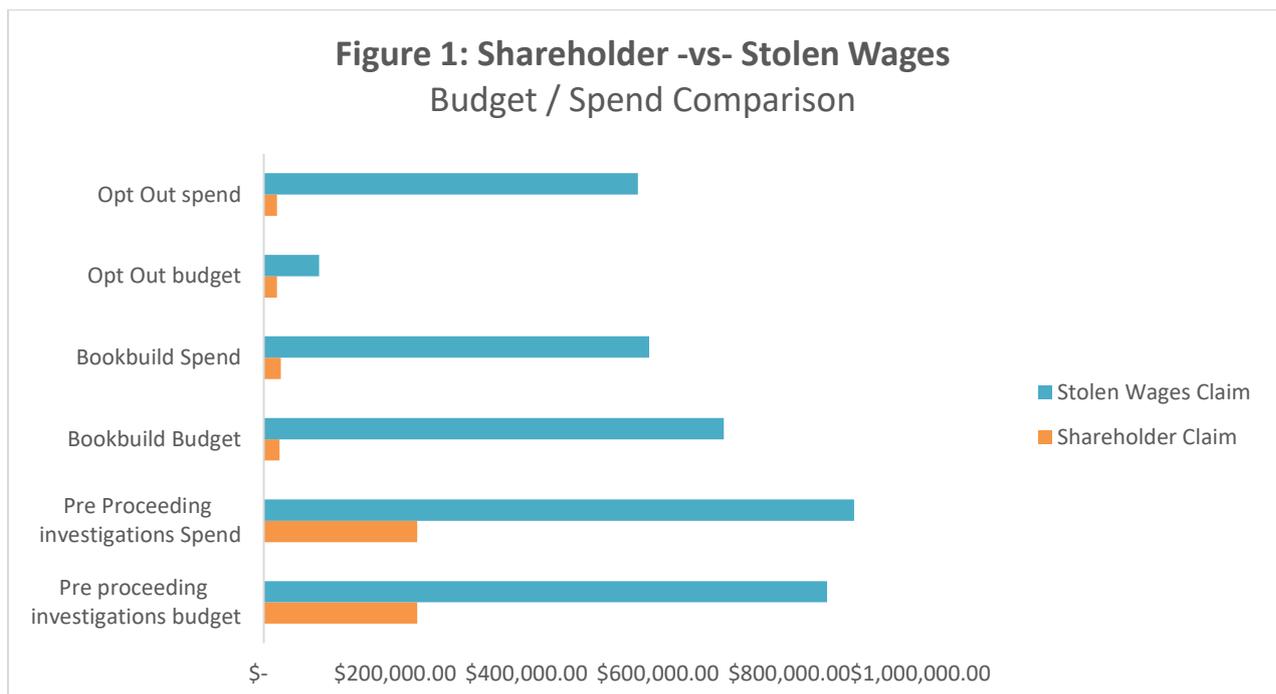
It must be accepted as a matter of logic and rational economic behaviour that the practical impact of the proposed Bill will be that funders will run closed-class, rather than open-class actions. This will be a natural response to the requirement that the LFA is only enforceable if a common fund order is not made in the proceeding. This is also evident in many of the submissions made to the PJC.

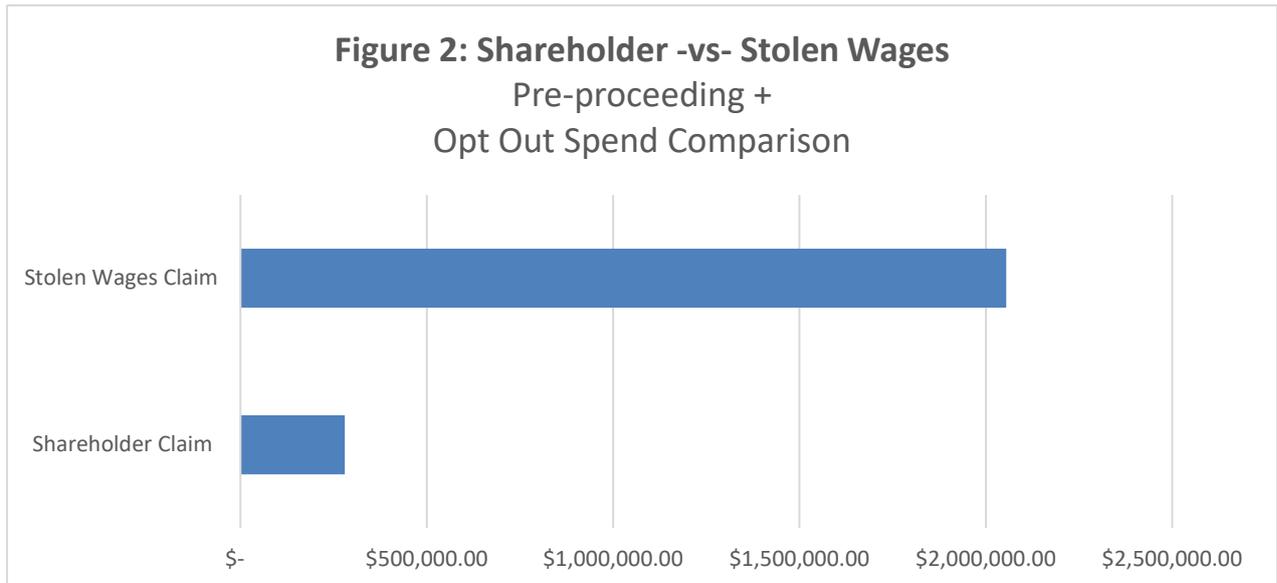
It must be noted that the cost, risk and effort involved in conducting a bookbuild and / or a court-ordered opt out outreach program are significantly more for non-shareholder class actions than shareholder class actions. This is because non-shareholder class actions:

- are generally much more complicated, and capping will most likely lead to no returns for claimants because funders will not take these cases on, especially for ones where it is likely the defendant will adopt delaying/hostile strategies to inflate costs;

⁷ PwC Report, p.20.

- involve claims that are varied and bespoke, novel and complex (negligence, breaches of contract, trust, racial discrimination, etc);
 - that, for example, require proving product liability are expensive and risky (Johnson & Johnson Class Action);
 - require bookbuilds that are inherently more expensive and time consuming. As a practical matter, the identification of victims involves getting out to communities of vulnerable group members where there is no central record of who might be an eligible group member; and
 - claimants may not understand financial literature such as Product Disclosure Statements.
- To illustrate the significant differences in costs as between shareholder and non-shareholder class actions, we have included **Figures 1** and **2** below. These Figures are based on real-life examples for matters in LLS’s portfolio and show that funders can be required to invest approximately ten (10) times the capital simply to investigate a non-shareholder claim, conduct a bookbuild, and convey to the group members their right to opt out of the proceeding.





- In addition, the running of closed class actions is likely to lead to a multiplicity – with overlapping or competing class actions being run. In practical terms, multiplicity can result in increased costs, delay, and uncertainty as well as strategic disadvantages for respondents.⁸

1.2. The impact of a guaranteed minimum return on the ability for cases to be run.

- The PwC Report concluded that:
 - a significant proportion of class actions would not have proceeded under an imposed 30% cap;
 - more specifically, in 36% of reported class actions supported by litigation funders, a 30% cap on gross returns would not have covered the litigation costs (even before consideration of any return to funders);
 - a 30% cap on gross returns to litigation funders will have the effect of reducing the investment by third parties to support class actions; and
 - therefore basis, providing higher returns to some plaintiffs in the manner proposed by the reforms will lead to fewer supported actions, and hence zero returns to other plaintiffs.⁹

We provide the following table to highlight, from an economic/behavioural consequence, the practical outcome of guaranteeing a 70% minimum gross return to claimants for either lower value claims, or claims where the funder considers there is a risk the resolution amount may end up settling for a lower amount. Given the colossal disadvantage the Bill will put the victim’s resourcing compared to the

⁸ King & Wood Mallesons ‘The Review’ Class Actions in Australia 2020/2021 (**KWM Report**) at p.23

⁹ PwC Report, pp.15-17.

defendant's resourcing, how can the Government justify ZERO compensation for those victims impacted by wrongdoing for these claims? **This can be remedied with a costs plus model as previously proposed by LLS.**

Figure 3

A.	Resolution Amount	\$ 10,000,000	\$ 15,000,000	\$ 20,000,000	\$ 25,000,000	\$ 50,000,000
	Legal Costs	(\$4,000,000)	(\$4,000,000)	(\$5,000,000)	(\$5,000,000)	(\$5,000,000)
	Insurance	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)
B.	Total Costs	(\$5,000,000)	(\$5,000,000)	(\$6,000,000)	(\$6,000,000)	(\$6,000,000)
C.	Guaranteed 70% return to Plaintiffs	\$ 7,000,000	\$ 10,500,000	\$ 14,000,000	\$ 17,500,000	\$ 35,000,000
	Gross Return to Funder (A + B - C) prior to any operating expenses	(\$2,000,000)	(\$500,000)	\$0	\$1,500,000	\$9,000,000
	Consequence of Bill	Victims can not get anything as case would not be run	Victims can not get anything as case would not be run	Victims can not get anything as case would not be run	Victims can not get anything as case would not be run	Victims could attract 3rd party funding

1.3. The impact of restricting a Plaintiff to a budget whilst allowing a defendant to have unlimited resources to hire the best legal and technical teams.

- The whole notion of a financially under-resourced plaintiff seeking third party litigation funding is to provide symmetry to that plaintiff to ensure they have all the resources necessary to argue their case. We ask the Committee to justify why they are putting that plaintiff at a colossal disadvantage when they are fighting a defendant who is better resourced and able to deploy a “take no prisoners” approach? **Why is there no regulation of the defendants costs in line with regulation of the plaintiffs costs?**

2. Lack of confidence that the Government is conducting a consultative process or giving proper consideration to industry trends

- 2.1. Recommendation 1 at 2.155 of the PJC report has been ignored. Why?
- 2.2. Further, with the introduction of the Bill that the Government has not considered recent trends in the class action landscape or the impact of the major legislative reform in 2020 regulating litigation funders previously exempt from holding an AFSL and complying with the MIS regime under the Corporations Act. After these legislative changes were introduced, 14 class actions were filed in 2020, with only one involving a litigation funder.¹⁰ In fact ‘while 2020 saw more new filings than ever before, far fewer of those filings were backed by third party funding. Only one-third of 2020 filings are known to have received third-party funding, down from 59% in 2019, 75% in 2018 and an average of 60% in the four years prior.’¹¹
- 2.3. It is clear the Government has not properly analysed or given adequate consideration to current class action industry data and trends. Instead it is choosing to thoughtlessly persevere with an uninformed agenda of reducing funding appetite

¹⁰ Allens Linklaters Class Action Risk 2021 (**Allens Report**) at p. 14.

¹¹ Allens Report at p.7 and see Figure 4 Third Party Funding.

and plaintiffs' ability to access redress through the class action system. Interestingly, the Government's proposed reform is against the backdrop of a rise in Government liability claims, with the number of claims against governments or government-owned entities more than doubling in 2020/2021 compared to 2019/2020.¹²

3. Constitutional concerns

3.1. These have been raised in various highly credible submissions regarding the source of the Commonwealth legislative power to sustain the Bill and that some of the provisions may be beyond that power and we will not repeat the detail of these material concerns here. That said, the additional costs and time delays that will burden case management is an unnecessary expense that is avoidable with proper consideration and resolution of these issues. We have already seen unnecessary costs added in the class action against Stanwell Corporation and CS Energy, where Stanwell unsuccessfully tried to have the claim struck out on the basis that it was an unregistered managed investment scheme and contravened laws passed in 2020.

C. Recommendations

1. We restate our technical recommendations made in our submission to the PJC dated 6 October 2021. For ease of reference, these include:
 - 1.1. The definition of "claim proceeds" in the Bill should be net of legal costs that is, claim proceeds should be the total (net) money obtained for the scheme's general members after deduction of members' legal costs of the proceeding.
 - 1.2. The definition of common fund order in the Bill be amended to exclude Funding Equalisation Orders.
 - 1.3. The wording of section 601LG(3) should be amended such that it reads "*For the purposes of subsection (1), in considering whether the funding agreement's claim proceeds distribution method, or any variation of that method, is fair and reasonable when considering the interests of the scheme's general members as a whole, the Court may have regard to the following factors...*".
 - 1.4. In relation to the rebuttable presumption contained in section 601LG(5), a prescribed list of factors and worked examples (such as those contained in ASIC's regulatory guides and the ATO's practical compliance guidelines) should be provided by Treasury to provide guidance to the Court as to when it would be appropriate for a Court to determine that a return to general members of less than 70% is considered "fair and reasonable".

¹² KWM Report at p.2.

- 1.5. Section 601GA(5)(a) should not be enacted.
2. The Government should carefully consider the overall economic impacts of the Bill and take into account the clear findings in the PwC Report, including the impact that fewer class actions will be funded, meaning zero returns for plaintiffs.
3. As part of 2 above , the Government must bifurcate the treatment of shareholder and non-shareholder class actions in the drafting of the Bill to take into account the significant difference in the costs and risks that third party funders assume in respect of each.

D. Who is LLS?

LLS is an un-listed Australian Public Company, which is majority Australian-owned, pays tax in Australia, and whose employees are all Australian taxpayers. LLS' litigation funding business has been in operation for over 20 years

LLS operates a disputes funding business; it provides funding to third party clients in respect of their solicitor fees, counsel fees, court costs, expert and other costs that are related to court litigation, on a contingent basis. Where the litigation is successful (either via court determination or commercial settlement), LLS receives a share of the client's resolution proceeds calculated either as a multiple of the funding advanced or as a percentage of the resolution amount (as agreed between the client and LSS). This is in addition to the return of its original funding costs. In the alternative event of an unsuccessful outcome, LLS does not seek to recover the funding it has provided and additionally, may also be obligated to pay the opponent party/s costs.

LLS is also conscious that its obligations extend beyond the pecuniary. LLS takes seriously its responsibility to conduct its operations in a manner that affords both fairness to its clients and respect to the integrity of the Australian court system. To that end, LLS is proud that its funded cases have achieved successful outcomes for its clients, that reflect its corporate ethos.

LLS has been a member of the Association of Litigation Funders Australia (**ALFA**) since the ALFA's inception and was instrumental in its establishment.

Stephen Conrad
Chief Executive Officer

Shaun Bonétt
Chairman

Nyunggai Warren Mundine AO
Director

Appendix A – Mervyn Street v State of Western Australia Outreach Program

Information Meetings

To find out more about your entitlements, come to your nearest Information Meeting.

TOWN	DATE	TIME	LOCATION
GOLDFIELDS A			
Kalgoorlie	28 June 2021	10:00AM to 2:00PM	Goldfields Aboriginal Language Centre. 2 Burt St, Boulder WA 6432
Laverton	30 June 2021	10:00AM to 2:00PM	Laverton Community Resource Centre. Augusta St, Laverton WA 6440
Menzies	1 July 2021	11:00AM-3:00PM	Menzies Aboriginal Corporation. 43 Walsh St, Menzies WA 6436
Coolgardie	2 July 2021	10:00AM to 2:00PM	Judumul Aboriginal Corporation. 75 Sylvester St, Coolgardie WA 6429
Esperance	4 July 2021	10:00AM to 2:00PM	Mudjar Aboriginal Corporation. 4 Woods St, Esperance WA 6450
GOLDFIELDS B			
Warburton	14 July 2021	11:00AM to 3:00PM	Warburton Community Store. Warburton Community WA 6431
Wanarn	15 July 2021	10:30AM to 2:00PM	Wanarn Community Store. Wanarn Community, Ngaanyatjarra-Giles WA 0872
Warakurna	16 July 2021	10:00AM to 2:00PM	Warakurna Community. Ngaanyatjarra-Giles WA 0872
KIMBERLEY (WEST) A			
Broome	2 August 2021	10:00AM to 2:00PM	Broome Circle. 27 Frederick St (Cnr Weld), Broome WA 6725
Bidayadanga	3 August 2021	10:00AM to 2:00PM	Bidayadanga Community Centre. Lagrange WA 6725
Lombadina/Djarindjin	4 August 2021	10:00AM to 2:00PM	Djarindjin Community Resource Centre
Beagle Bay	5 August 2021	10:00AM to 2:00PM	Beagle Bay Community Office. Beagle Bay Community, 54 Gunburrd Dr, Dampier Peninsula WA 6725
Fitzroy Crossing	7 August 2021	10:00am to 2:00pm	Fitzroy Valley Community Resource Centre. 158 Great Northern Highway, Fitzroy Crossing, WA 6765
KIMBERLEY (WEST) B			
Derby	22 June 2021	10:00AM to 2:00PM	Derby Professional Centre. 2 Clarendon St, Derby WA 6728
Mowanjum	23 June 2021	10:00AM to 2:00PM	Mowanjum Art and Culture Centre. Derby WA 6728
Djimung Nguda/Budulah/Karmarlinunga	24 June 2021	10:00AM to 2:00PM	Winun Ngari Aboriginal Corporation. 145 Loch Street, Derby WA 6728
Pandanus Park	25 June 2021	10:00AM to 2:00PM	Pandanus Park Aboriginal Corporation. Lot 353 Derby Highway, Willare WA 6728
KIMBERLEY (WEST) C			
Looma	1 July 2021	11:00AM to 3:00PM	Looma Community Office. Camballin WA 6728
Bayulu	2 July 2021	7:00AM to 11:00AM	Bayulu Community Office, St Geroge Ranges WA 6128
Junjuwa	2 July 2021	12:00PM to 3:00PM	Junjuwa Community Office, Fitzroy Crossing WA 6765
Wangkatjungka	3 July 2021	10:00AM to 2:00PM	WANGKATJUNGKA Community Hall, 6765 WA
Kurnangki/Mindi Rardi	4 July 2021	9:00AM to 1:00PM	Kurnangki/Mindi Rardi Community Office, Fitzroy Crossing WA 6765
Muludja	4 July 2021	1:30pm to 4:30pm	Muludja Community Office, St George Ranges WA 6728
Yakanarra	5 July 2021	10:00AM to 2:00PM	Yakanarra Community Office, Yakanarra Community, St George Ranges WA 6728
Yungngora	6 July 2021	11:00AM to 3:00PM	Yungngora Community Office, Mount Hardman WA 6765
SOUTHERN A			
Perth	19 July 2021	10:00AM to 2:00PM	Wadjak Northside Aboriginal Community Centre. 2 Finchley Cres, Balga WA 6061
Northam	20 July 2021	10:00AM to 2:00PM	Northam Recreation Centre. Peel Terrace, Northam WA 6401
Mukinbudin	21 July 2021	10:00AM to 2:00PM	Mukinbudin Community Resource Centre. 8 White St, Mukinbudin WA 6479
Bunbury	23 July 2021	10:00AM to 2:00PM	Bunbury Regional Art Gallery. 64 Wittenoom St, Bunbury WA 6230
Busselton	24 July 2021	8:00AM to 12:00PM	Busselton Community Resource Centre. 21 Cammilleri St, Busselton WA 6280
Manjimup	24 July 2021	1:00PM to 4:00PM	Manjimup Town Centre. Gilbert St, Manjimup WA 6258
Collie	25 July 2021	8:00AM to 11:00AM	Margaretta Wilson Senior Citizens Centre. 105 Forrest Street, Collie, WA 6225 Australia

Information Meetings Continued from overleaf

TOWN	DATE	TIME	LOCATION
SOUTHERN A			
Narrogin	25 July 2021	1:00AM to 4:00PM	KEEDAC Venue. 129 Federal St, Narrogin WA 6312
Katanning	26 July 2021	10:00AM to 2:00PM	Katanning Aboriginal Corporation. 1 Dijon, Katanning WA 6317
Albany	27 July 2021	10:00AM to 2:00PM	Southern Aboriginal Corporation. 54-47 Serpentine Rd, Albany WA 6330
SOUTHERN B			
Kojonup	7 June 2021	11:00AM to 3:00PM	Kojonup Sporting Complex. Ben Parade Hwy, Kojonup WA 6395
Moora	8 June 2021	10:00AM to 2:00PM	Shire of Moora - Town Hall. 34 Padburry St, Moora WA 6410
Morawa	9 June 2021	10:00AM to 2:00PM	Shire of Morawa - Function Room. 26 Windfield St, Morawa WA 6623
Mullewa	10 June 2021	9:00AM-1:00PM	Mullewa Town Hall .8 Jose St, Mellewa WA 6630
PILBARA			
Port Hedland	8 June 2021	10:00AM to 2:00PM	Jimblebar Function Room. Wanangkura Stadium, Hamilton Rd, South Hedland WA 6721
Roebourne	9 June 2021	9AM to 12PM	Roebourne PCYC. Sholl St, Roebourne WA 6718
Mingullatharndo/Cheeditha	9 June 2021	12:30PM to 2PM	Cheeditha Group Aboriginal Corporation. Welcome Street, Roebourne WA 6718
Onslow	11 June 2021	10:00AM to 2:00PM	Ashburton Aboriginal Corporation Office. Unit 4 4/200 Second Avenue Onslow WA 6710
Paraburdoo	13 June 2021	9:30AM to 1:30PM	Karingal Neighbourhood Centre. 88 Anzac Pl, Paraburdoo WA 6754
Tom Price	14 June 2021	10:00AM to 2:00PM	Nintirri Centre (Community Hall). Central Rd, Tom Price WA 6751
Jigalong	15 June 2021	10:00AM to 2:00PM	Jigalong Community Office. Jigalong Community, Newman WA 6753
Nullagine	16 June 2021	10:00AM to 2:00PM	Nullagine Community Resource Centre. 39 Gallop Rd, Nullagine WA 6758
Yandeyarra/Mugarinya	17 June 2021	11AM to 3PM	Yandeyarra Remote Community School. Yandeyarra Rd, Marble Bar WA 6760
MIDWEST			
Geraldton	29 June 2021	10:00AM to 2:00PM	Bundiyarra Aboriginal Community Aboriginal Corporation. Eastward Rd, Geraldton WA 6530
Carnarvon	1 July 2021	9:00AM to 12:00PM	Gwoonwardu Mia. 146 Robinson St, Carnarvon WA 6701
Mungullah	2 July 2021	12:30PM to 2PM	Mungullah Community Aboriginal Corporation. 31 Acacia Way, Greys Plain WA 6701
Burringurrah	4 July 2021	10:00AM to 2:00PM	Burringurrah Community Aboriginal Corporation. Mount Augustus Road, Meekatharra WA 6642
Meekatharra	6 July 2021	10:30AM to 2:30PM	Shire Hall. Main St, Meekatharra WA 6642
Wiluna	7 July 2021	10:30AM to 2:30PM	Youth Centre. 70 Wotton Street, Wiluna WA 6646
Mount Magnet	8 July 2021	10:30AM to 2:30PM	ANZAC Hall. 90 Hepburn Street, Mount Magnet WA 6638
KIMBERLEY EAST			
Kununurra	27 July 2021	10:00AM to 2:00PM	Kununurra Waringarri Aboriginal Corporation. 32 Speargrass Road, Kununurra WA 6743
Wyndham	28 July 2021	10:00AM to 2:00PM	Wyndham Recreation Centre. 6 Koolama St, Wyndham WA 6740
Warmun	29 July 2021	10:00AM to 2:00PM	Warmun Community. Warmun WA 6743
Mardiwah Loop/Lundia	30 July 2021	10:00AM to 2:00PM	Mardiwah Loop Community. Halls Creek WA 6770
Kundat Djaru	31 July 2021	10:00AM to 2:00PM	Kundat Djaru Community Office. Duncan Road WA 6770
Balgo	1 August 2021	10:30AM to 2:30PM	Wirrimanu Aboriginal Corporation. 7 Balgo Community, Halls Creek WA 6770
Halls Creek	2 August 2021	10:00AM to 2:00PM	Halls Creek Community Resource Centre. 29 Thomas Street, Halls Creek WA 6770
Mirima	4 August 2021	9:00AM to 1:00PM	Mirima Dawang Woorlab-gerring Language and Culture Centre, Button Drive (off Speargrass Rd), Kununurra WA 6743

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