SHINE LAWYERS


# Submissions to Committee Secretary Parliamentary Joint Committee on Corporations and Financial Services

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

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RIGHT WRONG.

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**Inquiry into Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 - Submissions by Shine Lawyers**

## A. Introduction

1. Shine Lawyers appreciates the opportunity to provide submissions to the Parliamentary Joint Committee on Corporations and Financial Services (**PJCCFS**) in respect of the inquiry into the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (**Bill**).

2. Shine Lawyers are concerned that the Bill, if passed in its current form, will cut directly across its stated objective, namely to improve the outcomes for litigation funding participants by *ensur*[ing] *that returns to litigation funders out of the claim proceeds of a scheme are fair and reasonable*,[1] particularly as between group members. Additionally, these proposals will raise significant barriers for Australians to gain *access to justice*, will increase the *costs of proceedings*, and cause inefficient *use of Court resources*.

3. Shine Lawyers are also concerned that the Bill, in its current form, is in many respects unclear and uncertain. This will inevitably lead to unnecessary and avoidable litigation, ancillary and unconnected to the central issues in dispute between the parties to class action litigation.

## B. Executive Summary

4. Shine Lawyers strongly urges the Government to reconsider the proposals that:

   4.1. require group members to provide written consent to participate in a class action litigation funding scheme;[2]

   4.2. restrict the availability of common fund orders (**CFO**) with respect to litigation funding agreements;[3]

[1] Explanatory Memorandum, Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Cth) 3 (**Explanatory Memorandum**).
[2] Bill, Schedule 1, item 4.
[3] Bill, Schedule 1, item 5, sub-cll 601LF(2)(c), 601LF(3)(d) and 601LF(4)(d).

4.3. define 'claim proceeds' to include the 'total remedies' obtained for one or more of the schemes members calculated on a gross (rather than net) basis and 'each award for legal costs'[4]; and

4.4. cap the commission payable to funders.[5]

5. These proposals do nothing to ensure that the distribution of claim proceeds will be *fair and reasonable* and indeed in some cases will ensure that the distributions of claim proceeds *will not* be fair and reasonable.

6. An important and unintended consequence of the proposals in respect of written consent and restricting CFOs[6] is that funded class actions would become far more likely to be commenced as "closed class" proceedings. Among other things this will:

6.1. increase the need for "book building", which is an expensive and time-consuming undertaking;

6.2. increase the proportion of costs borne by members of the class, as costs are spread between a smaller numbers of group members compared to an "open class";

6.3. increase the likelihood of separate claims being brought by claimants who did not sign a funding agreement and were not part of the "closed class" (leading to more, not less, class actions and to duplication of costs for both claimants and defendants);

6.4. lead to unfair outcomes between group members; and

6.5. increase barriers to negotiating settlements, as defendants place a very high value on finality when reaching a settlement.

7. A cap on returns to entities who are not members of the scheme[7] will mean that:

7.1. only high value claims will be funded resulting in lower value claims not proceeding at all, or being undertaken by plaintiff law firms; and

7.2. defendants will pursue the defence in cases in a way that will drive up legal costs with a view to making a case financially unmeritorious to pursue even in cases of clear wrongdoing by the defendant.

8. The Bill in its current form is contrary to the best interests of group members because it:

8.1. will result in even greater uncertainty than the Exposure Draft Bill;

8.2. is contrary to the desire of finality that all parties to class action litigation seek; and

[4] Bill, Schedule 1, item 1, cl 9.
[5] Bill, Schedule 1, item 1 cl 9; item 5 sub-cl 601LG(5).
[6] Referred to in [4(a)] and [34(b)] of these submissions.
[7] Bill, Schedule 1, sub-cl601LG(5).

8.3. is contrary to the administration of justice because of the avoidable and unnecessary ancillary litigation that will occur if this Bill becomes law.

9. For these reasons, it is clear that the Bill must be referred to the Senate Legislation Committee who is best placed, in our submission, to address all matters that follow from the Bill.

## C. Key Concerns

Written Consent

10. Open class proceedings are an essential feature of the class action regime as they protect the interests of group members who would otherwise be unaware of their right to litigate their claim(s) and/or face barriers in providing active consent,[8] and to ensure that defendants can achieve finality in a single proceeding.

11. The ALRC supports the concept of open class proceedings, as demonstrated by its recommended that Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) be amended to ensure that all representative proceedings be initiated as open class.[9] The intention of this recommendation is for the class action regime to revert back to its original design, namely for class actions to be initiated on an open basis, thereby ". . . improv[ing] access to justice by enabling all victims of a civil wrong to participate in the class action and not just those who take active steps to join."[10]

12. The Bill, if passed, will require eligible group members of a funded class action to provide written consent to participate in a class action litigation funding scheme.[11] Practically, this will lead to funded class actions being commenced as "closed class" proceedings so as to eliminate so-called "free riders", who would otherwise benefit from the class action but would not contribute to its funding by requirement claimants to enter into the class action litigation scheme and litigation funding agreement if they wish to participate in the proceedings.

13. Whilst a class action may be commenced as an open class, the implication of only some group members providing written consent to participate in the class action litigation funding scheme and contributing commission to the funder, is that it will create inequality between group members, with the "free riders" necessarily receiving greater proceeds than those members who have given their consent and contributed to the commission of

[8] Commonwealth, *Parliamentary* Debates, House of Representatives, 14 November 1991, 3174–3175 (Michael Duffy, Attorney-General) (**Duffy House of Representatives Speech**); Australian Law Reform Commission, *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 89 [4.1]; 90 [4.4]–[4.5] (**ALRC Report**).
[9] ALRC Report, 90 Recommendation 1.
[10] Ibid 90 [4.1].
[11] Bill, Schedule 1, cl 4.

the funder. Such inequality between group members would not represent *a fair and reasonable distribution of class action proceeds in proceedings involving third party litigation funders*, which is the stated objective of the Bill.

14. Shine Lawyers emphasises and agrees with the Australian Law Reform Commission's (**ALRC**) concerns in respect of a consent model, in particular:

    14.1. any finding of liability of a respondent will only be binding on group members who have consented to being part of the proceeding;[12]

    14.2. there is a risk of group members not being made aware of the proceeding and effectively being deprived of the opportunity to participate;[13]

    14.3. an affected person could subsequently seek relief against the respondent for the same cause of action of the "closed" proceedings, which could be recontested by the respondent[14];

    14.4. in respect of respondents with limited funds, a closed class may deplete those funds leaving group members who did not consent, without recourse to those funds[15];

    14.5. the impact of the proportion of the costs of the proceeding, which would otherwise be spread across all group members in an open class;[16] and

    14.6. the uncertainty for respondents arising out of the prospect of additional claims, if only group members of the closed class proceeding have their claims settled.[17]

15. Shine Lawyers further notes that obtaining written consent from claimants will likely necessitate a "book build" as a pre-requisite to the commencement of an action, which is a highly expensive and time-consuming process, often requiring hundreds or thousands of potential claimants to be contacted, whom are frequently not known to, or are unable to be contacted by the claimants.

16. The practical implication is that book building not only *increases costs of proceedings*,[18] it also presents a *barrier to access to justice* where potential group members are unable to be identified or contacted, and in circumstances where there are logistical difficulties in group members providing written consent. This outcome is clearly not in the best interests of group members.

[12] ALRC Report (n 6) 35 [1.55].
[13] Ibid 90 [4.5].
[14] Ibid 35 [1.55].
[15] Ibid 35 [1.56].
[16] Ibid.
[17] Ibid 248 [8.52].
[18] Particularly if it is intended that claimants must join a class action litigation funding scheme prior to the commencement of the proceeding, or by an early stage of it.

17. This presents severe disadvantages for bringing important cases on behalf of marginalised Australians where there can be numerous logistical difficulties in meeting the requirement for written consent.

18. The likely increase in "closed class" proceedings,[19] creates the risk that parties will experience greater difficulty in negotiating a settlement, leading to more matters proceeding to trial. This is due to the need for defendants to assess additional risk exposure in the context of potential further litigation, relating to the same facts and issues, by claimants who have not signed funding agreements and are therefore not group members of the closed class.

19. Such multiplicity and/or an increase in matters proceeding to trial will, contrary to the purpose of the class actions regime, result in *increased costs of proceedings* and *reduced efficiency in the use of Court resources*; a concern recognised by the PJCCFS whom have noted that [s]*eparate and concurrent class actions which litigate the same legal claims, for the same or overlapping class members, against the same defendant, undermine the objectives of the class action regime, which is for a single decision to resolve many claims that are the same or similar*.[20]

Common Fund Orders

20. The Bill seeks to restrict CFOs by introducing a requirement that, for any claim proceeds distribution method to be enforceable in respect of a class action litigation funding scheme, a CFO must not be made.[21] The restriction is unnecessary as the question of *fair and reasonable distribution* of claim proceeds is already managed by the Courts equitably and in a principled manner.

21. Further, the restriction of CFOs fails to engage with the recommendations set out in either the ALRC Report or the PJCCFS Report:

    21.1. It is contrary to recommendation 3 of the ALRC Report, which recommended that the Court be provided with an express statutory power to *make* CFOs;[22] and

    21.2. It does not address recommendation 7 of the PJCCFS Report which pertained to the uncertainty of CFOs arising out of the High Court's decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (2019) 374 ALR 627.

[19] In direct contradiction of recommendation 1 of the ALRC Report (n 6), namely that Part IVA of the *Federal Court of Australia Act 1976* (Cth) be amended so that all representative proceedings are commenced as open class: see ALRC Report (n6) 9.
[20] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry, (Report, December 2018)* (**PJCCFS Report**) xvi.
[21] Bill, Schedule 1, item 5, cl 601LF(2)(c), 601LF(3)(d) and 601LF(4)(d).
[22] ALRC Report (n 6) 9.

22. The Bill, in its current form, fails to address both of these recommendations in that it increases the uncertainty around CFOs by stating that ". . . nothing in this section implies that a Court has the power to make a common fund order."[23]

23. By restricting CFOs, there is an unacceptable risk of so-called "free riders", who benefit from the proceeds of a class action settlement, but who do not enter into litigation funding agreements and contribute to the commissions of the funder. Practically this makes it virtually certain that all funded class actions will be commenced as a "closed class". CFOs are therefore critical to the continuation of funded open class actions.

24. Without CFOs, meritorious claims involving large class sizes (in some cases tens of thousands of eligible claimants), but involving lower individual value claims, are more likely to become uneconomical for funders, which would result in those matters not being progressed at all. For example, many of the individual claims worth less than $20,000 each involving tens of thousands of group members, arising out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry will, in all likelihood, not be brought if this Bill is passed. Such an outcome would give a green light to corporate wrongdoing where the value of individual claims is relatively modest even though there might be tens of thousands of Australians impacted who collectively have claims valued at tens of millions of dollars or more. This is because corporations know that the prospects of having sufficient people sign funding agreements at the outset is challenging and risky for a litigation funder. Denying access to justice to those who have been wronged must not be permitted to become a consequence of the objective of ensuring fair and reasonable distributions of claim proceeds in funded class actions.

25. The position in relation to CFOs is further clouded and uncertain by the introduction of s601LG (6) and (7). The intended effect of these subsections is unclear as stand-alone subsections and as to how they are intended to inter-relate with the other subsections of s601LG.

<u>Returns</u>

26. It is Shine Lawyers' position that the question of *fair and reasonable distribution of class action proceeds* is already managed by the Courts equitable and in a principled manner, and for this reason, there is no need for a cap of the maximum returns to entities who are not members of the scheme (including the funder)[24]. Whilst there have been cases where returns could be deemed excessive, these cases are in the minority and do not warrant statutory intervention, given the consequences outlined below.

[23] Bill, Schedule 1, sub-cl601LF(7).
[24] Bill, Schedule 1, sub-cl601LG(5).

27. Shine Lawyers is concerned that the cap, together with the inclusion of legal costs in the definition of "claim proceeds", will create an obvious unfairness between claimants and the defendants as the extent of the legal costs that can be incurred by each party, particularly in complex claims involving important and novel issues of law, or claims with a value of less than $50million.

28. The practical implication of these subsections gives rise to a real risk that unmeritorious and costly steps in class action proceedings will be taken by defendants with a view to defeating an action not on the merits of the case, but by litigiously frustrating or outspending the claimant, hereby inhibiting the claimant's ability of prosecuting an action in accordance with the overarching purpose to facilitate the just resolution of a proceeding as quickly, inexpensively and efficiently as possible, as set out in Section 37M of the FCA Act.

29. As a result, it is likely that only high value claims will be funded, resulting in lower value claims either being undertaken by plaintiff law firms or not run at all. Even larger plaintiff law firms are restricted as to how many meritorious cases can be conducted 'off balance sheet'. Consequently, an outcome of this Bill will be that access to justice is restricted for group members in lower value claims.

30. These subsections not only cut across the intended objectives of the Bill, but contradict the core principle of the class actions regime, namely enhancing *access to justice*.

## D. Additional concerns

31. Shine Lawyers raises the following additional matter upon which we do not provide substantive commentary or analysis, which we consider will lead to further uncertainty and significant and costly litigation, peripheral to the substantive matters set out above.

32. The definitions of '*funder*' and '*class action litigation funding scheme*' in the Bill[25] clearly encompasses circumstances beyond litigation funding, including not for profit support offered to litigants and co-plaintiffs pooling financial resources to bring litigation. These consequences seem to fall outside the stated objectives of the Bill and if not addressed will cause significant, unintended hardship for group members in a number of circumstances.

## E. Conclusion

33. For the reasons outlined above, Shine Lawyers submits that the Bill, in its current form, will unnecessarily *inhibit access to justice*, *increase the costs of proceedings* and *reduce efficiency in the use of Court resources*. These outcomes are contrary to the very purpose

[25] Bill, Item 5, cl 9AAA.

of the class actions regime and for that reason Shine Lawyers submits that the current approach remains unchanged.

34. Shine Lawyers strongly urges the Committee to recommend that:

34.1. the Bill be referred to a Senate Legislation Committee for proper and fulsome consideration.

34.2. it omit the requirement for group members to provide written consent to participate in a class action litigation funding scheme;

34.3. the Bill be amended to endorse the use of CFOs in class actions practice;

34.4. to amend that the definition of '*claims proceeds'* to be net of legal costs so as to ensure fairness and equity as between claimants and defendants; and

34.5. the Bill be amended to remove the cap on returns.