

Senate Economics Legislation Committee
CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION
FUNDING PARTICIPANTS) BILL 2021

Attorney-General's Department

Hearing date: 17 January 2022

Hansard page: 23

Question type: Spoken

Senator Deborah O'Neill asked the following question:

On notice, could I also ask the Attorney-General's Department and the Treasury to provide a written submission to this committee which addresses the concerns about the bill raised in the 15 submissions received by this committee? We had a truncated hearing this afternoon—although I do note, with thanks, that the chair has adjusted the time to allow questions to be asked. I'd like you to focus particularly on the concerns set out in the submission by the Law Council of Australia, who remain concerned about the constitutionality—in addition to other matters—and the submission of Marland Law. Could I ask you to provide a response to each of the considered recommendations suggested by the National Farmers Federation in its submission? The view of the Law Council, in the evidence that they just gave us, might be important for you to have a look at as well. It's up to you how you craft your submission, but I do insist that you provide responses to each of those submissions and that you engage in detail with the multitude of concerns that have been raised by these diverse submitters. And, of course, I'll have a series of other questions on notice.

The response to the Senator's question is as follows:

The below table identifies the key concerns raised in the submissions to the Senate Economics Legislation Committee's inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (the Bill). The table also identifies the submissions in which these concerns are raised, as well as a response to each concern, jointly provided by the Attorney-General's Department and the Department of the Treasury.

Issue	Raised by which submissions	Response
Exhaustive list of factors the Court must consider	Levitt Robinson Solicitors, Law Council of Australia, Australian Institute of Company Directors, Maurice Blackburn Lawyers, Omni Bridgeway Limited, Woodsford Litigation Funding Limited	<p>The factors set out in subsection 601LG(3) provide a basis for the courts to consider the fairness and reasonableness of a claim proceeds distribution, and seeks to ensure clarity and consistency of application of the fairness and reasonableness test across class actions. The factors reflect those determined to be relevant to assessing the fairness and reasonableness of a claim proceeds distribution method in line with the policy intent of the Bill.</p> <p>The Bill allows regulations to omit, modify or vary the factors in subsection 601LG(3). This modification power is intended to ensure the fairness and reasonableness test remains a relevant and appropriate protection for class members into the future.</p>
Impact of the Bill on funder willingness to fund certain cases and corresponding impact on access to justice	Law Council of Australia, Association of Litigation Funders of Australia, Woodsford Litigation Funding Limited, Litigation Lending Services Ltd, Slater and Gordon Lawyers, Marland Law, Maurice Blackburn Lawyers, Mr Justin McDonnell, Litigation Capital Management Ltd	The concerns raised in submissions are often based on the premise that the Government is introducing a cap on returns to litigation funders. This is not the case. The proposed legislation regulates the distribution of proceeds and preserves the ability of the court to determine a fair and reasonable distribution. This means litigation funders are able to make a case for a particular distribution that they believe is fair and reasonable.

Issue	Raised by which submissions	Response
Impact of the Bill on closed/opt-in class actions, satellite litigation, and multiple actions on the same issue	Law Council of Australia, Association of Litigation Funders of Australia, Woodsford Litigation Funding Limited, Litigation Lending Services Ltd, Slater and Gordon Lawyers, Marland Law, Maurice Blackburn, Business Council of Australia	<p>The proposed reforms would not prohibit or prevent open class actions. These are regulated through the legislation underpinning a court's class action regime. The Bill seeks to ensure that a funder's commission is not imposed on class members without their consent while still enabling expenses to be shared to address any potential 'free-rider' problem.</p> <p>Currently, funders only need to sign up seven or more persons to a litigation funding agreement to bring the claim on behalf of all class members, without ascertaining the size of the class or approaching additional class members. They can then use common fund orders (CFOs) to claim their fees and commission from all class members. The Bill incentivises funders to ensure that there is genuine interest among the class, and test the merits and viability of the claim, prior to commencing an open class action.</p>
Impact of the rebuttable presumption on defendant conduct and strategy in a class action	Levitt Robinson Solicitors, Law Council of Australia, Association of Litigation Funders of Australia, Litigation Lending Services Ltd, Slater and Gordon Lawyers, Marland Law	<p>The rebuttable presumption preserves court flexibility to amend a claim proceeds distribution method, including by finding the presumption has been rebutted, in individual cases. The factors the court may consider in determining if the proposed distribution of proceeds is fair and reasonable include the complexity and duration of proceedings and the costs of the proceedings.</p> <p>Further, lawyers are bound by professional and ethical obligations to act with honesty, competence and diligence in class action proceedings. Parties to a dispute are also bound by standards of conduct, which courts can uphold through personal cost orders against non-compliant parties.</p>

Issue	Raised by which submissions	Response
Impact of the Bill on use and availability of CFOs (including whether the definition captures funding equalisation orders (FEOs))	Levitt Robinson Solicitors, Law Council of Australia, Association of Litigation Funders of Australia, Litigation Lending Services Ltd, Slater and Gordon Lawyers, Marland Law, Maurice Blackburn Lawyers, Litigation Capital Management Ltd, Business Council of Australia	<p>The Bill does not ban CFOs, but provides that the claim proceeds distribution method set out in a class action litigation funding scheme's litigation funding agreement will be unenforceable if the court makes a CFO.</p> <p>CFOs permit courts to impose a litigation funder's fee or commission on claimants who have not signed a funding agreement, and so have not consented to the fee. This contravenes the established common law doctrine of privity of contract, which holds that a contract cannot impose obligations upon any person who is not a party to the contract.</p> <p>The Bill does not seek to prevent expense sharing in an open class actions context. It is not intended to affect other existing court mechanisms of ensuring costs of the action are equitably shared between parties who benefit from the action (eg: FEOs).</p> <p>The Bill makes clear that it does not imply that a court has the power to make a CFO, so as not to affect the existing legal position with respect to CFOs. Any future action in relation to CFOs would be a matter for the Government.</p>
Constitutional validity of the Bill	Law Council of Australia, Litigation Lending Services Ltd, Maurice Blackburn Lawyers, Litigation Capital Management Ltd	The Government is aware of the concerns raised by various stakeholders around the constitutionality of the Bill. The Government has consulted with the Solicitor-General and Australian Government Solicitor and is confident that it has legal authority to legislate in this area.
Basis for the 70 per cent figure for the rebuttable presumption	Levitt Robinson Solicitors, Woodsford Litigation Funding Limited, Litigation Lending Services Ltd, Slater and Gordon Lawyers, Maurice Blackburn Lawyers, Omni Bridgeway Limited, Business Council of Australia	The design of the rebuttable presumption was informed by the Joint Committee's 2020 report on litigation funding and the regulation of the class action industry and the Government's consultations in June and September 2021.

Issue	Raised by which submissions	Response
Consultation process for the Bill	Litigation Lending Services Ltd, Maurice Blackburn Lawyers, Litigation Capital Management Ltd	The Bill is informed by the reports of the Joint Committee and the Australian Law Reform Commission (ALRC) in their respective inquiries into litigation funding and class actions, as well as the Government's consultations in June and September 2021.
Suggested additional reforms including increased case management powers for courts, amendments to security for costs orders, restrictions around strike out applications, court ordered mediations, changes to evidence rules	Levitt Robinson Solicitors, Law Council of Australia, Slater and Gordon Lawyers, National Farmers Federation	<p>So far as these amendments align with recommendations of the Joint Committee and ALRC inquiries into class actions and litigation funding, the Government has responded to these in a report tabled on 19 October 2021.</p> <p>Any additional reforms would be a matter for Government.</p>
Impact of the term 'sufficiently progressed' in subsection 601LG(2)(b)	Law Council of Australia	The provision is intended to supplement the court's existing case management powers. The purpose of this provision is to give the court a broad scope to decide whether there is enough information about a proceeding to make an order to approve or vary a claim proceeds distribution method.