



National Farmers' Federation

Submission to the Senate Economics Legislation Committee on the Corporation Amendment Bill 2021 (Improving Outcomes for Litigation Funding Participants)

17 December 2021

NFF Member Organisations





The National Farmers' Federation (**NFF**) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

Social >

In 2019-20, there are approximately 87,800 farm businesses in Australia, the vast majority of which are wholly Australian owned and operated.

Economic >

In 2019-20, the agricultural sector, at farm-gate, contributed 1.9 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production is forecast to reach \$78 billion in 2021-2022.

Workplace >

In 2021, the agriculture, forestry and fishing sector employ approximately 313,700 people, including over 215,800 full time employees.

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 26 per cent of the employed workforce is casual.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 49 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 7.79 million hectares of agricultural land set aside by Australian farmers purely for conservation/protection purposes.

In 1989, the National Farmers' Federation together with the Australian Conservation Foundation was pivotal in ensuring that the emerging Landcare movement became a national programme with bipartisan support.

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Introduction

According to its Explanatory Memorandum the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the Bill)* is intended to improve the outcomes of plaintiffs involved in class actions and utilising class action funding providers.¹

This is to be accomplished through implementing regulations which require:

1. A class action fund to submit their funding agreements to the court.
2. The court to review the agreement and determine whether it is “fair and reasonable”.
3. The court to consider a fees assessor report and the representations of a contradictor unless it is in the interests of justice not to do so.
4. The court to act on the “rebuttable presumption” that any funding agreement where more than 30% of the proceeds is paid to the funder is unfair.

The NFF does not take issue with the proposed regulation, in principle. However, we see this Bill as an opportunity for the Committee to further improve outcomes for litigation funding participants by regulating — not only the conduct of “wrongdoer” class action funders but also — the “wrongdoer” respondents. In particular, the Bill could introduce measures which prevent “litigation by attrition”. That is, strategies employed by well-resourced respondents to artificially drag out proceedings in order to increase legal fees, with the ultimate goal of exhausting a claimant’s funding and forcing them to abandon the claim.

The costs of such strategies are:

1. Poor outcomes for plaintiffs, even where their claim is successful;²
2. Increased costs for all parties involved;³
3. A more sluggish court system;⁴ and
4. Restricting access to justice for those who do not have sufficient resources.

Chapter 1 – The Australian Farmers Fighting Fund

The Australian Farmers Fighting Fund (**the AFFF**) was established by the NFF in 1985 from farmer donations to fight a major precedent setting industrial dispute, involving a small meatworks in the Northern Territory. The funding was provided by farmers who wanted to ensure that the industry would be resourced in order to participate in litigation which shapes law and policy affecting Australian agriculture,

¹ Explanatory Memorandum, p. 3.

² Explanatory Memorandum, P.3.

³ Longer proceedings times lead to increase legal and other costs for both parties, ultimately leading to poorer outcomes for plaintiffs.

⁴ Unnecessary proceedings increase the potential of bottlenecking courts, therefore increasing costs,

as well as to fight issues which would result in negative precedents for farmers and regional communities as a whole.

Although not its sole (or even a principal) focus, the AFFF has provided financial support for those involved in class actions. As such, it could be considered a “class action funder”. However, the framework and the motivations of the AFFF are very different to those of the commercial funders.

The AFFF is run as a purely charitable trust. It is managed by a board of volunteer Trustees and is subject to the regulation of the Australian Charities and Not-for-profits Commission. The Trustees also bear obligations to pursue the charitable purpose expressed in the trust deed, together with the usual fiduciary duties.

The AFFF is very selective about the matters it decides to fund, the process for parties to obtain funding from AFFF is rigorous, and the decisions of the Trustees are not financially motivated. An application for funding is vetted through a process which requires it to win the support of a number of tiers of the NFF membership, before being escalated for the ultimate decision of the Trustees. The goal is to ensure that the matters which the AFFF funds are genuinely important to the farming industry.

Historically, the AFFF has not asked for the return of a portion of any damages that were awarded to a successful applicant. It explores that option now but has only actually sought a return in one matter: the major case of *Brett Cattle Company v the Minister for Agriculture (the Live Export Matter)*. In that case the AFFF took a mere 10% of the award, as opposed to the 30% more commonly recovered by litigation funders. Furthermore, any moneys recovered by the AFFF is used in the furtherance of its charitable objectives i.e., supporting farmers by funding legal issues which would affect the sector as a whole. The AFFF will never make a profit, commercial distribution, or pay-out to any person. In short, to enable the fund to be self-sufficient a potential return to the AFFF is now — but only relatively recently — a factor in that decision making process. However, it is a relatively minor factor and the legal/policy ramifications for the industry as a whole are the critical considerations.

Finally, the AFFF’s only formal relationship is with the applicant/litigant. Although it reserves the right to comment on case strategy, any dealings with lawyers are moderated by that applicant itself.

Chapter 2 – The Live Export Matter

The Live Export Matter was a class action, with members of the class made up of businesses which had been affected by then Federal Minister for Agriculture, Joe Ludwig’s, decision in 2011 to ban live cattle exports to Indonesia.⁵ That decision was a massive shock to the Australian agricultural industry, severely impacting livestock businesses, farming families, and the supply chain. Indeed, it even had animal welfare issues, with livestock being stranded mid-processing due to the lack of

⁵ *Brett Cattle Company Pty Ltd v Senator the Honourable Joe Ludwig, Former Minister for Agriculture, Forestry and Fisheries and Anor.*

warning or industry consultation. Nonetheless, at the time neither of the major parties did anything to redress the harm, leaving it to industry to attempt to seek reparations. A class action was filed in October 2014, but the Commonwealth fought it every step of the way, refusing to engage in any form of settlement or alternative dispute resolution discussions at any point in the proceedings. In July 2017, the Court heard the case in a hearing spanning one week, followed by another week-long hearing in December 2018.

Justice Rares finally reached a decision favouring the claimants in June 2020.

Superficially, it was a massive victory for the farming sector. However, despite the win, the experience of the NFF, the AFFF, and — most importantly — the claimants and class members was very trying and highly distressing. The conduct and strategies deployed by the solicitors on behalf of the Commonwealth contributed significantly to this regrettable experience:

- The Commonwealth did not consider settlement at any time during the 9 years between the decision to suspend the live trade and Judgment being ordered in favour of the Lead Applicant in June 2020.
- No settlement discussions, mediation, or alternative dispute resolution took place, despite a neutral evaluation process being engaged in by the Lead Applicant which stated that proceedings would have meaningful prospects of liability being established.
- The Commonwealth's initial response to discovery was deficient, resulting in 22 separate tranches of documents eventually being produced by the Commonwealth before discovery was complete.
- The time period for this discovery process — that is, from the making of the initial discovery applications to the final tranches of documents being produced — spanned almost 4 years, from 10 April 2015 to 17 October 2018.

The Commonwealth's refusal to participate in any form alternative dispute resolution was particularly egregious considering that it was in possession of a highly detailed 'neutral evaluation report' which was written by very experienced Senior Counsel and showed that the claimants had a good prospect of establishing the Commonwealth's liability. This bullish approach suggests that the Commonwealth did not undertake a thorough consideration of its prospects of success or, worse, whilst understanding those prospects continued on regardless, thus, leading to potentially unnecessary years of increased costs and distress.

These actions, whilst disappointing in their own right, were especially unfortunate given that (at least in principle) they seemed to disregard the Commonwealth's obligation to act as a "model litigant". Indeed, the "model litigant obligations" require that the Commonwealth must deal with claims promptly and not cause unnecessary delay⁶, in addition to making an early assessment of potential liability and prospects of success.⁷ Dragging out proceedings, failing to provide full disclosure, and forcing

⁶ *Legal Services Direction* (2017) (Cth) Appendix B s2(a).

⁷ *Legal Services Direction* (2017) (Cth) Appendix B s2(aa).

the applicants to make continued discovery requests would appear to be the type of behaviour that the Model Litigant Obligations are meant to discourage. Nonetheless, the conduct remained a consistent part of the Commonwealth's approach for the duration of the matter.

In short, the Respondent to the Live Export Matter, the Commonwealth, had a positive obligation enshrined in legislation to act in "good-faith" and still engaged in 'litigation by attrition'.

Finally, the conduct was perpetrated by a body which is already answerable to the general public⁸ for any questionable conduct. Large corporations — who are similarly capable of affecting peoples and industries significantly and resourced to fund extremely long and drawn-out proceedings — are not beholden to anyone other than their shareholders and boards, who would generally support any strategy that minimise the company's financial exposure. It demonstrates that this kind of conduct is existent within class action proceedings at many levels, may be perpetrated by either or both the plaintiffs and respondents, and can occur in public or private matters. It clearly illustrates the need for a more comprehensive amendment than those contemplated by the current Bill.

Chapter 3 – Suggested Amendments to the Bill

Despite the successful outcome in the Live Export matter, it serves as a valuable illustration of how the conduct of respondents and the way in which they oppose a claim can frustrate the course of justice and result in unwarranted distress for valid claimants. It shows how, far from righting the wrongs which they have suffered, the justice system in its current state can exacerbate them.

If the government is sincere in its wish to 'improve the outcomes for plaintiffs' then it must address those issues too.

In this chapter we propose amendments which would assist in preventing such behaviours. They would substantially streamline the class action litigation process for all — both claimants and respondents — level the playing field and improve outcomes, without compromising the system or the rights of respondents. They would go a long way towards addressing the actions of "wrongdoers" on the respondent's side of a Class Action, and result in substantial savings for all parties.

We have presented each of these proposals as a requirement or rule which could be codified in court processes by regulation, applied bluntly across-the-board. However, an alternative may be to have the litigation funding assessor or the 'contradictor' (which the Bill establishes) consider each of these proposals in the context of the specific proceedings and advise if a particular requirement should or should not apply.

⁸ i.e. as part of the democratic process.

1. Security for costs based on initial assessment and pegged to sliding scale

Security for costs orders may create a major bar to litigation. In addition to the applications taking up a significant proportion of the Court's time and costing millions of dollars, the orders themselves can be a significant hurdle for claimants to overcome. They effectively require the claimant to bear the upfront costs of both prosecuting and defending the proceedings. Indeed, the "security for costs" orders are, in some respects, more problematic for claimants than simply covering their own costs, as the claimant will have only limited control over the amount they have to pay, and the payments generally have to be made as a lump sum or in accordance with a short schedule of a few payments.

Furthermore, while they can be justified when dealing with impecunious claimants or those who may liquidate in the face of adverse costs orders, they are unnecessary for purely speculative claims which can be controlled by other processes that are available to the court to manage its proceedings.⁹

A moderate step to address these issues would be to:

- (1) *Require or enable a court to consider the probable length and complexity of a Class Action at its commencement;*
- (2) *Then estimate the cost of the matter considering the size and significance of the issues at stake; and*
- (3) *Then adopt a sliding scale or formula for the staged payment of security for costs by Claimants to Respondents.*

We have not gone so far as to suggest that the Committee consider provisions which facilitate the granting of security for costs orders against Respondents. Although there may be merit in such orders — for example, where the Respondent uses court process to delay proceedings and/or refuses to engage in settlement discussion with a claimant who has an arguable case — this would be a significant departure from usual practice.

2. Controlling strike-out applications against each of the parties' pleadings.

The power to strike out pleadings is an important tool allowing courts to control claims which have no legal basis and no prospects of success or are merely vexatious and malicious. However, they also provide a tool which bad-faith litigants can use strategically to frustrate proceedings, ramp up costs, and deny claimants rights. As such, while we would not suggest the court's power should be limited in this regard, we would submit that it could be more targeted.

To that end, we submit that litigants be prevented from making repeated strike-out applications. Instead, in the ordinary course of a matter, the court should be limited to hearing any strike-out applications when the case which the claimants are making is clear and then when the defence to the case has crystallised. To that end,

⁹ Such timetabling actions, strike out applications, etc

the number of and opportunity for strike-out application would be limited to targeted and appropriate uses.

Strike-out applications should be limited to two occasions:

- (1) *Before the filing of evidence; and*
- (2) *After discovery.*

There may be cause for further application if, for example, the claimant makes significant amendments to the court documents formalising their claim.¹⁰ In that case, any further strike-out application or amendment applications can be heard at the beginning of trial. Furthermore, there may be other exceptional circumstances, and as such the court should have discretion to authorise a further application. However, this should be controlled so as to avoid undermining the limitations.

3. Parties required to conduct at least two court ordered mediations.

Mediation is a vital way for parties to limit costs while arriving at mutually acceptable results and/or narrowing the issues in contention. It can also help to focus the parties' minds, forcing them to seriously engage with the other parties' arguments and consider whether settlement or compromise would be a reasonable outcome. However, Respondents will be resistant to seriously engaging in mediation — or any form of settlement discussions — where they believe that they can simply exhaust Claimants into abandoning their case through the course of the proceedings.

The NFF's experience in the Live Export Matter illustrates the problem. The Respondent to that matter, the Commonwealth, flatly refused to consider settlement, despite the fact that:

- (1) The Claimants were wholly vindicated in the outcome, with an unqualified finding that the government had misused its power to their considerable financial detriment.
- (2) In addition to reducing costs and the size of the damages, settlement would have avoided a precedent on the exercise of executive power which is arguably more significant for government than the financial consequences.

Both of these factors should have prompted government to at least consider and enter into settlement discussions. The fact that it did not underscores the need for a mandated process.

There should be no fewer than two Court-ordered mediations:

- (1) *The first shortly after the filing of any Defence and/or Cross-Claim when the matters in dispute have crystallised; and*
- (2) *The second after all of the evidence to prove/disprove the claim has been revealed; that is after the filing of evidence and discovery.*

¹⁰ E.g. originating application, statement of claim, etcetera.

4. Limiting cost which may be claimed by respondents to subpoenas.

It is not unusual for parties to demand exorbitant amounts to comply with court orders to produce documents. While the court has the power to order the party issuing the subpoena to cover the subpoenaed party's expenses, occasionally the subpoenaed party demands payment which go beyond what could sensibly be considered "conduct moneys" or "loss or expenses". As such, there should be a limit on the amount which a subpoenaed party can claim for production of documents prior to trial.

Subject to extraordinary circumstances, the amount a party is require to pay up front should not be more than one hundred thousand dollars (\$100,000.00) for the production of documents.

Any additional sum should only be available to be claimed at the end of the trial and limited to an amount which is determined by the Trial Judge and following the witness' compliance with the subpoena.

5. Lay witnesses only be required to file Outlines of Evidence.

Usual practice in modern litigation is for a court to require the filing of affidavit evidence in chief, while oral testimony is principally limited to cross examination. Although this practice can save time and money — and many lawyers would see it as good practice in the preparation of a matter — there will be occasions when it simply adds to the burden and therefore cost without having any attendant benefit. For example, where a lay witness is only giving evidence in respect of a small or discrete aspect of the case or, alternatively where there is simply too much material to cover succinctly in written form, such that an affidavit runs into hundreds of pages.

Costs associated with gathering evidence are frequently the most expensive part of any proceedings, and a significant portion of those costs are spent preparing affidavits and statements of lay-witnesses. As such, it makes sense to limit those costs where practical. There is also the frustration of incurring those costs unnecessarily if the matter settles or is otherwise discontinued so that it does not go to a hearing. For that reason, courts should be discouraged from making the filing of affidavit evidence the default practice.

Of course, one of the advantages of affidavit evidence is that it limits the opportunity for "ambush" tactics, where one party withholds evidence until the last minute so as to deny the other party an opportunity to properly consider and respond to it.

By default, parties should only be required to file an outline of their lay witness' evidence which set out the substance of the evidence which it is expected that witnesses will give at trial.

If the matter proceeds to trial, they will give that evidence in detail during examination in chief and which then may be tested under Cross-Examination.

6. Representation at court appearances should be limited within reason

In major cases it is not unusual for well-resourced parties to attend court appearances with an army of lawyers. This practice will be justified on the basis that the litigation will canvas a broad range of legal issues which may require distinct areas of expertise or the delegation of tasks to junior practitioners. Nonetheless, even where such delegation of work is necessary, the input of these practitioners will largely be limited to preparations and not at the actual hearings or other (e.g. procedural) appearances.

As such, the court should be required to consider and approve the expected representation at major appearances. There should be a rebuttable presumption that

- (1) At a Directions Hearing each side requires no more than one Senior/Queens Counsel, one Junior Counsel, one senior (partner or associate) solicitor and one junior solicitor.*
- (2) At a hearing (interlocutory or final) each side requires no more than one Senior Counsel, two Junior Counsel, one senior solicitor and two junior solicitors*

Furthermore, except in exceptional circumstances the cost which the party incurs and can recover (in the event they obtain a costs order) should be limited accordingly. Not only would this limit unreasonable costs in proceedings, but it may help to introduce a measure of equity in representation and access to justice.

7. Prohibit Respondents from pressuring Group Members.

Introduce a mandatory protocol which prohibits Respondents from pressuring Group Members into giving up their rights without adequate compensation and legal protection.