BCA
Business Council of Australia

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

Submission to the Senate Economics Legislation Committee

December 2021

Contents

Submission to the Economics Legislation Committee

This is the submission of the Business Council of Australia in response to the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants Bill 2021* (**the Bill**).

The Bill was referred to the Senate Economics Legislation Committee by the Senate on 2 December 2021, with a reporting date of 3 February 2022.[1]

We note that the Bill has already been subject to a Parliamentary inquiry by the Joint Standing Committee on Corporations and Financial Services (**the PJC**). The Report of this inquiry was tabled on 21 November 2021.[2] There appears to be no reason why another committee of the Parliament should now traverse the same matters that were considered by the PJC in its inquiry into the Bill. As such, this submission largely re-produces the previous BCA submission to the PJC, which is set out below.

Overview

The Bill is strongly supported by the BCA. The current system of class actions and litigation funding is failing class members. It allows for funders and lawyers to maximise their own profits at the expense of class members.

In 2019, 61% of the compensation award for shareholder class actions in Australia went to litigation funders and lawyers, leaving less than 40% for class members. In 2018, when litigation funders provided funding for class actions, the median return to class members was 51%, compared to 85% in non-funded matters.

A guaranteed minimum rate of return for class members should be implemented as an urgent priority. The BCA is a longstanding supporter of reform to class actions in order to benefit class members. Our previous submission[3] to the 2021 Consultation Process "*Guaranteeing a minimum return of class action proceeds to class members*" considered the various reform proposals that are now reflected in the Bill. A number of points made in that submission are now repeated in this submission. The BCA also strongly supported recent reforms by the Commonwealth Government to restore the rules under which litigation funding arrangements are treated as Managed Investment Schemes (**MIS**) and for funders to be required to hold an Australian Financial Services Licence (**AFSL**).

The proposal for a guaranteed minimum return was also a key recommendation of the 2020 report of the Parliamentary Joint Committee on Corporations and Financial Services inquiry into "*Litigation funding and the regulation of the class action industry*" (**PJC Report**). The PJC Report followed the report of the Australian Law Reform Commission of December 2018 "*Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*" (**the ALRC Report**), which also considered similar issues.

The urgent need for reform

Class actions play an important role in providing individuals with access to justice in response to corporate or government wrongdoing and can make the legal system more efficient when used appropriately. However, some practices in class action litigation are contrary to the goal of ensuring that such actions expand access to

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/LitigationFundingBill
[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LitigationFundingBill/Report
[3] https://www.bca.com.au/guaranteeing_a_minimum_return_of_class_action_proceeds_to_class_members_submission_to_treasury_consultation_paper

justice for a wider range of people, rather than providing opportunities for those that run and fund the proceedings to earn disproportionate returns.

The litigation funding environment in Australia is now characterised by funders gaming the system to take advantage of the perverse incentives that enable them to make windfall profits, all of which are at the expense of the class members who have actually suffered damage. In the current environment, the primary determinant of which class actions get run is the potential return to funders rather than the damage suffered by class members or the potential redress for class members.

The greater the return for the funders, the lower the return for the class members. In one case in the New South Wales Supreme Court, the Court described the return sought by the litigation funder as *"stratospheric, in the tens of thousands of per cent."*[4]

Australia's class action system is currently failing to achieve its original objectives of expanding access to justice and generating more efficient use of the court system. As such, the class action industry in its current form is failing those whose interests should have priority – the class members themselves – whilst also generating considerable costs for defendants, which are ultimately picked up by shareholders (for companies) or taxpayers (for governments).

Any reforms in this area need to restore the primacy of the interests of class members. As such, they should be uncontroversial. The BCA endorses the conclusion of the PJC Report that *"those who most fiercely resisted comprehensive regulation of the industry were the vested interests who benefited from the status quo."* [5]

The inherent risk of conflicts of interest in litigation funding

There is an inherent potential for conflicts of interest between the interests of funders and the law firms whose fees they pay on the one hand, and the interests of class members on the other. These conflicts have not been sufficiently regulated, with the result that class members have been disadvantaged by the self-interested actions of funders and firms.

In funded class actions, the costs of the law firms acting for the plaintiffs are not met by the plaintiffs themselves, but by the funder. The funder may have an ongoing relationship with the law firm that is commercially lucrative for the firm to maintain. This gives rise to risks that the lawyers acting for the class members may have potential or actual conflicts between their obligations to their clients and their relationship with their litigation funder.6

Similarly, the terms of the funding agreements are negotiated by the funder and the law firm, not by the plaintiffs. In practice, it has been impossible for a typical class member to have any input into such arrangements, let alone the ability to raise concerns regarding potential conflicts of interest that may adversely affect them.

Further, class members (whether knowingly or not) delegate to lawyers and funders the power to make decisions on which claims to pursue, how cases are run and, most importantly, whether and on what terms to settle cases. Whilst they ostensibly have fiduciary obligations to the class members, this has not been sufficient to prevent abuses of their position. Those who make the decisions do not necessarily have the same interests as the class members, nor even the lead plaintiff. It has been observed that:

> *"such settlements involve the determination of legal rights of group members, who are not generally represented. The courts naturally look to representatives of the applicant for assistance, but the interests of all group members are not necessarily uniform nor the same as those of the applicant. Conflicting interests and duties are rife."* [7]

[4] *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd* (No 3) [2019] NSWSC
[5] Parliamentary Joint Committee on Corporations and Financial Services *"Litigation funding and the regulation of the class action industry"*, December 2020, page xiv
[6] Allens, submission to PJC Inquiry, page 11
[7] Jeremy Kirk SC, *"The case for contradictors in approving class action settlements"*, Australian Law Journal, Vol 92, Part 9, 2018

It is inherent nature of both litigation funding and class actions that they are more at risk of potential conflicts of interest. The regulatory regime needs to be more appropriately adapted to deal with these risks.

The catastrophic failure of self-regulation by litigation funders

Litigation funding schemes were previously subject to the laws governing financial products and services under the *Corporations Act 2001* (**the Act**). In 2009 the Federal Court ruled[8] that litigation funding arrangements were likely to constitute an MIS and thus be subject to the regime for such schemes under Chapter 5C of the Corporations Act.

However, the impact of this decision was reversed by a Regulation[9] made by the Commonwealth Government in 2012 to exempt litigation funders from both the MIS regime under Chapter 5C as well as the regime governing Financial Services and Markets under Chapter 7, which would require funders to hold an AFSL. This Regulation has been described as a *"bespoke exemption from the financial services and licensing conduct regimes that would otherwise apply"*[10] and the reasons for the exemption were never adequately explained. It effectively introduced a regime of self-regulation for litigation funders. This has proven to be highly detrimental to the interests of class members and enabled conduct to be engaged in by class action funders and lawyers that should never be tolerated in any field of commercial endeavour.

In 2020 the Commonwealth Government reversed the 2013 exemption and introduced a new Regulation to require litigation funding arrangements to be treated as an MIS and to hold an AFSL. This policy is strongly supported by the BCA.

The catastrophic failure of the self-regulation regime were illustrated by the recent decision of the Victorian Supreme Court in the *Banksia Securities* class action decision in October 2021.[11]

Amongst other things, the Court concluded that the returns obtained by the funders and lawyers in this proceeding were *"ill-gotten"*; their methods in obtaining them *"dishonourable"*; and their conduct *"would have shattered (the) expectation of lawyers as an honourable profession."*[12]

In the *Banksia* case the barristers for the plaintiffs engaged in misleading conduct by not disclosing their financial interest in the litigation funder. The funding entity was run by the solicitor acting for the plaintiffs and, in the absence of a contradictor, was able to provide a grossly disproportionate share of the proceeds to the lawyers. In practice, due to the nature of the arrangement, there was no effective distinction between the funding entity and the solicitors.

Whilst the unfair returns obtained by the lawyers and funders in the Banksia proceeding were achieved by subterfuge engaged in by the lawyers and funders, the basic business model they employed would still have been possible even without their misconduct. This business model is inherently conflicted and inherently disadvantages class members. It would not have been possible had litigation funding been treated as an MIS. The extraordinary abuses revealed by the *Banksia Securities* case were the inevitable result of the 2012 decision to remove MIS status. It shows the catastrophic (and entirely predictable) results of that decision.

[8] *Brookfield Multiplex Limited v International Funding Partners Pty Ltd* (2009) 180 FCR 1
[9] Corporations Amendment Regulation 2012 (No 6)
[10] King & Wood Mallesons, submission to PJC Inquiry, page 1
[11] *Bolitho v Banksia Securities Ltd* (No 18) (remitter) [2021] VSC 666 (11 October 2021)
[12] At para 2

Comments on features of the Bill

Class members must opt-in to the scheme:

The Bill will require all members of a class to opt-in to the class in writing.[13] This requires a funder to demonstrate that it does, in fact, represent a genuine, identifiable class of persons with a clearly identifiable cause of action, based on the actual circumstances of class members. The process will help quantify a claim and aid any settlement discussions. As recommended above, class members must also be free to opt-out in favour of any competing class action should they wish.

Court oversight of fees:

The Bill will require all class action funding arrangements to be set out in a funding agreement which must be approved by a court, and which can also be varied by the court.[14] Before approving a funding agreement, the court must (unless not in the interests of justice):

- receive a report of a cost reviewer; and
- appoint a contradictor and have regard to his or her views

The funder must cover the costs of each of these parties. This represents best practice and assists the court to make informed decisions about funding arrangements. These measures have proven their worth when they have been used. The Bill could provide more guidance as to the criteria to be used in selecting these parties and scoping their work, but the courts should be capable of appropriately utilising these resources.

"Fair and reasonable" test for funders' fees

The Bill will introduce a *"fair and reasonable"* test that courts must apply in approving a funding scheme.[15] In applying this test, the court may only have regard to the factors prescribed in the Bill, including:

- the expected amount of the claim, the legal costs (and their reasonableness)
- whether the action is being managed in the best interests of class members and the complexity and duration of the matter
- the funder's commercial return relative to the costs incurred by the funder
- the risks accepted by the funder
- any other compensation or remedies available to the members (including recovery of costs from the defendant)

The Bill also includes a rebuttable presumption that any payment to entities who are not class members of more than 30% of the claim proceeds is not "fair and reasonable."[16]

There is still a risk that, in cases where only one funder comes forward, the funder might see the potential to use this as leverage to argue for a lower percentage recovery by class members on the basis that it is not prepared to fund the matter unless it receives a higher return, giving rise to a temptation to allow the matter to proceed with a lower recovery threshold. This should not be a sufficient basis for the court to rebut the presumption and approve a lower return to class members.

For this reason, the Bill should make it clear that any return to non-class members above the 30% threshold can only be provided for in truly exceptional circumstances. We recommend that the Bill be amended to include an

[13] Clause 601GA(5)(a)(i)
[14] Clause 601LG(1)(b)
[15] Clause 601LG(3)-(5)
[16] Clause 601LG(5)

additional requirement to the effect that the court must apply the presumption that a claim proceeds distribution method is not fair and reasonable if less than 70% of the claim proceeds for the scheme is paid or distributed to the scheme's general members as a whole, unless it is satisfied that there are "exceptional circumstances". Alternatively, the Regulations contemplated by the Bill[17] should provide for this.

We note that certain submissions to the PJC inquiry argued that the rebuttable presumption of a 70% minimum return is not appropriate. It is important to emphasise that the Bill preserves the discretion of the Court to approve a return to class members below this level if it is appropriate to do so. If a funder is dissatisfied with a return of 30% or less, it can put its case to the court. The criteria which the court must consider in evaluating returns to funders is whether the return is fair and reasonable. The key point is that a funder must justify the returns it is seeking.

If funders wish to take more than 30% of the return this will be at the expense of the class members. The members of the class should, *prima facie*, take priority over those of funders. It is only fair and reasonable for the onus to be placed on funders to persuade the Court why their interests should prevail over those of class members in this regard.

Without this safeguard, funders will continue to be able to assert to the Court that unless they receive their proposed level of return then they will simply not run a particular case. This situation lacks rigour and disproportionately favours funders over the class members. Funders will still be able to make such claims to the Court under the Bill but they will no longer be able to do so as a matter of course without being required to justify such claims.

"Fair and reasonable" test should also apply to common fund orders

Under the Bill as drafted, the "fair and reasonable" test (including the rebuttable presumption that any return to funders greater than 30% is not fair and reasonable) does not apply where the court makes a common fund order.[18] In addition, the Court is not required to receive and consider a referee report, or representations by a court-appointed contradictor in making a common fund order.[19]

If, and to the extent that, a common fund order can be made by the court,[20] the effect of such an order is very often to fix the funder's remuneration as a portion of the claim proceeds in much the same way as a funding agreement. Accordingly, the court should also be required to the apply the "fair and reasonable" test when making a common fund order. There is no policy reason why the same principles should not apply to both. The Bill as currently drafted creates a loophole in which a party may seek to avoid the "fair and reasonable" test by simply applying for a common fund order.

For this reason, the Bill should be amended to also provide that the Court must:

- apply the "fair and reasonable" test when making *any* order fixing the funder's remuneration for the scheme; and
- receive and consider a referee report, and consider the representations made by a court-appointed contradictor, before making *any* order fixing the funder's remuneration for the scheme.

Finally, we note that common fund orders require group members who have not entered into a funding agreement to pay commission to a funder, whereas fund equalisation orders require group members who have not done so to contribute to the commission paid to a funder by other group members who have entered into a funding agreement.

Importantly, where a fund equalisation order is made, the funder's commission is payable by the group members who entered into the funding agreement pursuant to the terms of the agreement (which, under the Bill, would be subject to the "fair and reasonable" test). In contrast, where a common fund order is made, the funder's

[17] Clause 601LG(5)(f)
[18] Clause 601LF(2)(c), (3)(d) and (4)(d)
[19] cf. clause 601LG(6)
[20] See *BMW Australia Ltd v Brewster* (2019) 374 ALR 627

commission is payable pursuant to the court's order (which, under the Bill, would not be subject to the "fair and reasonable" test).

The power of courts to make a common fund order as a part of a settlement approval is yet to be determined by the High Court. The Bill itself states that it is not intended to imply that courts do have such powers.[21] If courts do have the power to make common fund orders as part of settlement approval, this could significantly undermine the proposed reforms because, as noted above, common fund orders may apply to group members who have not entered into a funding agreement.

The need for clear methodology for distribution of proceeds

The Bill will introduce new requirements for funding agreements, which will be required to contain a *"claim proceeds distribution method"* that specifies how the claim proceeds will be paid or distributed to the class members.[22] The methodology must be spelt out in each agreement and approved by the Court. This will help all parties assess the size of the claim and how the class members will participate in any recovery. This might change as the matter proceeds, so there should be an ability for the Court to amend it.

The reinstatement of Managed Investment Scheme status for class action funding

The Bill will confirm that a class action litigation funding scheme is an MIS as defined under the Act. As noted above, there was never any coherent rationale for why such schemes were ever exempted from the MIS regime by the Commonwealth Government in 2012.

We reject the arguments made to the PJC Inquiry that litigation funding should not be covered by this regime because it is "a separate regime" that was designed for a "different purpose".[23] The MIS regime was designed to cover a range of investment products and financial schemes that serve different purposes. At its most basic level, a litigation funding scheme is an investment vehicle in which members are charged by the funder for a financial service; where their financial interests are managed on their behalf by the funder; and where the funder takes a cut of the return on the investment. It is untenable to argue that such an arrangement should not be regulated as a financial service, as some submissions to the PJC inquiry did.

The MIS regime provides a regulatory platform that seeks to cover a wide range of financial products through registration, compliance and reporting. It is frequently adapted to operate effectively in particular circumstances.

The regime currently covers a broad range of products and services, including financial sales, advice and dealings in relation to financial products such as securities, derivatives, general and life insurance, superannuation, margin lending, carbon units, deposit accounts and means of payment facilities.

Chapter 7 of the *Corporations Regulations 2001* contains extensive refinements, modifications and exemptions to financial services regulation, including to the meaning of retail and wholesale clients for different financial products, when a financial service is considered to be provided, licensing requirements, financial services disclosure, best interests obligations and remuneration and disclosure obligations.

ASIC *Corporations (Litigation Funding Schemes) Instrument 2020/787* adapts the MIS platform as it applies to litigation funding schemes to ensure it operates effectively for them. Bespoke relief is also available for particular circumstances, as it is for many other kinds of financial products. It is well established that litigation funding is a financial product. Funders provide a financial service in funding class actions and receive a return depending on the outcome of the action. There is no reason why these services should be exempt from regulatory oversight and good reasons why they should be subject to it, as recent matters have demonstrated.

[21] Clause 601LF(7)
[22] Clause 601GA(5)
[23] PJC Inquiry Report, page 32

Court selection for class actions

The Bill will apply to class actions brought in federal courts; State and Territory courts exercising federal jurisdiction; and State and Territory courts not exercising federal jurisdiction.[24] The Bill will capture funding agreements in all jurisdictions by virtue of them being regulated as Managed Investment Schemes. This ought to prevent forum shopping in favour of a jurisdictions that are likely to be more favourable to the interests of funders.

Contingency fees and conflicts of interest for funders and lawyers

The Bill, if enacted, would still allow for a loophole in the class action regime that would enable law firms that fund their own costs without an external funder to escape the operation of the MIS regime and thus not be required to hold an AFSL. This may not be an uncommon scenario and certain firms may attempt to change their funding arrangements in order to run class actions under such a model.

There is a strong case for law firms who undertake class actions on this basis to be regulated on the same basis as other commercial parties – by holding an AFSL, establishing an MIS and being regulated in the same way. There might be a threshold below which minor matters do not require this, to reduce the regulatory burden.

Efficiency hearings to rationalise competing class actions

The Bill does not require a court to take action in the event of multiple class actions covering the same subject matter, and to consider whether the court should order that the proceedings be rationalised into a single proceeding in the interests of efficiency.

It would be a significant missed opportunity if this issue was not addressed in the Bill or in parallel reforms. One of the key virtues of class actions is that they enable greater efficiency and economies-of-scale for plaintiffs by dealing with common claims on a collective basis. This advantage for plaintiffs is substantially diminished where there are multiple claims litigating the same subject matter.

Currently plaintiffs, defendants and the courts often have to grapple with multiple competing actions, which add materially to costs and inefficiency.

At present, there is nothing to prevent multiple class actions being filed against the same defendant covering the same subject matter and the same class members. Courts should have greater powers to rationalise multiple claims. It has been estimated that around 34% of all class action claims filed in Australia have overlapped with other claims.[25]

The BCA endorses the findings of the PJC Report that:

> *"Separate and concurrent class actions which litigate the same* ***legal claims, for the same or overlapping class members, against the same defendant, undermine the objectives of the class action, which is for a*** *single decision to resolve many claims that are the same or similar."* [26]

The BCA also supports the recommendation of the PJC Report that Part IVA of the *Federal Court of Australia Act 1976* be amended to provide an express power for the court to rationalise competing class action claims where appropriate.[27] Ideally, this should occur within 60 days of a party commencing a class action. During this time the court should be required to hear from each class action proponent the basis of their case, how they propose to run it and then determine the most appropriate action to then go forward, with all class members embraced by that action, to close off the potential for subsequent actions based on the same set of facts. Any members of a

[24] Clause 601LF(2)-(4)
[25] Herbert Smith Freehills, submission to PJC Inquiry, page 2
[26] PJC Report, page xvi
[27] Recommendation 2

class/MIS providing funding to an action which is stayed as a result of such order should have the right (but no obligation) to join a class/MIS associated with an action that is proceeding.

In addition (or as an alternative), the government may wish to consider introducing a mechanism into the licensing regime to require the holders of an AFSL which has established an MIS for the funding of a class action to participate in a process supervised by a court or other body to achieve the same result.

Recommended amendments to the Bill

We recommend the following amendments to the Bill:

1. Exemptions to the 30% maximum return to funders should only apply in exceptional circumstances

The rebuttable presumption that a return to entities other than class members above 30% is not "fair and reasonable" should be strengthened to include a further requirement that a court must apply the presumption unless it is satisfied that there are exceptional circumstances.

2. The "fair and reasonable" test for funding agreements should also apply to common fund orders

Courts should also be required to apply the "fair and reasonable" test when making common fund orders, including the rebuttable presumption that a return to funders above 30% is not "fair and reasonable". The requirements to consider a referee report and representations made by a Court-appointed contradictor should also apply.

3. Court powers to consolidate class actions

Courts should have greater powers to rationalise overlapping class actions to promote efficiency and maximise benefits for class members. This can be done through amending the *Federal Court of Australia Act 1976* or through the Managed Investment Scheme regime, in which litigation funders (as proponents of an MIS) are obliged to participate in a court rationalisation process wherever necessary.

4. Class members should be free to opt-in and opt-out of classes

Funding agreements established by Funders for the purposes of class action litigation should be required to be non-exclusive. No class member should be restrained from being a member of any other scheme for the funding of litigation in relation to the matter in question.

5. Prohibit contingency fees

Contingency fees for lawyers should be prohibited for class actions in all jurisdictions, to the extent possible. The use of the class action system to make inordinate investment returns at the expense of class members is particularly concerning when it is engaged in by law firms acting on behalf of the class members. This can be done through contingency fees, which are outcome-based rather than time-based fees charged by lawyers, in which they are paid a percentage of what is recovered on behalf of the client, in a similar manner to the arrangements for litigation funders.

Lawyers have fiduciary obligations not to put their own commercial interests above the interests of their clients. A leading Australian authority on lawyers' professional ethics, Professor Gino Del Pont, has described the obligation in this way:

> *"...a lawyer must shun situations involving a conflict between the lawyer's personal interest and the duty to the client, and refrain from using the lawyer-client relationship in order to profit apart from a reasonable professional fee"* [28]

The opportunity to enhance their own returns at the expense of their clients creates an inherent conflict of interest for lawyers and is clearly contrary to their fiduciary obligations.

[28] Dal Pont, G. E. "*Lawyers Professional Responsibility*" (6th ed), Lawbook Co, 2017, page 121

It is notable that as long ago as 1988 the Australian Law Reform Commission recommended that contingency fees based on a percentage of the returns obtained be prohibited for class actions.[29]

In 2020 the Victorian Government introduced changes that now permit lawyers to charge contingency fees in class actions in the Victorian Supreme Court. This is likely to encourage many class actions to 'migrate' to the Victorian jurisdiction, not out of concern for the interests of members, but due to the self-interest of the law firms that run the proceedings.

The conflict of interest inherent in contingency fees should not be considered acceptable in any jurisdiction. It is not possible to reconcile the financial interests of the lawyers who profit from them with those of the class action members whose returns are subsequently diminished. As such, the Commonwealth Parliament should use the Bill to also amend relevant Commonwealth legislation so that contingency fees can form no part of arrangements relating to any claims under Commonwealth laws or in courts exercising Commonwealth jurisdiction. The Victorian legislation to allow for contingency fees should also be repealed by the Victorian Parliament in due course.

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au

[29] Australian Law Reform Commission, "***Grouped Proceedings in the Federal Court***", Final Report, December 1988