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5 November 2021

Attention: The Committee Secretary
The Hon. Andrew Wallace MP
Chair, Parliamentary Joint Committee on Corporations & Financial Services
Parliament House
PO Box 6100
Canberra ACT 2600

By email: **corporations.joint@aph.gov.au**

By facsimile: **(02) 6277 5719**

Dear Mr Wallace

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

This proposed legislation interferes with the funding contracts which willing and ready Group Members in Class Actions have entered into, with Litigation Funders.

Under the draft legislation, people who have not signed up to covering the cost of a Class Action from which they stand to benefit and on which they will ultimately want to cash in, if it is successful, will not ordinarily be liable for the costs for which they have not contracted.

Ordinarily, according to the Government (see Explanatory Memorandum) such Group Members should reap a benefit without having had to contribute, because they did not contract to contribute. They will just get windfall gains unless a Common Fund Order is made – but the Government's draft is set against the making of Common Fund Orders.

As well as interfering with contractual relations, the draft legislation dictates to the judiciary how it should determine what is fair and reasonable in the litigation funding sector, the only financial sector where Court approval for a settlement is already required. Currently, Courts must ensure that any distribution of money from a Settlement Scheme in a Class Action is distributed fairly and equitably, including with respect to the return to the Litigation Funder and the lawyers' costs – without this draft legislation.

The Government's focus is on restricting if not destroying altogether, access to Class Actions for members of the public who cannot afford to access their legal rights any other way.

Yet in a complete paradox, the Government fails to address the continuing operation of "*Shylocks*" and loan sharks in the financial services industry, who remain largely unregulated and the often rapacious practices of the insolvency industry and the lawyers whom they retain.

Costs in Family Law matters continue to run rampant.

The Government, having restricted access to the litigation funding market through regulations introduced in August last year, is now trying further to disincentivise litigation funders from assisting Australian citizens in need of litigation funding support, by undermining the business case for the Litigation Funding of Class Actions.

The Government has still failed to make it clear that self-funded Class Actions, namely, cases where the aggrieved litigants put up their own money to run a Class Action, are not caught by the definition of a Managed Investment Scheme.

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Now dealing with the specific provisions of the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 – "*Proposed Legislation*":

Section 6 of the Proposed Legislation, amending Section 601GA, will likely have the effect of ending "*Opt-in*" Class Actions, which are Class Actions only open to people who have entered into a Funding Agreement by which the clients agree to be bound. The proposed amendments interfere with the freedom of contractual relations.

Section 601LF headed "*Enforceable Funding Agreements etc*" is linguistically confusing in that it deploys the use of double negatives. Additionally, it effectively states that a Funding Agreement will only be enforceable (subject to some other conditions precedent, as well), if the Court does not make a Common Fund Order.

Section 601LF does not make it clear whether a Common Funder may still be available to supplant a Funding Agreement, but it makes it clear that a Common Fund Order does not extend to the reimbursement of the payment of the legal costs of the proceedings. (See the joint operation of Section 601LF (2) (c) and (6).

Section 601LF (7)) adopts a position of neutrality on Common Fund Orders but makes it clear, in Section 601LF (6), that reimbursement of payment of the legal costs to the Funder would not be covered by a Common Funder Order.

Is that intended to mean that the Court cannot make a Funding Equalisation Order (FEO) as well as a Common Fund Order or is it intended that the Common Fund Order would be gross of the legal costs of the proceedings? If so, the provision would be most unfair.

At clause 601LG – "*Approval or variation of claim proceeds distribution method for a Class Action Litigation Funding Scheme*": The proposed legislation imports a "*Fair and reasonable test*". Line 4 of sub-section (3) seeks to fetter the Court by prescribing that the Court must "***only***" have regard to the following factors. This restraint on Court discretion is unreasonable and inappropriate.

Section 601LG (3) (ii) assumes that only the Plaintiffs' lawyers have the ability to minimize or control the cost of the proceedings.

Concerningly, in considering the Government's "*Big Brother*" intervention to fetter freedom of contract (at Section 601LG (3) (f) and (4)), it is envisaged that the Government may make Regulations to further restrict the Courts, as to what they may or may not consider.

Sub-section (5) is quite objectionable in that it imposes an arbitrary percentage which needs to be displaced by the Funder or the Plaintiffs' lawyers in circumstances where the Court has already addressed an exhaustive, mandatory checklist of matters to be taken into account in making a "*fair and reasonable*" determination.

Such a provision as Section 601LG (5) would not be tolerated with respect to the provision of Financial Services or Financial Products in any other sector of the Financial Services Industry and is a clear attempt by the Government to cut off the opportunity to access Litigation Funding for aggrieved citizens for any case with any level of commercial complexity.

Put simply, the legislation is grossly unfair and will effectively ring the death knell for Class Actions involving commercial issues with any level of complexity or requiring substantial discovery or compliance with subpoenas.

The title of the proposed legislation is a misnomer because it is squarely aimed at depriving as many Class Action participants as possible, of access to Litigation Funding, where commercial litigation of any complexity is involved.

It is designed to cripple the ability of Plaintiffs' lawyers adequately to advance "*Litigation Funding Participants*" interests because their supply lines will be exhausted by Defendants' firms churning costs by cunningly deploying arcane rules of legal practice and procedure to undermine the economic rationale for maintaining litigation-funded Class Actions.

The Parliamentary Committee tasked with examining Litigation Funding Class Action reform and legal costs has exposed system abusers on both the Plaintiffs' and Defendants' sides of Class Actions, albeit that there are many instances where there has been no abuse of the system by either side.

As matters stand, the Government's Exposure Draft Bill on Class Action Reform is so one-sided as inevitably to make justice inaccessible to aggrieved persons who simply cannot afford to litigate on their own behalf, if carried.

Defendant wrongdoers in a Class Action contribute at least as much and mostly, more. to the build-up of legal costs which eat into settlement monies at the expense of those who have been wronged in the first place.

Action against wrongdoers through the Class Action process is most important because those most likely to need access to Class Actions are frequently subject to the will or domination of the Defendants, either through abusive contractual relationships or because of the way our society and our financial system have been organised. Those vulnerable people, who are the Group Members in most Class Actions, are small business owners, farmers, Indigenous Australians, Bank, and Insurance customers and Defence personnel. Those people will lose-out from the poorly conceived draft legislation, if enacted.

Defendant "*wrongdoers*"

The proposed legislation does nothing to address the actions of wrongdoers on the Defendants' side of a Class Action, who frequently employ strategies and tactics aimed at delay, obstructing or frustrating access to justice by Plaintiffs.

A wholistic approach to Class Action reform is necessary.

By handicapping only Plaintiffs' lawyers, the legislation is effectuating a massive legal "*gerrymander*" in favour of Defendants. Defendants with deep pockets, particularly big business, the Banks and Government, will be empowered like never before, to thwart just claims by Group Members, deploying the tools of litigation to drag out cases for years, to push up claimants' fees by attrition, to destroy the business case for litigation funders to make a cost-benefit assessment to support deserving plaintiffs.

Frequently:

- the Defendants' legal teams take one (1) legal point after another;
- bring or oppose one (1) Interlocutory Hearing after another;
- make excessive applications for Security for Costs; and
- wage big and expensive fights over every Subpoena, over providing discovery and force all parties to incur millions of dollars in avoidable legal expenses.

Not one (1) large top tier law firm servicing the Defendants' interests (big business, the Banks or Government), will be adversely affected by what is being proposed under these so-called "*reforms*": they will be incentivised by this legislation to tie up their victims up in expensive legal knots, to make representative actions an uneconomical proposition for Plaintiffs' lawyers and funders, denying access to justice for those who have no other means to fund cases to redress wrongs and salvage compensation.

The wrongdoers: unscrupulous business operations, exploitative franchisors, and fraudulent scammers who operate on a large scale – will be the big winners from the Proposed Legislation, if passed.

The 70:30 rule for complex civil litigation is unworkable.

Intimidation

Under the laws as it currently applies, banks, franchisors and large corporations can and do effectively intimidate Group Members during a Class Action by:

- scaring victims out of joining in or signing-up to a Funding Agreement;
- threatening the renewal of their franchise term, to an extension of their Lease or obstructing their ability to sell an asset at a reasonable price on a free market.

- by threatening them with a Cross-Claim and releasing them only if they sign a release of their own claims in a Class Action, without taking into account the lack of equivalence between the value of what is being sought by the victims in the Class Action and what is being demanded by way of release by the wrongdoer.

In the 7-Eleven Class Action, in 2018, the franchisor literally bought off witnesses just ahead of their providing testimony to the Inquiry conducted by this very Committee, by paying an extraordinary premium for their stores in exchange for releases of their Class Action claims, their silence and their integrity. Such practice does not serve the public interest.

Common Fund Orders

Common Fund Orders are desirable: When a case is settled or won, the people who were too scared to join in, finally come forward in great numbers to claim their share, a share to which, without a Common Fund Order, they would otherwise not have had to contribute towards the cost of gaining, with the burden being unfairly borne only by those who had had the courage to commit to the action in the first place.

This is not fair, and free riders should not get free rein.

Book-building is often not possible in the face of the scare tactics and intimidation, commonly brought to bear against Class Action litigants by wrongdoers.

Why this draft legislation is so wrong

It is often the Government, supposed to be a model litigant, who are responsible for running up the costs and protracting litigation, denying Group Members compensation for inordinate periods. The respondents produced twenty-two (22) tranches of discovery throughout the proceedings. This is more than double what would be expected in a large class action.

In *Brett Cattle Co. v Minister for Agriculture* [2020] FCA 732 a judgment was given in favour of live cattle exporters, whose Class Action had run for nine (9) years with many millions of dollars incurred in prosecuting a claim against the Government for its unlawful banning of live cattle exports.

The tactics of the Government through their legal representation was to seek to drain the resources of those supporting the action. Ultimately, the Government will be liable for hundreds of millions of dollars in compensation, demonstrating that the bringing of the Class Action was vindicated by the outcome.

In *Searle v The Commonwealth* [2019] NSWCA 127, it took several years to get the NSW Court of Appeal to decide, three-nil (3-0) that the Defence Establishment could not just break a contract with an enlisted service personnel with impunity and that while such contracts cannot be specifically enforced, they may nevertheless sound in damages.

After two (2) mediations and two (2) major hearings, the Court of Appeal also dismissed the Commonwealth's challenge to the quantum of damages awarded to the Lead Applicant, but the Commonwealth is still intent on challenging the payout to the remaining two-hundred and eighty-five (285)-odd Group Members, so the case drags on.

Were it not for the Litigation Funder, the Marine Trainees, to whom the Court has found the Government is liable, would not be able to press their claim, listed for a damages hearing in 2022.

This case will bring in roughly twenty million dollars ($20,000,000) in damages for three hundred (300)-odd sailors and will finish up costing nearly half of that in legal fees alone, thanks to the Commonwealth Government's pettifogging and delay. The amount that the Commonwealth has been prepared to throw at the case in order to frustrate the Marine Trainees' accessing their compensation is close to the amount of the compensation being sought. Ultimately, the Commonwealth must lose but they have sought to wear down the enlisted men (both current and former) and their Litigation Funder in the process.

These are just two (2) examples which demonstrate just how false and misleading the description of this legislation, "*Improving Outcomes for Litigation Funding Participants*" actually is.

Recommendation

A root and branch review of costs in legal proceedings in general – (the Parliament would do well to review, in particular, the exorbitant costs which are incurred in the flawed Family Law Justice system of which the Hon. Senator Pauline Hanson of One Nation, is Deputy Chair of the Joint Select Committee), is urgently needed.

This draft exposure is no substitute or excuse.

We believe that up to forty percent (40%) of the legal costs for Class Actions could be shaved off by the following reforms:

1. At the outset of a Class Action, require the Federal Court to assess the length and complexity of proceedings to estimate the costs of a class action proportionate to what is at stake. On this basis the Court should then adopt a sliding scale or formula for the staged payment of security for costs by plaintiffs for defendants. A great deal of Court time and millions of dollars in costs are racked up in arguing about security for costs in Class Actions.
2. Strike-out Applications against each other's pleadings. Instead of repeated applications being brought, two (2) dates should be fixed for the hearing of Strike-out Applications (if any): one before the filing of evidence and one after discovery, with any further Strike-out application or amendment applications to be left to the beginning of trial, except in exceptional circumstances.
3. There should be no fewer than two (2) Court-ordered mediations, one (1) after the filing of any Defence and/ or Cross-Claim and the other, after evidence and discovery.
4. Introduce a mandatory protocol which prohibits Defendants from pressuring Group Members into giving up their rights without adequate compensation and legal protection.
5. There should be a limit on the amount which a subpoenaed party can claim for production of documents prior to trial, of one hundred thousand dollars ($100,000.00) with any additional sum only to be claimed at the end of the trial, to be determined by the trial Judge, following the witness' compliance.
6. Instead of lay witnesses having to file Affidavit evidence, as is already the practice adopted by some Federal Court Justices, lay witnesses should only be required to file Outlines of Evidence which then may be tested under Cross-Examination, if the matter proceeds to trial.
7. At a Directions Hearing, per side: no more than one (1) Senior Counsel, one (1) Junior Counsel, one (1) Senior Solicitor and one (1) Junior Solicitor should be entitled to charge for a Court attendance and at trial.
   No more than one (1) Senior Counsel, two (2) Junior Counsel, one (1) Senior Solicitor and two (2) Junior Solicitors should be entitled to charge for their attendance in Court, except in exceptional circumstances. Large Defendants' firms often have a huge team of lawyers in Court which adds massively to the costs, not least because of the need of the Plaintiffs to match the resources of the opposing legal team, mostly by accessing litigation funding.
8. There should be no impediment or obstacle to group members' self-funding litigation.

Conclusion

Law reform in litigation, not just but particularly in Class Action litigation, is desirable in order to reduce the costs of litigation. The law cannot just hamstring Plaintiffs' lawyers. That gives an unfair advantage to Defendants and wrongdoers (often one and the same) on an unlevel playing field and compromises our system of justice.

Access to justice should be optimised, not compromised.

Yours Sincerely
LEVITT ROBINSON

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