Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021
Submission 5

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Parliamentary Joint Committee on Corporations and Financial Services
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Dear Committee Members

Submission: Inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 ("Bill")

Thank you for the invitation to make a submission to this inquiry. I note at the outset that the short time period for this inquiry is disappointing and manifestly inadequate given the importance of the subject matter. Owing to time constraints my submission necessarily lacks detail.

Need for uniform national approach

1 As an overall comment, I urge the Committee to recommend that the proposed Bill be withdrawn pending negotiations with the states (or at least those states that have adopted class actions regimes), and with a view to agreeing on national uniform legislation regulating the funding of class actions.

2 The Bill as presently drafted includes provisions that purport to regulate the procedure applying to litigation in state courts in a manner that is directly in conflict with state legislation. For example, state courts have their own statutes and rules governing when contradictors can be appointed or when questions can be referred. The proposed Bill would include provisions requiring this to be done in certain instances in a way that is inconsistent with what the state legislation provides. That gives rise to significant constitutional difficulties. To the extent it purports to apply to matters not in federal jurisdiction, it has no clear basis in the *Constitution*.

3 Further, the *Corporations Act* 2001 (Cth) presently relies on the referral of certain corporations powers from the states each state's version of the *Corporations (Commonwealth Powers) Act* 2001. Amending the *Corporations Act* to regulate to control the exercise of judicial power by state courts, thus overriding (or purporting to override) the states' ability to regulate their own court processes, risks upsetting the agreement underpinning the national uniform corporations legislation.

4 The way to avoid these difficulties would be for the Commonwealth and the states to agree to a uniform approach to the regulation of class actions and litigation funding. No legislation of the contemplated type should be passed by the Commonwealth until that has been achieved.

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Specific comments on provisions in the Bill

5 In addition to the above general comment I have the following specific comments on the proposed Bill as drafted.

Proposed section 9AAA

6 The definition of *"class action litigation funding scheme"* in proposed section 9AAA is absurdly broad. To give an example, say there is a flood in an apartment building, seven of the lot owners engage a lawyer to make a demand on the owners corporation, and three of them agree to pay the fees for the others. If the proposed Bill were passed, the lot owners are an illegal unregistered managed investment scheme and the three who agreed to pay the fees have committed an offence. The definition should be revisited to ensure it is only applicable to commercial enterprises of the type the regulations are aimed at.

Proposed subsection 601GA(5)

7 The proposed requirement in subsection 601GA(5) for the scheme's constitution to provide for certain matters is problematic because, amongst other things, it is unclear what the effect would be of a funding agreement not complying with the scheme's constitution, and it would also be unclear how (if at all) the scheme's constitution impacts on people who are group members in the class action but have not agreed to be members of the scheme.

8 These difficulties highlight the fact that the managed investment scheme regulations are not the appropriate means of regulating court processes or the administration of justice. A person agreeing to fund litigation is not the same as a person conducting a property development or managing a hedge fund, and should not be regulated in the same way or by the same legislation. Again, I urge the Committee to recommend that a national uniform approach is negotiated and is then implemented through a legislative regime specifically targeted towards litigation funding, not through the *Corporations Act*.

Proposed section s 601LF

9 If proposed s 601LF is enacted as presently drafted there will be a difficult question as to the Commonwealth's constitutional ability to legislate regarding matters of contract law applying to litigation outside of federal jurisdiction. If the provision is held invalid to the extent it purports to do this, then there would be a clear incentive for litigation funders to commence litigation in state courts making claims in state jurisdiction where available. This would create significant *"forum shopping"* problems and would also lead to duplicative proceedings because, for example, in order to avoid federal jurisdiction a separate action would need to be commenced in each state on behalf of the residents of that state, rather than commencing a single action on behalf of all claimants wherever situated.

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Proposed subsection 601LG(3)

10 Proposed subsection 601LG(3) should not exhaustively state the matters to which the Court may have regard. There will undoubtedly be considerations which are relevant but are outside of the things envisioned by the drafters. The word *"only"* should be deleted from the chapeau, such that it says *"the Court must have regard to the following factors"*; and there should be a subparagraph (g) inserted reading *"any other relevant matters"*.

Proposed subsection 601LG(6)

11 Proposed subsection 601LG(6) fails to take into consideration the costs that would be imposed by the imposition of the appointment of a contradictor or referee. In smaller settlements, these costs would likely outweigh any benefit from the appointment of such a person. After the words *"unless it is not in the interests of justice to do so"* should added something to the effect of *"or to do so would not be cost effective, having regard to the amount, or expected amount, of claim proceeds for the scheme"*.

Yours faithfully

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Barrister