



Law Council
OF AUSTRALIA

Office of the President

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Mr Andrew Wallace MP
Chair
Parliamentary Joint Committee on
Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Chair

**CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION
FUNDING PARTICIPANTS) BILL 2021**

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Corporations and Financial Services in response to the inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (**Bill**), which proposes amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**).
2. The Law Council acknowledges the assistance of the Class Actions Committee of the Federal Litigation and Dispute Resolution Section (**Class Actions Committee**), the Financial Services Committee of the Business Law Section, and the Law Institute of Victoria in the preparation of this submission.
3. The Law Council would be pleased to appear before the Committee to discuss the issues raised below and any other matters the Committee may wish to raise concerning the Bill.

Overarching position

4. The Law Council notes that the Bill is aimed at improving outcomes for class action plaintiffs by seeking to ensure that group members receive a share of the claim proceeds which is fair and reasonable.
5. The Law Council strongly supports that underlying purpose.
6. The courts already have powers to oversee and control legal and funding fees in class actions. It is a robust, independent framework of powers and discretions to protect the interests of group members. But it can be improved. The Law Council has previously submitted to the Committee that additional oversight by the courts to ensure fair and

reasonable outcomes should be considered.¹ The Law Council considers that clarifying and widening the powers of the courts is the best mechanism to protect group members, without imposing regulations that stifle competition, create uncertainty and other cost for plaintiffs and defendants, and reduce the availability of funding for meritorious claims. The reforms as proposed do not improve the powers of the courts to achieve the stated purpose of the legislation. In some respects, they impose undue limits on the courts' powers.

7. In addition, the reforms proposed by the Bill are particularly complex and are likely to have a range of unintended consequences to the detriment of both group members and respondents, as well as the public interest.
8. In the Law Council's view, the Bill should not proceed in its current form. Rather, it should be the subject of comprehensive consultation with stakeholders to ensure that reform of the regulation of litigation funding can meet the intended purpose of the Bill without impacting on access to justice and generating significant uncertainty.

Timeframe

9. At the outset of the submission, the Law Council notes the unusually short period of time provided for consideration of the Bill. Whilst the Law Council recognises that the Committee's timeline is set by the referral from the House of Representatives, the timeline fails to provide stakeholders with sufficient time to consider the broader impacts of the Bill and the many issues and unintended consequences arising from the current drafting. That problem is exacerbated by the fact that stakeholders were only provided with one week to consider the Exposure Draft version of the Bill released by Treasury on 30 September 2021.
10. No clear justification has been provided for the failure to allow a reasonable time for stakeholder consultation and subsequent evaluation of stakeholder views on important matters with widespread impact.

Adverse consequences for defendants and their insurers

11. Due to its complexity and in some cases ambiguity, the Bill, if enacted, is likely to have effects that are prejudicial to defendants (typically, corporations, company directors and government entities) and their insurers. Those potential consequences include:
 - (a) encouraging significant 'satellite' litigation over the validity, proper interpretation and effect of the proposed provisions;
 - (b) a return to multiple closed class actions combined with lawyer run no-win-no-fee open class actions which will increase costs significantly and make settlement more difficult and uncertain;
 - (c) settlement amounts being driven higher so funders reach an amount which meets the 70/30 presumption while meeting costs and providing a reasonable return to the funder;
 - (d) cases being run against defendants' wishes and despite best efforts to settle because the settlement amount proposed will not deliver a 70 per cent return to members while meeting reasonable costs which have been incurred; and

¹ Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation funding and the regulation of the class action industry* (16 June 2020).

- (e) cases which would otherwise settle, not settling for low amounts (where for instance insurance moneys are largely used up) and so the 70/30 presumption cannot be met with the result being that plaintiffs will pursue individual company directors including through to bankruptcy.
12. To offer just some examples of the disputes that will likely arise for determination:
- (a) the constitutional validity of the provisions;
 - (b) questions as to the interaction between these provisions and other existing Commonwealth, state and territory laws;
 - (c) debates as to whether particular considerations do or do not fall within the strictly limited set of relevant considerations in proposed subsection 601LG(3);
 - (d) issues as to how to deal with multiple class actions in the new environment created by the Bill, including where one of the proceedings is not a managed investment scheme but others are;
 - (e) whether the powers of a state or territory court are 'substantially similar' to those in proposed section 601LG;
 - (f) whether the court has power to make a common fund order as part of settlement approval; and
 - (g) whether a 'plan' is an anti-avoidance plan caught by proposed subsection 9AAA(2), including whether that sub-section would but for subsection (3) effect an acquisition of property otherwise than on just terms.
13. The ingenuity of defendants, plaintiffs and funders, and the evolution of the funding market, will inevitably throw up a plethora of other issues. All disputes of this kind add costs to a system that if anything is already too costly. Those costs are ultimately borne, in the most part, by defendants and their insurers, as well as by group members and the public via the costs of the court system.
14. Reforms should, so far as possible, be simple, clear and avoid the creation of rules that invite a multiplicity of occasions for argument. The proposed Bill does not satisfy these criteria.

Shift to a closed-class system

15. Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) which contains the federal class action regime operates on the default basis of an opt-out structure. Under this system a class action can be commenced without the express consent of group members (section 33E of the FCA Act). Instead, the class action defines the group (section 33H) and then a court-approved notice is given to group members advising that they may exclude themselves from the proceedings by advising the court (sections 33J and 33X(1)(a)). The opt-out class action is also referred to as an open class action.

16. The opt-out structure was recommended by the Australian Law Reform Commission (**ALRC**) because it promotes access to justice and efficiency. Group members who cannot be identified at the outset or who are unable to elect affirmatively to participate due to social or economic barriers are not excluded from the legal system and a potential remedy.² That is particularly important for large classes of potential claimants in rural, regional and remote, Aboriginal and Torres Strait Islander and/or culturally and linguistically diverse communities and for those with disability. The opt-out approach also promotes efficiency by including all group members at the outset and binding them, unless they opt-out, to the outcome of the proceedings (section 33ZB of the FCA Act).
17. The Class Actions Committee considers that the opt-out approach promotes finality for the benefit of defendants. The Class Actions Committee notes, for example, where an action has been commenced as a 'closed' class action (i.e. where the group members are confined to those who have signed a funding agreement with the funder) defendants often insist that the proceeding is converted to an open class proceeding as a pre-condition of settlement. The Class Actions Committee consider that only in this way can a defendant settle with confidence that more claims will not emerge in the future.
18. No doubt Parliament had these advantages in mind when it adopted the ALRC's recommendation to structure Part IVA around an opt-out model.³
19. However, the opt-out model meant that unfunded group members could be part of a class action but not have to pay any fee to the funder. The funders initially addressed this 'free-rider' problem by adopting a 'closed class' method of group definition.⁴ That created other problems. The closed class is contrary to access to justice and efficiency as some (maybe many) group members are excluded from the funded class action. They may therefore not claim and be unable to obtain a remedy, unless they are included in a separate, subsequent class action (or other form of proceeding) meaning that multiple proceedings are commenced. The negative consequences of a closed class were addressed through the development of 'common fund orders' which supported the opt-out class action model by permitting the funder to recover a fee from all group members but with that fee subject to court review and approval.⁵ The High Court of Australia subsequently ruled that common fund orders could not be made at the commencement of a class action,⁶ but current case law supports them being available as part of settlement approval.⁷

² Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 14 December 1988) [92], [106]-[107].

³ Commonwealth, *Parliamentary Debates*, House of Representatives, Federal Court of Australia Amendment Bill 1991 (Cth), Second Reading Speech by the Hon Michael Duffy, Attorney-General, 14 November 1991, 3174.

⁴ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

⁵ These developments are discussed in are detail in Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52; and Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 *Australian Law Journal* 655.

⁶ *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

⁷ *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183. An application for special leave to appeal to the High Court was denied: *7-Eleven Stores Pty Ltd v Davaria Pty Limited & Ors* [2021] HCATrans 113 (25 June 2021).

20. The ALRC in its 2018 inquiry into class actions recognised the adverse consequences of a system that encourages a closed class action and recommended that they not be permitted.⁸ The ALRC stated that its recommendation ‘improves 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’.⁹
21. The Bill appears likely to achieve the opposite result. It regulates litigation funding in the class action context in such a way that many funders will likely revert to using closed classes. The Bill does this by creating a ‘class action litigation funding scheme’ which is subject to a variety of requirements. Pursuant to proposed section 601LF this includes that each funding agreement for the scheme is not enforceable unless the court approves the scheme’s claim proceeds distribution method and *does not* make a common fund order.
22. The Bill defines a ‘member’ as a person who holds an interest in the scheme. A claimant mentioned in paragraph 9AAA(1)(a) for the scheme must agree in writing to: (i) be a member of the scheme; and (ii) be bound by the terms of the scheme’s constitution.
23. The Bill necessitates that for the funder to obtain a fee from a claimant, that claimant must be a member of the class action litigation funding scheme that the funder is financing. In short, the Bill provides a powerful financial incentive for litigation funders to bring closed class actions to ensure they comply with the Bill’s requirements and are entitled to be paid.
24. That is contrary to the rationale behind the opt-out class action model which underpins the Commonwealth and State class action laws. It hinders access to justice for those individuals who may face social or economic barriers to opting-in and exposes defendants to the risks and costs of multiple claims, and the lack of finality of outcomes from settlements and judgments.

Increased prevalence of multiple actions

25. As noted above, a likely consequence of the shift away from the current ‘open’ or ‘opt-out’ system will be the increased prevalence of multiple closed classes or a mixture of both closed and open class actions against the same defendant.
26. In the event that there are multiple closed class actions, settlement for corporate defendants and their insurers may be more problematic. It may also encourage the commencement of ‘follow on, open, no win no fee class actions’ following a successful closed class action. This may be preferable for claimants who did not join the initial funded action as they would be able to ‘free-ride’ on the initial action without being required to pay a funder.
27. As matters stand multiple class actions may still be commenced but typically, they are all open class actions, commenced on the basis that a common fund order will ultimately be sought. The courts deal with this issue by various techniques¹⁰ which are made possible, or easier, where all the claims are open classes. The result is that defendants only have to face one claim. The proposed Bill will reverse this dynamic.

⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) Recommendation 1.

⁹ *Ibid* [4.1].

¹⁰ See, e.g. *Wigmans v AMP Ltd* (2021) HCA 7.

28. As such, the Bill may significantly prejudice corporate defendants, company directors and their insurers who would be faced with multiple class actions, increased costs and a near impossibility of efficiently and cost effectively settling all actions.
29. These issues do not arise currently with the opt-out class action regime where usually only one class action proceeds for a particular dispute and there is the opportunity of settling with certainty and finality.

Uncertainty around the availability of common fund orders

30. Recommendation 7 of the Committee's Report *Litigation funding and the regulation of the class action industry* was that 'Australian Government legislate to address uncertainty in relation to common fund orders' arising as a result of the High Court of Australia's decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall*.¹¹
31. The Bill fails to address this uncertainty and the current drafting of the Bill in relation to common fund orders is unclear and confusing.
32. Proposed subsection 601LF(1) states that a funding agreement for a litigation funding scheme that is a managed investment scheme 'is not enforceable and has no effect to the extent that it relates to the scheme's claim proceeds distribution method, unless subsection (2), (3) or (4) applies to the proceedings'.
33. However, subsections 601LF(2)-(4) would explicitly not apply where the relevant court has made a common fund order. That implies that a common fund order might be made. Curiously, proposed subsection 601LF(7) is then included to state that '[t]o avoid doubt, nothing in this section implies that a court has the power to make a common fund order'.
34. This represents a serious failure in the drafting of the Bill. Rather than clarifying the law, the Bill creates confusion.
35. In the Law Council's view, the opportunity should be taken by the Parliament to resolve any uncertainty in relation to common fund orders and positively state that a court has the power to make a common fund order.
36. Experience during the period in which common fund orders were permissible was that the competitive pressure introduced by the common fund order regime and the greater involvement of the courts in setting rates had a significant downward impact on commissions charged and increased the transparency of litigation funding arrangements. In short, competition and market forces combined with court oversight to reduce fees for funders and improve returns for group members, is consistent with the stated purpose of the Bill.

Fair and reasonable test – discretion of the court

37. Proposed subsection 601LG(3) sets out the test that the court must apply in determining 'whether the scheme's claim proceeds distribution method, or any variation of that method, is fair and reasonable when considering the interests of the scheme's members as a whole'. The proposed subsection then lists a set of factors to which the court 'must *only* have regard' (emphasis added).

¹¹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation funding and the regulation of the class action industry* (21 December 2020).

38. It is critical that the court has sufficient discretion to ensure fair, reasonable and just outcomes. Judicial discretion is a vital component of the rule of law, enabling all judicial officers to turn their minds to the individual facts and circumstances of each case that comes before them, to determine what is, in those specific facts and circumstances, a fair and reasonable outcome. The exercise of judicial discretion is critical to doing justice.
39. It is of great concern to the Law Council that the current proposal in the Bill exhaustively prescribes for the court the only factors that it is permitted to consider when determining whether a claim proceeds distribution method, or any variation of that method, is fair and reasonable. Such a proposal, if enacted, would unduly fetter the court's discretion by preventing it from acting as justice requires in a particular case. There are risks that this may produce injustice in some circumstances with unintended consequences that are at odds with the intention of the laws and fundamental principles which underpin the administration of justice.
40. The current drafting of this provision risks prescribing matters today, which may or may not be relevant in the future, rather than allowing courts to have regard to further considerations that may be appropriate in determining whether a claim proceeds distribution is fair and reasonable in the particular circumstances of a case. The limitation may mean a court cannot have regard to a highly relevant matter.
41. The Bill would have a greater compatibility with cardinal principles of the rule of law and the due administration of justice by removing the word 'only' from the drafting of proposed subsection 601LG(3). That would still require the court to consider the listed factors as prescribed by the Parliament, while also allowing the court the discretion to consider other factors that may be relevant in ensuring a fair and reasonable outcome in a particular case. Alternatively, the Law Council would suggest including an additional factor which provides the court with some level of discretion to determine other relevant matters that may arise.

Proposed subsection 601GA(2)

42. Proposed paragraph 601GA(2)(b) states that a court may only approve or vary a claim proceeds distribution method if 'the proceedings are sufficiently progressed to enable the court to determine whether that claim proceeds distribution method, or any variation of that method, is fair and reasonable'.
43. The practical effect of this paragraph may be that a court is unable to approve a settlement in the early stages of a dispute despite this being in the interests of the group members and defendants alike. It has been known for plaintiffs and defendants to negotiate in good faith to achieve an in-principle resolution of a claim soon after or even before proceedings have been commenced. The proposed provision risks stifling the ability of well-advised parties to reach settlements that are in the interests of all concerned. Of course, any settlement requires court approval, on the basis that it is reasonable as regards the parties and group members. No further limitation is necessary.

Effect on availability of funding and competition in the litigation funding and class actions markets

44. The Explanatory Memorandum states that one impact of the Bill is likely to be that '[l]itigation funders may experience a reduced funding appetite, especially in respect of cases in which they would previously have received a windfall return'.¹²
45. That statement seems to involve a basic misunderstanding. Funders achieve a 'windfall return' when the return is disproportionate to the *risk* actually undertaken. That may occur, for example, where a matter is settled very early, before any significant costs have been incurred. If the funder's fees in such a case depend on a common fund order, the fact of settlement at an early stage will be taken into account by the court. But a resolution which involves the funder achieving fees that take the return plus costs over 30 per cent of what is recovered bears no relationship to the idea of a 'windfall'. That may involve nothing more than a fair reflection of the risk undertaken, including the circumstances changing so that while a claim is strong, the ability of the defendant to satisfy it has become poor.
46. More fundamentally, however, there is a significant risk that the Bill would have a tangible deleterious effect on access to justice by reducing the availability of litigation funding and legal services for meritorious cases. There is particular risk that implementing the Bill will disproportionately impact on the availability of litigation funding and legal services for lower value or higher risk actions. Those are often based on common law causes of action arising from faulty products, property damage consequent upon environmental disaster, misleading conduct by financial services providers and institutional abuse. They affect some of the most vulnerable members of the community.¹³ Such an outcome would not be in accordance with the stated objective of improving outcomes for class action members.
47. The above concern arises because of the combination of the definition of 'claim proceeds' (which includes costs) and the provisions concerning the rebuttable presumption the scheme's claim proceeds distribution method is not fair and reasonable if more than 30 per cent of the claim proceeds for the scheme is to be paid or distributed to entities who are not members of the scheme (i.e. are paid to the funder, lawyers and others). Together, these may have the effect of limiting the commercial viability of many otherwise meritorious actions.
48. There are circumstances in which meritorious but complicated actions are brought but due to the complexity of the issues, legal and other costs incurred (leaving aside funding costs) are significant, although in the circumstances, fair, reasonable and proportionate. However, under the reforms proposed in the Bill, where these complicated issues arise and/or where the anticipated claim value is small, it is unlikely that funders (and therefore, many smaller legal firms) will be willing to support an action given the limitation of the 70/30 presumption.
49. It should not be assumed that the power of the court to permit recovery of combined costs and fees in excess of 30 per cent removes the problem. Funders, like any commercial enterprise, weigh up risks and rewards. The risk of having to ask the court for such relief, given its uncertain outcome, will inevitably reduce the willingness of funders to take on cases.

¹² Explanatory Memorandum, Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, 3.

¹³ See, eg, *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237 (an expensive and high-risk environmental class action); *McAlister v New South Wales (No 2)* [2017] FCA 93 and *McAlister v New South Wales (No 3)* [2018] FCA 636 (a relatively low value institutional abuse class action).

50. Alternatively, where funders seek to ameliorate such risks by having a portfolio of claims, they will likely bargain for higher returns on other claims to make up for this risk.
51. In short, the Bill is likely to have the effect of either reducing the availability of funding or increasing funding costs in cases not likely to be affected by the 70/30 restriction, or both.
52. The Law Council also notes the potential effect on choice for the public and competition in the legal services and litigation funding markets whereby some funders may leave the market. That may mean that only some of the larger class actions will be conducted and then only by the larger plaintiff law firms, thereby cementing an oligopoly in that market and restricting consumer choice. The Law Council is concerned that the impact, in actuality, will be that many genuine, socially valuable class actions funded at the margin will not be brought when they otherwise may have been.¹⁴
53. Additionally, it is well understood that class actions fulfil a supporting regulatory role by holding entities to account in circumstances where statutory regulators may be unable or unwilling to do so.¹⁵ Enactment of the Bill in its current form will likely lead to a void that under resourced statutory regulators are not able to fill.

Possible Constitutionality concerns

54. The Law Council is aware that significant constitutionality concerns have been raised in relation to the Bill. Those concerns relate to whether:
 - (a) the corporations power in section 51(xx) of the *Constitution* and/or the referral of state powers to the Commonwealth pursuant to section 51(xxxvii) can support the provisions of the Bill; and
 - (b) provisions of the Bill which purport to apply to state courts not exercising federal jurisdiction offend the *Melbourne Corporation* principle by impairing, curtailing or weakening the capacity of states (and state courts) to exercise their constitutional powers.¹⁶
55. In addition, pursuant to section 109 of the *Constitution*, the provisions of the Bill would prevail over a number of provisions of the class actions legislation enacted in several Australian states (including Victoria, New South Wales and Queensland). Furthermore, insofar as there is an inconsistency between the proposed provisions and provisions of the FCA Act, there may also be an implied repeal of those FCA Act provisions. These are matters of particular significance. The wider implications of the Bill should be the subject of careful consideration including inter-governmental consultation, in particular given that the Commonwealth's legislative power, if any, may depend on a referral of powers by states.
56. In the timeframe provided for submissions, the Law Council has not had the opportunity to consider these issues in depth. However, the Law Council recommends that the Parliament give significant consideration to these issues before the Bill proceeds.

¹⁴ See Vince Morabito and Jarrah Ekstein, *Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study* (2016) 35(1) *Civil Justice Quarterly* 61.

¹⁵ Ben Slade and Jarrah Ekstein, 'Class Actions and Social Justice: achievements and barriers' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 281.

¹⁶ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

57. Should the Bill be enacted, it is likely that a significant level of litigation will result in order to determine the constitutionality issues. That is an undesirable outcome.

Anti-Avoidance

58. The anti-avoidance provision (proposed subsection 9AAA(2)) applies to any person, which would include solicitors, lead applicants and potentially even group members.
59. In that context the obscurity of its scope is a significant issue. It is remarkable, for example, that it combines the subjunctive and the passive voice in a civil penalty provision ('it would be concluded').
60. For this reason, the anti-avoidance provision, if it is to be included at all, should be limited to the funder as operator, not any person who is involved in the 'plan'. Any wider operation of the section should depend on knowing involvement under section 79 of the Corporations Act.

Proposed subsections 601GA(5) and (6)

61. The Bill proposes to insert a new subsections 601GA(5) and (6) into the Corporations Act. The Law Council notes that a subsections 601GA(5) and (6) have already been notionally inserted into the Corporations Act through the Australian Securities and Investments Commission (**ASIC**) *Corporations (Chapter 5C – Miscellaneous Provisions) Instrument 2017/125*.¹⁷ Under that instrument, subsections 601GA(5) and (6) allow the constitution of a registered scheme to include a listing rule consistency provision. Should the Bill proceed, new subsection numbers for subsection 601GA(5) and (6) which is not already in use are required.

Contact

62. If you would like to discuss this matter further, please do not hesitate to contact me directly on 0438 301 956 or jacoba.brasch@lawcouncil.asn.au. Alternatively, please contact John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au if you require further information or clarification.

Yours sincerely

Dr Jacoba Brasch QC
President

¹⁷ ASIC Corporations (Chapter 5C—Miscellaneous Provisions) Instrument 2017/125
<<https://www.legislation.gov.au/Details/F2017L00874>>.