Parliamentary Joint Committee on Corporations and Financial Services
Answers to Questions on Notice
Public Hearing: Friday, 12 November 2021

T60 Pt02: In response to a question from Mr. Hill on 12 November 2021:

Transcript:
Mr. HILL: A number of you talked about the fact that a perverse impact - or perhaps the intended impact, depending on your perspective - will be that meritorious claims that could currently proceed won't proceed. You might want this question on notice. I've asked other witnesses about this throughout the day. This is a really complex area and it's difficult, I think, for lay people or media or many others - indeed, everyday Australians - to understand what it might mean.

Question:
Can you provide us with any other illustrations of actual cases that would not have proceeded, in your view, had this regime been in place? I think it would be really helpful to illustrate the point. The litigation funders were going to have a look, given the work that PwC did for them that assessed that about 36 per cent of cases would not have proceeded if this regime had been in place. But any view that you had as well - given, Mr Watson, you don't use litigation funders, but you may have a broader view - would be really helpful, just to try and illustrate it in a practical real-world sense.

Answer:
Shine Lawyers cannot definitively state whether cases would ***not*** have proceeded as these cases are funded and a funder may take a view different to Shine. However, we submit that the following cases are examples of matters which are *unlikely* to have been funded if the Bill was in effect at the material time. The running of these matters would fall to large plaintiff firms like Shine Lawyers to run on a no-win-no-fee basis. As previously submitted, even larger plaintiff law firms are restricted with the number of cases that can be conducted 'off balance sheet' and as such, some of these cases may not have been possible for plaintiff firms to run.

The following cases are/were funded and relate to allegations for common law and statutory breaches of duties in respect of the provision of financial services, each involving tens of thousands of group members, some of which have arisen following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry:

(a) Gregory John Lenthall & Anor v Westpac Banking Corporation ABN 33 007 457 141 & Anor;[1]
(b) Nigel Peter Stack & Ors v AMP Financial Planning Pty Limited & Ors;[2]
(c) Edward Thomas & Anor v Commonwealth Financial Planning Limited & Ors;[3] and
(d) Simon Mallia v Colonial First State Investments Ltd & Anor.[4]

Each of the claims of individual group members in the above cases are modest being less than $20,000 each. Each case has more than 50,000 group members and up to hundreds of

[1] (Federal Court of Australia, NSD1812/2017, commenced 12 October 2017).
[2] (Federal Court of Australia, VID489/2020, commenced 23 July 2020).
[3] (Federal Court of Australia, VID559/2020, commenced 21 August 2020).
[4] (Federal Court of Australia, VID28/2020, commenced 22 January 2020).

thousands of group members. Collectively the claims are worth at least many tens of millions of dollars and in some cases hundreds of millions of dollars.

Parliamentary Joint Committee on Corporations and Financial Services
Answers to Questions on Notice
Public Hearing: Friday, 12 November 2021

T60 Pt08: In response to a question from The Chair on 12 November 2021:

Question:
Chair: Can you just take that on notice? If there are any other points that occur to you, it would be helpful to receive them by Monday or Tuesday by way of additional clauses, because at least some members of the committee may give that consideration - suboptimal, as it is.

Answer:
Our primary submission is that subsection 601LG(3) of the Bill should not limit the Court's discretion. Accordingly, the word "only" should be deleted. This ensures that the Court will consider the criteria listed in subsection 601LG(3) and any other relevant matters that fall outside the criteria to ensure that the claim proceeds distribution method is 'fair and reasonable.' In terms of additional criteria, Shine Lawyers recommend the inclusion of the following at subsection 601LG(3):

a) The financial position of the respondent(s) at settlement approval or judgement, including their ability for payment; and
b) The likely financial return to all group members had the matter proceeded to trial and judgment handed down.

Parliamentary Joint Committee on Corporations and Financial Services
Answers to Questions on Notice
Public Hearing: Friday, 12 November 2021

T60 Pt09: In response to a statement by Senator O'Neill on 12 November 2021, The Chair made the following question (highlighted):

Transcript:
Senator O'Neill: First of all, I thank you so much for your submissions, for your passionate evidence and for your articulation of the need to stand up for Australians who find themselves in all sorts of situations they never thought were going to happen. You advance those for them and you bring them that expertise. As a woman, I particularly want to acknowledge here today the case against Johnson & Johnson of vaginal mesh. I was on another inquiry in the House of Representatives when we looked at this. What happened was just appalling, so class actions are a very, very important part of the ecosystem for accessing justice. Many concerns have been raised with us today. We're about to ask questions of ASIC and the Attorney-General's Department. Given the limited time, could I ask you to put on the record your views about what's going on with the managed investment scheme structure, which was previously rejected wholesale by ASIC?
It had been seemingly forced on them by the government and now is, in some shape or form, being proposed to proceed. Also, there is the issue of common fund orders. What are your thoughts on those two critical issues?

Question:
CHAIR: I will ask you to take those two questions from Senator O'Neill on notice. Is that what you're asking for, Senator O'Neill? Are you happy with that?

Answer:
Consistent with the submissions made by Shine Lawyers and others, the funding of class action litigation is totally inappropriate to be treated as a managed investment scheme both for matters of principle and practical matters. Our submissions in relation to the matters of principle that apply in this case are set out in [44] to [51] our submissions to this Committee dated 11 June 2020, in respect of Litigation Funding and the Regulation of the Class Action Industry.
In essence the stated outcome of the Government to improve transparency and outcomes for group members, when removing the relaxation applying to funded class actions is not being achieved because transparency as to funding terms was already in place and outcomes from group members has been diminished because of the increased costs of compliance with these measures. Practically, it is taking considerable time and expense for managed investments schemes to be registered. We have experience of having to wait for cases to be filed because of this delay.

In relation to Common Fund Orders we refer the committee to our submissions set out in [52] to [59] of our submissions to this Committee dated 11 June 2020, in respect of Litigation Funding and the Regulation of the Class Action Industry and [20] to [25] our recent submissions dated 5 November 2021. The current proposal leaves the position in relation to common fund orders unclear and uncertain. It also leads to gross unfairness as between group members in the one action. Assuming that a funder does decide to fund an open class action, with some group members becoming members and other not, then those who are members will pay for all the costs of the action (as the funder cannot seek a common fund order or funding equalisation order if they want to enforce their funding agreement under s601LF) and those group members who did not become members will not have to contribute to any of the costs of the funder. That clearly gives rise to gross unfairness and inequality between group members.