Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021
Submission 2

OPINION

Issues arising from

Corporations Amendment (Improving Outcomes

for Litigation Funding Participants) Bill 2021

1. In an Opinion dated 6 October 2021 for the Class Actions Committee of the Law Council of Australia we made some observations regarding the discussion draft of this Bill (the **Draft**). We have now been asked by the Class Actions Committee to comment on the Bill as introduced to Parliament (the **Bill**).

2. We outline below a number of issues – some carried over from the Draft, and others new – that appear to us to arise. Some of them are very problematic. We note that a number of them were raised by participants[1] in the online seminar convened by the Australian Academy of Law on 28 October 2021.

3. It is appropriate at the outset to make three overarching comments:

   (a) first, the very title for the Bill identifies its objective as 'improving outcomes' for what might be called 'funded' group members, but the Bill appears to us to create a real risk that meritorious but difficult class actions, that could not be expected to be run without funding, will not be run at all because of the constraints and uncertainties arising from the Bill;

   (b) second, the Bill has the curious effect of taking one detailed statutory regime, namely the 'class action' regime in Part IVA of the *Federal Court of Australia Act 1976 (Cth)* (**FCA Act**) and its cognates in most State jurisdictions, and not merely overlaying but modifying it using a separate regime that was framed for a quite different purpose;

   (c) third, the Bill appears to be directed at corralling class actions either into closed actions limited to funded group members, or else into open actions in which a 'common fund order' is sought – but in the latter regard it does nothing to resolve questions over the availability of CFOs. By that missed opportunity it perpetuates an uncertainty that, if anything, would be expected to drive funders to require closed actions. This is a less draconian impact than (a) above but the effect is similar. It still reduces access to justice for victims, by discouraging actions for unfunded group members, and it still has the important consequence of also limiting the benefits that *defendants* can otherwise obtain

[1] Kate Morgan SC, Justin Gleeson SC, Justice Button of the Supreme Court of Victoria and Nathan Rapoport, Special Counsel, Slater & Gordon. The views which we express in this Opinion do not necessarily reflect the views of participants in the seminar.

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by settling an open action, namely 'ruling a line' under their exposure to claims arising from events with 'group' consequences.

4. We turn to the major issues with the Bill as we see them.

Definition of 'claim proceeds'

5. In proposed s.9, '*claim proceeds*' is now defined to mean *the sum* of:

   (a) the total remedies obtained for one or more of the scheme's members as a result of a judgment made by a court or a settlement agreed, in relation to class proceedings for the scheme plus

   (b) each award of legal costs by the court, and each agreement to pay costs (if any) *in favour of the members* in relation to such proceedings.

6. This wording at least resolves the problem identified in our earlier Opinion, as to whether 'claim proceeds' was inclusive or exclusive of costs.

7. However, the new wording creates more questions, and at least one profoundly serious consequence that does not seem to be acknowledged by the Bill.

Individual settlements

8. First, the definition of 'claim proceeds' would catch individual settlements negotiated directly between a group member and a defendant. These are not uncommon. They do not require court approval and usually will not be known to either the court or the representative plaintiff. They would be caught by the new s.9 definition, but the uncertainty as to whether they have occurred, or on what terms, would bedevil 'group-wide' settlement discussions. The representative plaintiff, its lawyers and any funder would be unable to know whether or how information about earlier individual settlements might come to light and undermine whatever calculations were done for the purpose of assessing the attractiveness of the proposed group-wide settlement.

9. The effect, in short, would be at least to increase the complexity of plaintiff-defendant settlement discussions. Especially where the defendant had included confidentiality provisions in the earlier individual settlement(s), which would be normal, we consider that the effect could only be to increase the complexity, reduce the prospects, and exacerbate the costs of settlement procedures both for plaintiffs and defendants.

'Claim proceeds' – reference to 'costs'

10. Paragraph (b) of the definition of 'claim proceeds' is very odd. It refers to costs awarded or agreed 'in favour of the members'. But in class actions costs are only ordered, and therefore in our experience only ever agreed, in favour of the representative plaintiff. This reflects the special costs rules in s.43(1A) of the FCA Act and its cognates in the State jurisdictions. In short, costs are never awarded or agreed 'in favour of' the group members.

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'Claim proceeds' – serious consequences of aggregating compensation and costs

11. A more major complication is created by the combination of the definition of 'claim proceeds' and the later provisions concerning the rebuttable presumption that the distribution of claim proceeds is not 'fair and reasonable' if more than 30% of those proceeds is to be 'paid or distributed to entities who are not members of the scheme…': see s.601LG(5).

12. Our principal concern here is that it is not infrequently the case that a complex class action might be settled for many tens of millions of dollars, but because of its complexity the legal costs alone – which in almost every case are only recoverable to the extent that they are assessed by independent consultants and approved by the Court as 'reasonable and necessary' – already equate to a substantial portion of the total settlement.

13. Take the example of a modest-sized but complex funded class action:

    (a) it might settle for $50m. On no view is that 'nuisance money'. It plainly reflects an acknowledgement of very substantial legal risk on the part of the defendant;

    (b) but court-assessed costs could quite easily be $8m and the actual 'own side' costs might be $9m – that is, 18% of the total settlement;

    (c) and that $9m reflects perhaps half of the financial risk borne by the funder, since it was also exposed to the risk of an adverse costs order if the claim failed. The defendants' costs will almost certainly at least match those of the plaintiff, so the funder had an $18m risk – and actually much more, if the costs under consideration here reflect only the costs up to mediation and not a full trial;

    (d) but the 70:30 rule[2] means that, of the $50m settlement, $35m is quarantined for the group members. The funder is limited to the remaining $15m, less its actual outlay of $9m;

    (e) the bottom line is that the funder could make a maximum return of $6m on an outlay of $9m and a total risk of $18m – and this is without considering the time-value of those amounts, in circumstances where the litigation was very likely on foot for 2-4 years.

14. The practical effect is likely to be that the Bill will discourage meritorious and quite high-value class actions, if the nature of the claims, or the posture of the defendant, indicate that the action is likely to be complex or hard-fought. Indeed, the definition of 'claim proceeds' rather encourages potential respondents to do everything possible to impress upon potential claimants the vigour with which the litigation will be defended, in the hope that the thin returns likely to be available to the funder *because* of this new definition of 'claim proceeds' will dissuade any funder and stymie the potential claim.

15. Very high value claims of course would still be likely to be brought, but the mid-range and smaller claims – if any class action can sensibly be regarded as 'small' – are likely to be discouraged. This appears to us to be squarely contrary to the 'access to justice' objectives of the Federal and State class action regimes.

[2] In proposed s.601LF(7).

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16. We note for completeness that this chilling effect is not able to be avoided by structuring settlements as 'principal plus costs'. Such a provision would be irrelevant given the definition of 'claim proceeds'.

17. Two final points should be made.

18. First, we referred in our earlier Opinion to the problem that this definition of 'claim proceeds' would pose for costs *orders* made by a Court at the conclusion of a complex class action. It would give such orders a consequence for funders' remuneration that goes beyond, and is rather inconsistent with, the obvious intent of the orders as such. Although that situation would presumably attract the 'rebutting' aspect of the 'rebuttable presumption', it demonstrates again the inaptness of trying to legislate a blanket rule (albeit as a presumption) for something as varied as the range of potential settlement structures in class action litigation.

19. Second, the Bill seems to overlook the unavoidable reality that the *quantification* of costs is very frequently a matter required the 'taxation' procedures of the relevant Court. Those procedures can take many months, and sometimes years. If the terms of a settlement, or the outcome of a judgment, require taxation then the process of distributing the agreed or ordered compensation to group members must presumably be deferred until the costs have been quantified, so that 'claim proceeds' can be quantified, so that the 70:30 presumption can be applied. Again, this only means delay in delivering compensation to group members, and an increased burden for the public resources of the Court system while legacy class actions await taxation hearings.

'Claim proceeds' – definition discourages open class actions

20. Next, we note that the "claim proceeds" definition limits the concept to the proceeds recovered for "the scheme's members". This group roughly corresponds to what for many years were called "funded" group members, as opposed to what the Bill calls "claimants" and who were traditionally called "unfunded" or "other" group members: see for example s.601LF(2)(c).[3]

21. The Bill, in proposed s.601GA(5), then creates distinction between class actions generally, and those class actions that are "managed investment schemes" (we shorthand the latter as **MIS class actions**). The latter are defined in the proposed s.9AAA and for present purposes can be regarded as meaning any *funded* class action. For these funded, MIS class actions, subs.(5) imposes various requirements for the "scheme constitution", all of which relate to the "funding agreement". Proposed s.601LF then provides that the funding agreement is not enforceable in relation to the "claims proceeds distribution method" (meaning, recall, the method for distributing 'claim proceeds' among the funded group members) unless one of ss.601LF(2) to (5) applies.

22. In effect, the funding agreement is only enforceable in relation to the claims proceeds distribution method if the relevant Federal or State court:

    (a) approves the method *and*

[3] The distinction first appears in the definition of 'class action proceedings' in proposed s.9.

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(b) does not make a common fund order (**CFO**).

23. We deal below with the continuing uncertainty regarding the availability of CFOs. For present purposes, several features of the above provisions, tending in our view to undermine the efficacy of the class action regime(s), should be acknowledged:

(a) first, to the extent that funders are (justifiably) unwilling to take the heavy financial risks of a class action in the *hope* that (i) CFOs remain available and (ii) a CFO is eventually obtained, the provisions drive funders to prefer closed actions confined to funded group members. As noted above, one critical consequence of this is that a closed action deprives *defendants* of the opportunity to finalise all their exposures arising from a given event. They would continue to face the risk of follow-on claims, whether as individual proceedings, multi-plaintiff claims, or even further class actions;

(b) second, the Bill creates a real disincentive for a practice that was formerly common, whereby a funder with a sufficient 'book' of funded group members would then commence the action on an open basis and seek a 'funding equalisation order' or '**FEO'** (rather than a CFO) to allow funded group members to share with unfunded group members some of the formers' obligations to pay remuneration to the funder.[4] The unsophisticated definition of 'common fund order' in the Bill would arguably cover a FEO just as much as a CFO, since a FEO is concerned either directly or indirectly with the remuneration of the funder. The unclear availability of a FEO under this Bill, and the unclear availability of CFOs anyway, create a real disincentive for a funder to countenance the possibility of an open action covering both funded and unfunded group members. The problem it would face is that group members would refrain from entering the scheme, in the hope that by abstaining and becoming 'unfunded' group members they will get the benefits of any litigation but perhaps at a lower personal cost. This was the old problem of 'free riders' that led to the rise of closed class actions in the first place. In short, for this reason as well the provisions will tend to drive funders toward closed class action;

(c) third, even to the extent that a funder *is* willing to take the chance of a CFO, the provisions are arguably unclear as to whether a funded class action can avoid the Bill by ensuring that the funded subgroup is confined to fewer than 20 members. That is, the proposed new s.601GA(5) and (6) are contemplated to be added to the existing s.601GA, which is clearly directed only at 'registered' schemes, meaning in turn schemes with (relevantly) more than 20 members: s.601ED(1)(a). The proposed new provisions appear to be intended as 'stand alone' requirements that apply to all funded class actions, but it

[4] As explained in our previous Opinion, in very simple terms a FEO deducts from an overall settlement the *quantum* of funding costs that "funded" class members agreed to pay, and distributes the balance pro rata among funded and unfunded group members so that they all enjoy the same "net" rate of recovery. The funder still only recovers the remuneration due to it under the funding contracts it entered with the funded class members. In contrast, a CFO deducts from an overall settlement the *rate* of funding costs that "funded" class members agreed to pay – in effect, treating unfunded group members as if they too entered the relevant funding agreement. The effect is usually to increase the remuneration recovered by the funder, above the amount to which it was entitled under the contracts it actually made.

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is odd then to fit them into a broader section directed only at registered schemes. If the new provisions were to be read as limited to schemes requiring registration under s.601ED, a funder would be better off holding its funded group to fewer than 20 claimants.[5] The class action would not qualify as a MIS class action[6] and would not be subject to the 70:30 presumption in s.601LF(7);[7]

(d) fourth, the Bill misses the opportunity to clarify a question that might well be regarded as unresolved by the original *Brookfield Multiplex* decision[8] that classified funded class actions as managed investment schemes, namely whether the unfunded group members "contribute … money's worth" so as to be characterised as "members" of the scheme. This uncertainty could significantly affect the operation of critical provisions like s.601GA(5)(a)(ii). On any view, it raises the unfortunate prospect of requiring the private resources of litigants and the public resources of the courts to be expended on testing and resolving a difficult question that Parliament could address in a sentence;[9]

(e) finally, the provisions only address the relationship between funders and scheme members (aka 'funded' group members). They say nothing about the rights of funders vis-à-vis the general 'claimants' (aka unfunded group members), beyond the ambiguous reference to common fund orders. Strictly speaking, therefore, if a MIS class action were commenced for an open class (see discussion above), the Court upon making an award of damages or (more likely) approving a proposed settlement would need to apportion the 'claim proceeds' payable to the 'members' from those payable to the general 'claimants'. The mandatory criteria as to 'reasonableness' in s.601LG would apply to the former but not to the latter. If there were relevant considerations *not* listed in s.601LG then the curious problem arises, of whether the Court is to consider those matters in assessing the settlement vis-à-vis the general claimants even while unable to do so for the subgroup of members. Such a bifurcated jurisprudential exercise is highly unsatisfactory.

[5] See s.601ED(10(a) of the principal Act (ie., Corporations Act).

[6] At least, it would not require registration under s.601ED, would not be a 'registered scheme' as contemplated in current s.601GA and we assume would likewise not be caught by the proposed new s.601GA(5).

[7] The obvious next issue here, however, would be that that arrangement would raise questions as to the operation of the 'anti-avoidance' provision in proposed s.9AAA(2). If we proceed down this rabbit-hole, the first question is how one would gauge whether a funding agreement with, say, one funded client 'would' alternatively have been a funding agreement with 20 or more clients, or a scheme with 20 or members. It is hard to know where to start with the legal technicalities that either an aggressive defendant to invoke, or an adventurous plaintiff or funder might raise to resist, the anti-avoidance provisions. It is, as we said, something of a rabbit-hole but experience suggests that one can be confident that the process of clarifying the operation of s.9AAA(2) in this kind of context will be costly both for plaintiffs and defendants.

[8] *Brookfield Multiplex Limited v International Funding Partners Pty Ltd* (2009) 180 FCR 11.

[9] We note as well that the provisions only address the relationship between funders and scheme members (aka funded group members). They say nothing about the rights of funders vis-à-vis the general 'claimants' (aka unfunded group members), beyond the ambiguous reference to common fund orders.

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24. We are driven to offer the observation that these kinds of anomalies in the Bill appear to reflect the haste with which it was prepared, and the lack of meaningful consultation with practitioners familiar with the exigencies of class action litigation.

Definition of 'claim proceeds distribution method'

25. The revised definition of '*claim proceeds distribution method*' overcomes most of the problems adverted to in our earlier Opinion. However, new complications have been introduced.

26. Proposed s.6 seeks to amend s.601GA by providing that if any *claim proceeds* are to be paid *or distributed* to an 'entity' that is not a [class member] the entity must be a party to a funding agreement (s.6(5)(a)(iii)). As the definition of *claim proceeds* now includes costs, this would appear to require that any law firm, barrister, expert witness or other 'entity' to which any of the costs may be *distributed* pursuant to any judgment or settlement, must be a 'party' to the funding agreement.

27. Although *Note 2* to the proposed s.601GA(5) states that:

> 'Subparagraph (a)(iii) does not prevent payments or distributions flowing to a person through another person that is a party to a funding agreement for the scheme (for example, to a forensic accountant engaged by a funder for the scheme)'

this is difficult to reconcile with the provision as drafted. It certainly appears still to require any law firm or barrister to be a party to the funding agreement. We note that, in practice, law firms are often a party to an agreement with the funder (for instance, covering billing arrangements) but not necessarily a party to the funding agreement(s) between the funder and the class members.

28. Particular complications are likely to arise in respect of premiums for 'after the event' (**ATE**) insurance policies or deeds of indemnity. The former are commonly obtained by funders to hedge their own risks of adverse costs orders, while the latter are a common response to defendants' requests for security for costs. Often part of the substantial premium is paid upfront by the funder to the ATE insurer, with the balance only payable in the event of success in the action. Often, with court approval, the balance payable to the ATE insurer upon success is paid out of the proceeds of settlement otherwise payable to the class members.

29. In short, insofar as any part of the premium is to be paid to the insurer out of the *claim proceeds*, does this require the ATE insurer to be a party to the funding agreement?

Constitutional questions

30. As we identified in our earlier Opinion, a question arises as to whether some of the provisions are constitutionally permissible.

31. As noted below, the provisions purport to apply to state courts not exercising federal jurisdiction. However, federal legislative power does not permit legislation that significantly impairs, curtails or weakens the capacity of states or state courts to exercise their constitutional powers or functions: see for example *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

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32. We note that legal industry discussions over the Bill[10] have also identified valid questions as to:

    (a) whether the corporations power in the *Constitution* (s 51(xx)) and/or the referral of state powers to the Commonwealth (pursuant to s 51 (xxxvii)) can support the provisions[11]; and

    (b) whether the provisions would amount to implied repeal of part of the *Federal Court Act* and/or an inconsistency with state class actions provisions so as to override them pursuant to s 109 on the *Constitution*.

33. In view of the limited time period for consultation, we do not express any concluded view on the first question.

34. As to the second, however, it appears to us that in the now-likely scenario of 'closed class' MIS class actions, the proposed statutory test for assessing the reasonableness of the funder's remuneration, and the test for considering the rebuttable 70:30 presumption in s.601LG(5), would replace or supersede the existing statutory provisions in:

    (a) s.33V of the FCA Act (and cognates in the State Acts), together with the vast body of jurisprudence that have developed around them. Although, as in any system, a tiny number of examples might be cited to demonstrate that the s.33V tests are not unimpeachably perfect all the time, any sensible evaluation must conclude that over the 25-odd years that s.33V has been applied the supervisory role it confers upon the court(s) has worked extremely well, to ensure that proposed settlements are indeed properly justified as 'fair and reasonable, *inter partes* and *inter se*, having regard to the interests of the group members considered as a whole; and

    (b) s.33ZDA of the *Supreme Court Act 1986 (Vic)*. This is the 'group costs order' (**GCO**) provision unique to the Supreme Court of Victoria which permits, under quite strict conditions,[12] 'contingency fee' type arrangements for class actions. We note that, since a GCO is payable to the plaintiff's lawyers, it would not seem to qualify as a CFO for the purposes of proposed s.601LF(2). It would seem to follow that an action started in the Victorian Supreme Court that qualified as a MIS class action, albeit that it was commenced in contemplation of a GCO, would encounter an irreconcilable conflict between the GCO and virtually all the principal provisions of this Bill.

35. Needless to say, although it is within the power of the Federal Parliament to amend federal legislation, either expressly or impliedly, more contentious issues arise in relation to the overriding of powers of State courts.

[10] See note 1.

[11] In respect of corporations, the referral is limited to the formation of corporations, corporate regulation and the regulation of financial products and services and has effect only to the extent that the matter is not already a subject of Commonwealth power.

[12] See *Fox v. Westpac Banking Corporation Ltd* [2021] VSC 573 (Nichols J).

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Unresolved question as to availability of CFOs

36. We noted above that the Bill appears to proceed upon an assumption that its effect will *not* be to drive funders back to 'closed' class actions because they could, for the reasons outlined earlier, seek CFOs.

37. But proposed s.601LF(7) is explicit in providing that nothing in that section (or, ergo, the Bill) implies that a Court has the power to make a common fund order.

38. This is somewhat ridiculous. The Bill presumably seeks to avoid the criticism that it discourages open class actions and access to justice, by falling back on the availability of CFOs, in circumstances where the Parliament must be aware that there remains a real question as to whether CFOs are permissible under the existing FCA Act provisions (and cognate provisions in the State Acts).

39. That question was not resolved in *Brewster*.[13] The High Court there held that CFOs could not be made at the early stage of class actions, and some judges have subsequently proceeded on the basis that *Brewster* did not preclude CFOs at the settlement stage of class actions – but it is very arguable that the High Court was only dealing in *Brewster* with the facts of the particular matter before it and in reality its reasoning applies to CFOs at *any* stage of a class action.

40. Hence the ridiculous situation. Parliament could resolve the question over CFOs in a sentence, but instead this Bill creates an inherent uncertainty that will certainly expose some unfortunate collection of plaintiffs, defendants and judges to a tortuous process of running the issue back up the line to the High Court. The Bill is, in our opinion, in this respect severely to be criticised.

41. We note for completeness that the ALRC recommended that there should be an express power to make a common fund order (recommendation 30). The PJC proposed that legislation was needed to address uncertainty in relation to common fund orders (Recommendation 7). The Explanatory Memorandum states that the Bill is intended to implement the government response to various recommendations of the PJC, including no 7. The Bill does not seek to resolve existing uncertainty as to judicial powers to make common fund orders.

Insurers

42. Proposed s.9AAA has been amended to address one issue we noted in our earlier Opinion, namely the inadvertent recharacterization of insurers' subrogated recovery actions so as to qualify as MIS class actions.

43. But we note that the revised wording in proposed s.9AAA(1)(d) does not wholly resolve the problem. Although a class action run 'no win, no fee' by a law firm, in which group members' insurers contribute to the costs of disbursements, would now be excluded from being a MIS class action, we are aware of class actions that were co-funded by commercial funders as to part, and also by group members' insurers as to another part (typically disbursements). That

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

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situation is not common but it has arisen and we expect the effect of the Bill would be to discourage it. We do not see what public benefit is achieved by that.

Judicial discretions

44. Apart from the abovementioned issues, the Bill (s 601LG (3)) seeks to limit the factors that the Court *must* have regard to in considering whether the claim proceeds distribution method is fair and reasonable, with provision for other factors be prescribed by regulation. We cannot conceive of any defensible rationale for seeking to *limit* the factors to be taken into by the Court. The proviso that such factors can be supplemented or varied by regulation is unnecessarily complicated and burdensome.

Anti-avoidance provisions

45. As noted above, the Bill includes anti-avoidance provisions, and severe ones given that they attract civil penalties. Two observations can be made:

    (a) first, naturally they will tend to bind parties, funders and practitioners to the black letter of this poorly drafted Bill, with all the various inefficiencies and adverse consequences we have identified above; and

    (b) second, to the extent that any party, funder or practitioner sought to avoid the anti-access effects of the Bill – for example by attempting a single-client funded action for an open class – the reliable consequence will be complex satellite litigation while the defendant contends that the anti-avoidance provisions ought be applied.

46. Again, therefore, it seems to us that the Bill is very likely to increase the transaction costs of class actions both for plaintiffs and defendants, as well as to tend to reduce the likelihood of open class actions and thereby limit what has been shown over the last 28 years to be a conspicuously-effective vehicle for improving access to justice.

Suitability of MIS regime

47. Although legislation and regulations to bring the class actions within the ambit of the MIS regime are already in force, the proposed further legislative provisions exemplify how inappropriate this regime is to class actions.

48. Legislative provisions now bring class actions back within the ambit of the MIS regime which they were originally held to be within by the majority decision of the Full Federal Court in *Brookfield*.[14] However, ongoing complications, including issues as to the identity and responsibilities of the 'responsible entity', attest to the unsuitability of subjecting class actions to this regime.

49. In *Brookfield* the majority of the Full Court held that the litigation funding scheme in that case fell within the MIS regime. One member of the Court took a different view, as did the judge who dealt with the matter at first instance.

[14] *Brookfield Multiplex Limited v International Funding Partners Pty Ltd* (2009) 180 FCR 11.

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50. According to the majority, the *members* of the scheme were held to be the group members and the funder. It was noted that the lawyers may also be a scheme member. [15]

51. The majority members of the Court noted that there was some debate as to whether the funder or the lawyers were the *responsible entity* for the purposes of the relevant legislation.[16] Both were said to be fulfilling functions that might be thought to be part of the operation of the 'scheme'.

52. In *Brookfield*, the contention that the litigation funding arrangements did not comply with the MIS requirements did not arise out of any concern to protect the interest of the group members. As the judge at first instance found, it was designed to stop the litigation in its tracks.[17]

53. In the Bill the *members* of a *class action litigation funding scheme* are the group members who agree in writing to be members of the scheme and to be bound by the terms of the scheme's constitution.

54. The present arrangements under the MIS regime and those proposed to be implemented in the Bill highlight the unsuitability of the application of the MIS regime to class actions generally and to funded class actions in particular.

Application to State Courts not exercising federal jurisdiction

55. The provisions in respect of the enforceability of funding agreements purport to apply to State courts not exercising federal jurisdiction. This gives rise to a number of problems.

56. First, there is the constitutional problem we referred to above.

57. Second, in such courts funding agreements will not be enforceable (to the extent that they relate to the scheme's claim proceeds distribution method) *unless*:

    (a) the Court approves or varies the scheme's claim proceeds distribution method 'under any *powers or procedures* of the Court that are *substantially similar* to those in section 601 LG and

    (b) in or in relation to the proceedings, the Court does *not* make a *common fund order*.

58. In the Bill there is uncertainty as to:

    (a) what powers or procedures in the State Courts may be '*substantially similar*', and

    (b) how these provisions will operate in Victoria in relation to the 'group costs order' provisions noted above.

[15] At [1].

[16] [104].

[17] *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* No 3 (2009) FCA 450 at [2].

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Conclusion

59. The proposed legislation if enacted and if valid, will alter significantly the conduct and the outcomes of group litigation across all courts of Australia. It will significantly impact on ordinary Australians, not just corporations, and affect their ability to obtain access to justice.

60. From a policy perspective, although purporting to improve outcomes for those who sign up to funding agreements in respect of class actions, the Bill, if enacted, is likely to reduce the incidence and ambit of funded cases and prevent or constrain remedies for the majority of those who suffer loss or injury which might otherwise be compensable through the 'opt out' class action regime.

61. It will also lead to the other practical problems that we have identified, both above and at [40] of our earlier Opinion.

62. Leaving aside policy considerations, the provisions of the Bill give rise to an amalgam of constitutional complications, technical complexity, legal uncertainty and practical problems in their application. We also consider it regrettable that such little time has been allowed for consultation with practitioner experts regarding the difficult questions created by this Bill.

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