Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021
Submission 4

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Submission to the inquiry into Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

We thank you for the opportunity to submit to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill.*

Phi Finney McDonald is concerned by the proposal to limit the operation and availability of open funded class actions. This will lead to an increase in competing claims, increase the cost of class actions, and deprive the Government's quiet Australians of access to the justice system.

The Government's proposed legislation will limit the availability and effectiveness of funded class actions. It will do so in a manner that will detrimentally impact ordinary Australians (including smaller retail investors, franchisees, and individual property owners) in particular.

If this bill is passed without amendment, actions such as the live export class action brought by farmers against the Federal Government, class actions against Ford and Toyota for defective vehicles and actions against banks and superannuation funds for misconduct may not have been able to proceed.

This cuts against the entire purpose of Australia's class action regime, which was designed to provide effective and equitable access to justice to Australians and allow them to pursue claims that may not otherwise be economic to run. These are claims that are often brought on behalf some of the most vulnerable sections of society.

This problem results from the legislation limiting the benefit of funded class actions to those persons that positively sign up to a managed investment scheme. That, intentionally, subverts the broader legislative intention underpinning Australian class actions by imposing an opt in requirement. It runs counter to a decade of Federal Court jurisprudence that was determined to avoid such an outcome due to the impact on access to justice.

The requirement will unnecessarily increase the costs of litigation and impose a substantial barrier to entry. The only reason for doing this is to reduce the likelihood of such a class action ever commencing.

The only beneficiaries from this policy setting are the wrongdoers who stand a greater chance of avoiding facing any accountability for their misconduct. They will be allowed to keep the proceeds of their wrongdoing and avoid paying compensation to those that they have hurt. If this is the aim – to hurt the Government's own quiet Australians – then it should be stated clearly.

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This particular element of the bill was never publicly consulted on despite its impact. It ought not be confused with the other aspects of the proposed amendments that are directed to group member returns. By attaching this additional element, the Government will ensure that many impacted Australians will get no return at all. The Government's proposed measures will make many meritorious class actions economically unviable. It will create another costly barrier to entry, in addition to that already created by the AFSL/MIS requirements. The Government's already "quiet Australians" will be gagged. They will be prevented from pursuing legitimate claims against powerful companies and institutions that do the wrong thing.

That the Government is seeking to present this reform as a consumer protection measure is Orwellian gaslighting.

Further highlighting the idiocy of this legislation is that it is opposed by leading class action defendant lawyers at Herbert Smith Freehills. They point to the fact that this change will inevitably result in multiple class actions being filed in relation to the same dispute, which they say will increase cost and risk for their clients – namely, the big business defendants that the government is – quite plainly, but clearly not very effectively – doing its best to serve.

If the legislation is to proceed, then it should be amended to expressly allow funded class actions to benefit 'passive group members' that do not positively join the MIS and allow the Court to require them to contribute to the cost of a proceeding (including the funding commission) through court-regulated common fund orders or funding equalisation orders. That would reinforce the status quo, with an MIS overlay. It would bolster the Court's powers and reinforce (and update) the Part IVA regime to account for developments since it was first enacted.

This would mirror the Government's proposal to give the Courts a clear power to regulate excessive fees charged pursuant to litigation funding contracts and help to ensure that returns to funders are determined in a fair and transparent manner.

Phi Finney McDonald does not support the bill in its current form.

We urge the Committee to distinguish between the 'return to participants' elements of the bill from this much broader and more fundamental change which will deprive millions of Australians of access to justice. We ask the Committee to reinforce Australia's opt out regime and allow litigation funding to continue to benefit ordinary Australians, albeit subject to the greater degree of government regulation that has already been enacted.

By doing so, it will be listening to class action practitioners on both the plaintiff and defendant side. The only voices it will be ignoring are those speaking on behalf of the business lobby who stand to benefit from these reforms by avoiding having to compensate victims of their misconduct.

Thank you for considering Phi Finney McDonald's concerns. If you have any questions or require any clarification do not hesitate to contact us.

Yours sincerely

Ben Phi
Managing Director
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