Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021
Submission 9

SUBMISSION TO PJC INQUIRY ON *CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION FUNDING PARTICIPANTS) BILL 2021 (CTH)*

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This submission focuses on the proposals in the *Corporations Amendment (improving Outcomes for Litigation Funding Participants) Bill 2021* ('the changes').

This submission is necessarily short given the time available and so makes relatively short comment.

1. The submitted has previously submitted and/or taken the view that:
    a. licensing of litigation funders as a general principle seems desirable.
    b. AFS licensing has the advantage that the legislative and regulatory infrastructure is there though has the disadvantage that it is somewhat complex.[2]
    c. despite this, treating a funded class action as a managed investment scheme appears to somewhat strain the regulatory framework and may not be the most apt form of regulation.[3]
2. In relation to the specific proposed changes in the above legislation, the 70% across the board presumptive return to group members (maximum 30% to others) may be well intentioned but may have unintended consequences. This is because, while large aggregate claim class actions may still proceed, smaller aggregate claim class actions may not proceed, as they may be less economic for funders and lawyers. This would be unfortunate as the public importance of a proceeding cannot be said to correlate automatically or precisely with the total or aggregate amount of the damages claimed or recovered.
3. Indeed, it can be argued that an action by a smaller group who have suffered large individual losses may be at least as important as a very large group with comparatively small individual losses. For instance, 50 investors who have lost $100,000 each ($5 million total in action) may be quiet a high impact matter. Despite being ten times larger, 50,000 who have lost $1,000 each will certainly be of less

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[2] See Michael J Duffy, "Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory" (2016) 39(1) *University of New South Wales Law Journal* 165.

[3] Ibid.

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impact to the individuals involved despite there being many more of them and the matter being a $50 million total claim.

4. Further, the presumption is something of a blunt instrument as neither the quantum, complexity and quality of legal and funding services can be said to correlate automatically nor precisely with the total or aggregate amount of the damages claimed or recovered.
5. In other words, it may be that smaller class action claims are just as worthy in public importance and indeed can be just as legally complicated as larger ones, yet it is the former that may become uneconomic.
6. In relation to smaller matters it may be that claimants will cease to use the class action procedure and run multiple claims or test cases in order to bypass these MIS rules. The former is likely to lead to increased costs and reductions in court efficiency.
7. Admittedly, the 70% presumption is rebuttable and courts will be able to determine how it might be rebutted and the nature of evidence required [but note that the funder may be required to fund the case against rebuttal also under proposed s601GA(5)(a)(v) and s601GA(6)(b)].
8. Mindful of the above, a slight modification that may have a less chilling effect on smaller class actions might be a rebuttable presumption in relation to distribution of claim proceeds along more of a sliding scale on the following lines:

Scheme Claim Proceeds	Up to $5 million	$5 million to $10 million	$10 million to $250 million	Above $250 million
Unfairness Presumption	Above 49% to be distributed to non scheme members	Above 40% to be distributed to non scheme members	Above 30% to be distributed to non scheme members	Above 25% to be distributed to non scheme members.

(under this proposal, the *quid pro quo* for a higher percentage allowed for small actions is a lower percentage imposed for extremely large recoveries above $250 million).

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Submitter's background

The submitter's background is:

He has been an academic since 2007 and has published extensively in peer reviewed journals on ASIC law, company and shareholder law, class actions and access to civil justice and regulation of quasi (or actual) financial products such as litigation funding and digital currency as well as constitutional law.

He is a lawyer and, before joining Monash, was a Solicitor at Mahony & Galvin (1989-1992) and Senior Associate at Macpherson & Kelley (1992-1999) and Maurice Blackburn Cashman (1999-2004) and a Senior Lawyer with the Australian Securities and Investments Commission (2004-2007). He spent ten years in general commercial litigation acting for plaintiffs and defendants then four years as a plaintiff lawyer in shareholder class actions. At ASIC he worked as a senior enforcement lawyer working on matters including corporate investigation and liquidation, continuous disclosure, insider trading, managed investment schemes and financial services.

He was accredited by the Law Institute as a commercial litigation specialist from 1997 through 2007.

He has consulted to the private sector in relation to managed investment schemes and the structure of representative proceedings. He has also received funding from the private profession to research access to justice issues, takeover law in proprietary companies and public interest relief in shareholder class actions.

He holds bachelor degrees in Law and Commerce and a Masters in Law from the University of Melbourne and a PhD from Monash for his thesis examining the extent to which private securities class actions can provide investor protection from poor securities disclosure, including a comparison with ASIC enforcement in the area.