***Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (Cth)**

Joint Opinion

1. Our instructing solicitors act for International Litigation Partners Pte Ltd and the Association of Litigation Funders of Australia. We have been asked to provide a short opinion identifying issues which we perceive may impact upon the constitutional validity and operation of the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (Cth) (**Bill**).

A. Aspects of the Bill may not be supported by Commonwealth legislative power

2. It appears to us that insufficient attention has been given to the source of Commonwealth legislative power to sustain the Bill and, in our opinion, some provisions may be beyond power. For present purposes, we concentrate on three possible sources of power.

A.1 Power Incidental to Federal Jurisdiction

3. The Explanatory Memorandum to the Bill (**EM**) states (at [1.26]) that the "procedures and powers introduced in the Bill are incidental to class action proceedings in federal jurisdiction" (our emphasis). If this is intended to convey that s 51(xxxix) and Ch III are an available source of power, then in our opinion this is an unsupportable view. As five judges of the High Court said recently,[1] Parliament has no power "to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III."

A.2 State Referrals of Power

4. An alternative source of power is the 2001 referrals from State legislatures under s 51(xxxvii) of the Constitution. The subject of the referrals was, relevantly, the power to legislate with respect to "corporate regulation" (which we consider at **A.3** below) and "the regulation of financial products and services".[2] If this is contemplated as the source of legislative power for the Bill, then it appears to us that insufficient attention has been given to bringing the Bill within the referred power. The Bill does not rely on the finding of a managed investment scheme in *Brookfield Multiplex*.[3] Instead, it inserts into the definition of a "managed investment scheme": "(aa) a class action litigation funding scheme".

5. In our opinion, a "class action litigation funding scheme" as defined in proposed s 9AAA of the Act would not readily be characterised as a "financial product or service". The arrangements caught by the definition are ones which have the "dominant purpose" of seeking remedies to which seven or more persons (defined as "the claimants") may be legally entitled, and feature the taking of ordinary steps involved in civil litigation.[4] It is not immediately apparent to us that there is a "financial product or

---

1 *Rizeq v Western Australia* (2017) 262 CLR 1, [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).

2 See s 4(1)(b) of the: *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (WA); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (Tas); and *Corporations (Commonwealth Powers) Act 2001* (Vic).

3 *Brookfield Mutliplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 (***Brookfield***), [82] and [103] (Sundberg and Dowsett JJ, Jacobson J dissenting).

4 See proposed s 9AAA(1)(a) and (b).

service" merely because a person, defined as "the funder", provides funds and/or indemnities under an agreement (defined as the "funding agreement") to enable the claimants to seek remedies.[5] This is particularly so where group members in an open class action: (a) may not have signed a litigation funding agreement, (b) may not be in any contractual relationship with the litigation funder, (c) will not necessarily have consented to a remedy being sought in respect of their claim, and (d) may not even know about the proceedings or the litigation funding arrangement.[6]

6. As defined, a litigation funder need not be a commercial entity. It could be, for example, a not-for-profit, a public interest group, a farmers' federation, a trade union and so on. Neither a textual or purposive construction of the State referrals of power readily suggests they were intending to confer on the Commonwealth Parliament the power to regulate such organisations in their support of litigation under the ordinary processes of the courts of the land, let alone alter the procedures of those courts in the drastic manner contemplated by the Bill.

A.3 The Corporations Power

7. Another alternative source of power is the corporations power in s 51(xx) of the Constitution. Whilst the corporations power is undoubtedly very broad, the Bill as drafted does not impose its legal norms in a way which has any necessary engagement with that power. For example, a corporation is not an inevitable part of a "class action litigation funding scheme" as defined in proposed s 9AAA. It would be open to litigation funders not to conduct their businesses through corporations, and to define Group Members in a manner that excludes corporations. To the extent that the Bill depends only upon the corporations power or the referred power with respect to "corporate regulation", it is unlikely that it could have valid application to a litigation funding arrangement having those features. We also note that proposed s 601GA(5) and Pt 5C.7A apply to *all* "class action litigation funding scheme[s]", such that the reform is not limited to managed investment schemes registered under s 601ED of the Act.

8. Even if the operation of the Bill were confined to *registered* managed investment schemes, which are required to have a public company as the responsible entity,[7] there is significant doubt whether the Bill could be supported by the corporations power or the power with respect to "corporate regulation". It appears to us that the object[8] of the proposed Bill is *not* to regulate corporations but *instead* to improve outcomes for members of class action litigation funding schemes, a matter which has no necessary connection to s 51(xx) or "corporate regulation". While a law need not have a single character, the connection between the measure and the company, which s 601FA requires operate a registered managed investment scheme, may be too "insubstantial, tenuous or distant"[9] to permit the Bill to be characterised as a law "with respect to" either matter.

---

5 See proposed s 9AAA(1)(c).

6 See eg ss 33C(1) and 33E of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**). We note, in this respect, that *Brookfield* involved a closed class action: see the *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* (2007) 164 FCR 275, [44] (Jacobson J, French J agreeing).

7 Section 601FA of the Act.

8 See *Spence v Queensland* (2019) 268 CLR 355 (***Spence***), [59]-[62] (Kiefel CJ, Bell, Gageler and Keane JJ).

9 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 (***Melbourne Corporation***), 79 (Dixon J).

9. The fate suffered by the Commonwealth law in *Williams v Commonwealth (No 2)*[10] is instructive here. It was not enough for a law authorizing payment of money to a provider of school chaplains to qualify as a law supported by s 51(xx) that the provider in question receiving the money happened to be, or even must be, a corporation. The provider, even if a corporation, did not receive its capacity to make the agreement or receive the payments from the impugned law.

B. The Bill may contravene the doctrine of inter-governmental immunities

10. Even if, contrary to the above real doubts, the Bill is supported by a head of power, in our opinion at least ss 601LF(1) and (4) may transgress the doctrine of inter-governmental immunities. The doctrine, recognised in *Melbourne Corporation v The Commonwealth,*[11] reflects a structural implication preventing the Commonwealth from curtailing "in any substantial manner" the exercise of State power, or interfering with State "operations".[12] Its application "requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments".[13]

11. Section 601LF(1) and (4) operate to render the claim proceeds distribution method of *all* funding agreements relevantly "not enforceable" and of "no effect" unless a State court exercising State jurisdiction has powers or procedures "substantially similar" to those in s 601LG (and, until, those powers or procedures are exercised to approve or vary the claim proceeds distribution method). One vice of this measure is that it interferes with the operation of State judiciaries, by curtailing the ability of claimants to pursue representative proceedings under State law.[14] It is established that State courts are an "essential branch of the government of a State".[15] In our opinion, the provision by a State to its citizens of access to justice administered by State Supreme Courts is an essential aspect of constitutional government. Section 601LF(1) and (4) operates to interfere with that matter, by disincentivising litigation funders and (to that extent) disabling some litigants from prosecuting claims in State courts.

12. A second vice of this measure is the attempt to coerce or procure that State legislative power be exercised in a certain way, namely so as to confer powers or procedures on State courts exercising State jurisdiction that are "substantially similar" to proposed s 601LG. The choice of a State legislature whether, and how, to enact legislation, is, of its essence, an essential power and function of the States, the interference with which curtails their capacity to function as governments.

C. The Bill may contravene Chapter III

13. In our opinion, there are also difficulties in reconciling proposed s 601LG with the strictures of Ch III of the Constitution. In particular, there is a question whether s 601LG confers non-judicial power on

---

10 (2014) 252 CLR 416, [50] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
11 (1947) 74 CLR 31.
12 *Melbourne Corporation*, 74 (Starke J, citation omitted) quoted in *Spence*, [100] (Kiefel CJ, Bell, Gageler and Keane JJ).
13 *Fortescue Metals Group Ltd v The Commonwealth* (2013) 250 CLR 548, [130] quoted in *Spence*, [108] (Kiefel CJ, Bell, Gageler and Keane JJ).
14 See eg Pt 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**).
15 *Re Australian Education Union* (1995) 184 CLR 188, 229 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also *Austin v Commonwealth* (2003) 215 CLR 185, [147].

Ch III courts,[16] and/or involve a departure from the independence and impartiality of the judiciary which is mandated by Ch III of the Constitution. As to the latter, we observe that the political branches cannot "cloak their work in the neutral colors of judicial action"[17] and are prohibited by Ch III from enlisting Ch III courts in the implementation of the legislative or executive policies of the relevant polity.[18] In *Attorney General (NT) v Emmerson*,[19] it was said that the legislature cannot impose functions whereby the judiciary "is essentially directed or required to implement a political decision or a government policy without following ordinary judicial processes."

14. At the heart of the Bill is a contingent proscription that claim proceeds distribution methods in any funding agreement are "not enforceable" and of "no effect" unless the Court exercises the power in s 601LG, which includes a power to vary the claim proceeds distribution method to ensure that it is "fair and reasonable". In our view, the following features present difficulties in relation to Ch III.

15. *First*, the function which s 601LG imposes on the Court[20] may not involve the determination of any controversy as between the parties, who may be perfectly content with the claim proceeds distribution method in the funding agreement. Indeed, the Court may act of its own initiative.[21]

16. *Second*, the Court may be determining, not what the parties' rights and obligations *are*, but what legal rights and obligations should be *created*.[22] The Court's order is not interlocutory in nature.[23] We note that, if the Court varies the claim proceeds distribution method, it is empowered to declare that it had effect, as so varied, at and after the time when the agreement was made, or some specified later time.[24]

17. *Third*, whereas guiding principles would ordinarily be expected to emerge from Ch III courts as to the (otherwise open-textured) question of fairness and reasonableness,[25] in exercising the function under s 601LG the Court is confined to considering the *mandatory* and *exhaustive* factors specified in proposed s 601LG(3). A difficulty here is that s 601LG(3) excludes factors necessarily relevant to the fairness and reasonableness of the claim distribution method. For example, proposed s 601LG(3)(a)(vii) requires the funder's commercial return to be assessed by reference to the costs of the proceedings,[26] excluding the "risk undertaken [by the funder] and benefit conferred on group members"[27] in funding the action.

18. *Fourth*, s 601LG(3) is subject to a "Henry VIII clause" in proposed s 601LG(4), which permits regulations to provide that s 601LG applies as if s 601LG(3) "were omitted, modified or varied as

---

16 As to the essential character of judicial power, see *Rizeq*, [52] (Bell, Gageler, Keane, Nettle and Gordon JJ).
17 *Mistretta v United States,* 488 US 361, 404 (1989), quoted in *Attorney General (NT) v Emmerson* (2014) 253 CLR 393, [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
18 See *Kuczborski v Queensland* (2014) 254 CLR 51, [140] (Crennan, Kiefel, Gageler and Keane JJ).
19 (2014) 253 CLR 393, [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
20 A "Court" is defined ins 58AA of the Act and includes, relevantly, the Federal Court, the Supreme Court of a State or Territory and the Federal Circuit and Family Court of Australia (Division 1) .
21 See proposed s 601LG(8)(a).
22 See *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
23 Cf *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 (***Westpac***), [98] (Allsop CJ, Middleton and Robertson JJ).
24 See proposed s 601LG(7).
25 *Thomas v Mowbray* (2007) 233 CLR 307, [92] (Gummow and Crennan JJ); *Westpac,* [100].
26 See also the EM to the Bill, [1.71].
27 See *Westpac*, [105].

specified in the regulations". The scale of the abandonment here of the legislative task to the executive cannot be overstated and would be likely to provoke close High Court scrutiny.

19. *Finally*, the rebuttal presumption in s 601LG(5), that the claim proceeds distribution is not fair and reasonable if more than 30% of the claim proceeds is to be paid or distributed to entities who are not members of the scheme, does not have a necessary relationship to the fairness and reasonableness of the claim proceeds distribution method. This is particularly so when it is recognised that "claims proceeds" are defined to include the award of legal costs.[28]

D. The Bill may render Commonwealth and State laws inoperative

20. Separately to the above, the Bill has been drafted and propounded without any evident attention to the likelihood that, even if otherwise valid, it would effect an *implied repeal* of various Commonwealth laws, and render *inoperative* various State laws (under s 109 of the Constitution). Four examples will illustrate this. *First*, the regulation of claim proceeds distribution methods effected by proposed s 601GA(5) and Pt 5C.7A is likely to be inconsistent with Commonwealth and State laws conferring broad discretionary powers on Courts with respect to representative proceedings, including in relation to settlement.[29] *Secondly*, the Bill's stated intent in the Second Reading Speech that the use of common fund orders will be "superseded"[30] is inconsistent with the powers courts, at least arguably, currently have in that respect. *Thirdly,* the Bill's stated intent in the Second Reading Speech that it will "ensure that claimants who do not want to participte in a class action do not need to actively opt out", if achieved in the drafting, is directly inconsistent with the open class action/opt out model of federal and state schemes.[31] And *fourthly*, the statutory restrictions preventing a member of a managed investment scheme from withdrawing from an illiquid scheme[32] are likely to be inconsistent with Commonwealth and State laws permitting group members to opt out of representative proceedings by written notice.[33]

5 November 2021

Justin Gleeson SC — Banco Chambers
Sebastian Hartford-Davis — Banco Chambers
Myles Pulsford — Banco Chambers

28 See the definition of "claim proceeds" in proposed s 9.
29 See eg ss 33V and 33ZF of the FCA Act and ss 173 and 183 of the CPA.
30 Second Reading of the Bill, House of Representatives, 27 October 2021 (Sukkar MP).
31 See eg s 33J of the FCA Act and s 162 of the CPA.
32 See Pt 5C.6 of the Act.
33 See eg s 33J of the FCA Act and s 162 of the CPA.