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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee,

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

Thank-you for the opportunity to make a submission in relation to the *Corporation Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* ("**The Bill**").

Background

I am a solicitor based in Bundaberg, Queensland. I do not specialise in class actions but am involved with two major proposed class actions in Queensland, namely the Linc Energy Class Action and the Paradise Dam Class Action.

The Linc Energy Class Action is an action on behalf of over 500 landholders across an area of 120,000 hectares which were impacted by the contamination caused by the Linc Energy UCG facility located at Chinchilla. The claim is against the State Government for negligence in granting the approvals in the first instance and for failing to adequately monitor the site. The claim is in the order of \$300 million for direct contamination and diminution in value. The cost of the claim to proceed to court is in excess of \$10 million including barristers, experts costs and adverse costs insurance.

The Paradise Dam Class Action is an action on behalf of over 600 farmers in the Bundaberg region in relation to the Queensland State Government, and the State-owned Government corporation, Sunwater, for its management of the Paradise Dam on the Burnett River. The claim is in excess of \$500 million due to loss of water security, loss of crop value and diminution in property values. The cost of the claim to proceed to court is \$15 to \$20 million.

Neither of these cases could be run without litigation funding as the financial risk placed upon an individual plaintiff, or even a number of plaintiffs, up against a well-resourced and tax payer funded State Government, is too much of a burden.



The Bill, in its current form, places at risk the chances of having both class actions funded which would leave over 1000 landholders and farmers in Queensland without recourse against the negligence of their own State Government.

ALRC Recommendations

The Australian Law Reform Commission (ALRC) report, *“Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders”* was tabled in Parliament on the 24 January 2019.

The ALRC report provided 24 recommendations to “promote fairness and efficiency in class action proceedings, protecting litigants and assuring the integrity of the civil justice system”.

Some of the key recommendations from the ALRC report include:

- **Recommendation 1** – that all representative proceedings are initiated as an “open class”.
- **Recommendation 2** – provide criteria for when it is appropriate to order class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.
- **Recommendation 3** – provide the Court with an express statutory power to make “common fund orders” on the application of the plaintiff or the Court’s own motion.
- **Recommendation 8** – the Court may appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval.
- **Recommendation 9** – the Court may tender settlement administration and include processes that the Court may adopt when tendering settlement administration.
- **Recommendation 10** – to require settlement administrators to provide a report to the class on completion of the distribution of the settlement sum. The report should be published on a national representative proceeding data-base to be maintained by the Court.
- **Recommendation 11** – prohibit a solicitor acting for the representative plaintiff, whose action is funded in accordance with a Court approved third-party litigation funding agreement, from seeking to recover any unpaid legal fees from the representative plaintiff or group members.
- **Recommendation 12** – a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.



- **Recommendation 13**— expressly empower the Court to award costs against third party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.
- **Recommendation 14**—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that:
 - third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;
 - the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
 - third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
 - Australian law governs any such third-party litigation funding agreement the funder submits irrevocably to the jurisdiction of the Court.

It is dumbfounding that almost **none** of the recommendations from the ALRC Report have been adopted in the current Bill and, in fact, the Bill directly contradicts many of the recommendations. Other inclusions to the Bill, such as the 30% cap on costs and funders fees, appears to have materialised out of thin air.

The Bill

It is noted with some irony that the Bill is proposed by a Federal Government that supposedly supports the free market and exposes the benefits of “market forces”. The Bill is a direct interference into an already regulated industry which has significant oversight by the Courts. It is not only an unnecessary regulatory overstep – it is misguided at best.

The intent of the Bill is to “*improve outcomes for litigation funding participants*”.

However, much like the ill-conceived requirements for class actions to be registered as a Managed Investment Scheme, which was introduced to improve class action procedures and outcomes for class members, it has in fact resulted in a “stifling effect” on litigation funders interest in being involved in funding class actions at all.

The effect of the Bill is that it will reduce the access for justice of those who are least able to protect themselves against State and Federal Governments, ASX listed companies, and parties who have the significant benefit of a power imbalance in any judicial proceedings.



Minimising unreasonable costs

The commercial and practical reality of capping legal costs and litigation funding returns to 30% of the total quantum awarded in a class action will mean simply that many class actions won't be able to be funded and many genuine cases will not be able to be run.

The resultant "minimum return" and "maximum return" to plaintiffs will be zero.

It is also unsure where the magical "30%" figure has been derived from and clearly has no objective basis.

The Bill aims to "*minimise unreasonable costs*" on behalf of the Plaintiff lawyers but makes no mention of the potential for Defendants to be unreasonable, causing undue delay and increasing Plaintiff costs in the process.

Solicitors and lawyers in Australia are already under a professional, ethical and statutory duty to only claim costs that are "fair and reasonable" value for the legal services provided. If there is a concern that Plaintiff lawyers are charging excessive fees – they can either have their invoices cost assessed or have the matter determined by the Courts.

Placing an arbitrary cap on costs and fees at 30% will only incentivise defendant lawyers from engaging in unnecessary and strategic delays to increase the Plaintiff parties' costs as a way of frustrating a party to either settle or withdraw an action due to funding pressures.

Money Max

There has been an increased focus by the Courts on funders fees and returns since the decision in the 2015 *Money Max*¹ decision by Justice Murphy in the Federal Court of Australia.

Justice Murphy was ultimately satisfied that the funding commission was "*fair and reasonable*", commercially realistic and proportionate for the investment and risk. Murphy J also noted that the funder in that matter had taken on substantial obligations and significant financial risk to fund the large, complex and expensive case, at a time when the risks could not be accurately assessed and the outcome was far from certain. Amongst other matters, Murphy J referred to a 23.2% funding rate on the gross settlement as being within the broad parameters of the funding rates available in the market, and lower than many available funding rates. Murphy J also recognised the important role that litigation funding played in providing access to justice for the class members.

The reality is that the party best placed to determine whether the costs and commission in a class action are "fair and reasonable" are the Courts and the experienced Judges who hear the matters and can see the conduct of both parties during the litigation process.

¹ *Money Max Int Pty Ltd v QBE Insurance Group Limited* – VID513/2015



Banksia Securities

The recent Banksia Securities class action has been used as an example of the need for greater oversight of the litigation funding industry. In that case, Victorian Supreme Court judge John Dixon is quoted as saying “the case unmistakably, undermined public confidence in the due administration of justice”. He also made Barristers Norman O’Bryan SC and Michael Symons pay back \$12 million in over charged fees and another \$10 million in costs. Both were disbarred and are under investigation for criminal investigations for fraud.

The Banksia Securities case, rather than being an example of the requirement for increased regulatory oversight, is an example of a system that is already working in the best interests of Plaintiffs.

Inequality of arms

Another recent case which supports the importance of litigation funders, which the Federal Government would be acutely aware of, is the PFAS Contamination Class Action.

In that case Justice Lee of the Federal Court stated:

“the reality of these cases...is that without funding, the claims of group members would not have been litigated in an adversarial way, rather the group members would likely have been placed in a situation of being supplicants requesting compensation in circumstances where they would have been the subject of a significant inequity of arms. It seems to be a testament to the practical benefits of litigation funding that these claims have been able to be litigated in an efficient and effective way and have produced a settlement”.

The proposed Bill, rather than assist Plaintiffs, will be an impediment to obtaining an “equity of arms” against large, well resourced, and even sometimes taxpayer funded Defendants.

Closed class actions

The proposed requirements for “Closed class” and “Opt in” will increase the costs of class actions and also goes directly against the recommendations made by the ALRC.

Much of the “book build” process will be required to be undertaken prior to the initial due diligence of a class action is completed and before funding is secured. This will mean that only large class action firms will have the scale and capacity to undertake such a process forcing smaller firms out of the market completely.

Common fund orders

The Bill seeks to undermine the power of the court to make “common fund” orders. The proposal also directly contradicts the ALRC recommendations.



Conclusion

The fact that the widely consulted and carefully considered recommendations from the ALRC report have not only been completely ignored but in fact directly contradicted, without any justification, is reason enough to scrap the Bill in its entirety.

The parties best placed to oversee and regulate class actions and determine the reasonableness of their funding arrangements, are the Courts and the experienced Judges who have both the technical experience and knowledge.

It is not for the legislature and politicians, who have very little practical or commercial understanding of how class actions actually operate on a day-to-day basis across Australia's various jurisdictions, to seek to override a process which is already working.

The most insidious element of this Bill is that despite the rhetoric of protecting "Plaintiffs", those that will benefit most from this Bill are the defendants of class actions and those most at risk of this Bill are in fact individual plaintiffs.

I am happy to answer any further questions are required by the Committee.

Yours faithfully
Marland Law



Tom Marland
Principal