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Our ref: SAL:JEM:VS:180050:125

14 December 2021

Attention: Senate Economics Legislation Committee
Attention: Mr Mark Fitt,
The Committee Secretary,
Department of the Senate,
Parliament House
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Canberra ACT 2600
By email only: **economics.sen@aph.gov.au;**
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By facsimile: **(02) 6277 5719**

Dear Sirs

Re: Submission to the Senate Economics Legislation Committee
Re: The Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 ("draft legislation")

(In this document, the terms, "Litigation Funder" and "Litigation Lender" are used interchangeably. The terms "Class Members" and "Group Members" are also interchangeable).

Access to Justice should be optimized, not compromised.

The Government has been playing against type, at least as a "Liberal" Government, in propounding extensive regulation and the fettering of the free market, particularly where there is already in place under the Federal Court Act and Rules and also under State Legislation, an effective supervisory regime for the Courts for ensuring fair and equitable Class Action outcomes.

The Government's premise seems to be that Litigation Funders and Class Action lawyers are pernicious pariahs and bloodsuckers, quite different from other commercial lenders and lawyers; conversely Group Members in Class Actions are worthy victims who need protection from predatory Litigation Lenders and the Plaintiffs' lawyers, who are the Litigation Lenders' facilitators.

RISK AND REWARD

The truth is that there are (at least) two (2) types of lenders and (at least) two (2) types of loans. There are the lenders and loans where, if things go wrong, it is only the borrower who could lose, which includes traditional lending involving banks or finance companies, advancing money secured against domestic and/or commercial assets (including businesses), when the lender is fully protected at the borrower's expense.

Then there is the second class of lending, which is higher risk, where if things go wrong, only the lender could lose, because the borrower is fully protected at the lender's expense. That is the position with Litigation Lending.

CONVENTIONAL LENDING

With a home or business loan the lender, will obtain valuations for which the borrower pays and the lender will only advance money if there is adequate security and enough of a cushion to protect the lender if things go wrong. The lender can demand mortgage insurance with the borrower paying

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the premium and, if the borrower falls on hard times and defaults, the lender can charge the borrower a default interest rate which may be compounded and can border on the extortionate.

Even if the borrowers just borrowed $500,000.00 against a $2,000,000.00 asset, the lender can take possession of the asset itself or appoint a Receiver to do so – especially if it is a business - and can continue to run and operate it, and charge huge expenses for doing so and load up the borrower with all of the expenses of the Receivership, and the Receiver's lawyers; if there is a company involved, a liquidator may be appointed too – and there will then be a liquidator's fees, the liquidator's lawyers' costs, default interest charged on all of these fees and expenses, until that $500,000.00 debt against a $2,000,000.00 property has become a $1,000,000.00 - $2,000,000.00 liability, still owed by the borrower, even after his security property has been sold.

These kinds of situations are not unusual. They are entirely legal. The Government does next to nothing to stop them and the banks and the insolvency profession, supported by the Courts (because that is the current state of the law)[1], continue to countenance these sad and grossly unfair outcomes.

Ask the farmers who were victims of Landmark, and then of the ANZ Bank - or the Commonwealth Bank's victims, after CBA took over the BankWest debtors book and you will know that I am right.

LITIGATION LENDING

Contrast this with Litigation Lending. A few aggrieved persons with sound legal claims against a well-resourced defendant approach a lawyer. They tell him that there are hundreds of other people like them but none of them has enough money to run a case because they have been financially crippled by the prospective defendant. The lawyer finds them a Litigation Funder. The Funder has its lawyers assess their claims and the prospects for recovery and weighs the risk that its funds may be tied-up for a long time, it will have to stump-up security for the defendant's costs, there will be an opportunity cost in the meantime and the Funder alone will have to bear the expense of having millions of dollars invested with no return, at the mercy of the legal system. There is also the possibility that the case may be lost and with the Litigation Funder's investment lost along with it. The Litigation Lender may also have to pay the defendant's costs which could almost double the Litigation Lender's downside.

The Litigation Lender is advancing money solely in order to enable the class of aggrieved persons to access justice., which would otherwise elude them - and to profit itself, only if they are successful. If things go wrong in the case, unlike with a traditional lender, only the Litigation Funder will bear the loss. The borrower does not commit or risk any funds through the litigation being funded.

The borrowers, being the Class Members who have signed up to a Funding Agreement and to be represented by the lawyers acting for the Class, are fully indemnified against any adverse costs order(s) and have to pay nothing if the Litigation Lender loses all of its own investment.

FREE RIDERS

If a member of a representative group ("**Group Member**") decides not to opt-out of the litigation and has also decided not to retain the Plaintiff's lawyers to act in the proceedings, then the Group Members would not be liable for the legal fees of the Plaintiff's lawyers. That creates the potential for division within a representative group, with some Group Members paying for legal representation, with other Group Members declining to do so and thereby obtaining a "**free ride**"[2]. (That is when the need for Common Fund Orders or Funding Equalisation Orders arises)

[1] Inglis v Commonwealth Trading Bank of Australia [1972] 126 CLR 161

[2] Paul O'Brien, Alexandra Bartlett and Harriet Price, "A Beginner's Guide to Class Actions in Australia", YPOL Insurance Update, Yeldham Price O'Brien Lusk 2017.

Say there is a settlement for $100,000.00. The Group Members, many of whom ran for cover during the heat of the battle while the litigation was underway, emerge from their caves with their hands out and their palms outstretched. They want their piece of the action now. These are not the aggrieved persons who approached the lawyers and signed a deal with the Litigation Funder, initiated the action and committed themselves to supporting it.

The free rider Group Members whom the Government's Bill is primarily portrayed as supporting, are essentially the passive opportunists who contributed nothing and took no risk of even a non-financial kind. So let the Courts appoint a Contradictor, by all means, to ensure that any settlement which binds Class Members is fair and reasonable and that the lawyers and Litigation Funders are fully accountable. There would be no substantial settlement for the Court to consider, whether fair or unfair, if there were no reasonable legal basis for the Plaintiffs' lawyers and the Litigation Funder to have brought the action. They had pursued justice and gained an outcome for the Class entirely at the Litigation Funder's expense and risk. The Group Members who did not enter into a retainer with the lawyers or sign-up to the terms offered by the Litigation Funder have acted apathetically - even parasitically - but still stand to reap a considerable benefit from the Class Action settlement or verdict.

However, the reason why they are entitled to a slice of the cake which has been baked by the Class Action lawyers, with eggs and flour provided by the Litigation Funder, is because they too were victims of the wrong which has been vindicated through the Class Action. Their interests do indeed need protection.

The Bill before Parliament wrongly treats Litigation Funders and Class Action lawyers as suspect malefactors when, by and large, the Litigation Funder Funder is the only risk taker, whereas in traditional borrowing, the borrowers are the only risk takers.

The Government is acting with gross unfairness towards Litigation Lenders where the Litigation Lender will only ever receive a return in circumstances where the borrowers receive substantial compensation for avenging a legal wrong, only made possible with the Litigation Funders' money and the Plaintiffs' lawyers'work.

Traditional lenders undergo very little scrutiny because when they go about enforcing their rights, they often impoverish the borrower in the process, to the point where the borrower can offer no resistance.

Now dealing with the specific provisions of the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 – "*Proposed Legislation*":

Section 601LF headed "*Enforceable Funding Agreements etc*" is linguistically confusing in that it deploys the use of double negatives. Additionally, it effectively states that a Funding Agreement will only be enforceable (subject to some other conditions precedent, as well), if the Court does not make a Common Fund Order.

Section 601LF does not make it clear whether a Common Funder may still be available to supplant a Funding Agreement, but it makes it clear that a Common Fund Order does not extend to the reimbursement of the payment of the legal costs of the proceedings. (See the joint operation of Section 601LF (2) (c) and (6).

Section 601LF (7)) adopts a position of neutrality on Common Fund Orders but makes it clear, in Section 601LF (6), that reimbursement of payment of the legal costs to the Funder would not be covered by a Common Funder Order.

Is that intended to mean that the Court cannot make a Funding Equalisation Order (FEO) as well as a Common Fund Order or is it intended that the Common Fund Order would be gross of the legal costs of the proceedings? If so, the provision would be most unfair

At clause 601LG – "*Approval or variation of claim proceeds distribution method for a Class Action Litigation Funding Scheme*": The proposed legislation imports a "*Fair and reasonable test*". Line 4 of sub-section (3) seeks to fetter the Court by prescribing that the Court must "***only***" have regard to the following factors. This restraint on Court discretion is unreasonable and inappropriate.

Section 601LG (3) (ii) assumes that only the Plaintiffs' lawyers have the ability to minimize or control the cost of the proceedings.

In furtherance of the Government's "*Big Brother*" intervention to fetter freedom of contract (at Section 601LG (3) (f) and (4)), it is envisaged that the Government may make Regulations to further restrict the Courts, as to what they may or may not consider.

Sub-section (5) is quite objectionable in that it imposes an arbitrary percentage which needs to be displaced by the Funder or the Plaintiffs' lawyers in circumstances where the Court has already addressed an exhaustive, mandatory checklist of matters to be taken into account in making a "*fair and reasonable*" determination.

Such a provision as Section 601LG (5) would not be tolerated with respect to the provision of Financial Services or Financial Products in any other sector of the Financial Services Industry and is a clear attempt by the Government to cut off the opportunity to access Litigation Funding for aggrieved citizens for any expensive case, namely, which is commercially and legally complex.

Put simply, the legislation is grossly unfair and will effectively ring the death knell for Class Actions involving commercial issues with any level of complexity or requiring substantial discovery or compliance with subpoenas.

It is designed to cripple the ability of Plaintiffs' lawyers adequately to advance "*Litigation Funding Participants'*" interests because their supply lines will be exhausted by Defendants' firms churning costs by cunningly deploying arcane rules of legal practice and procedure to undermine the economic rationale for maintaining litigation-funded Class Actions. <u>The Plaintiffs and the Defendants will no</u> longer be playing by the same rules. The Defendants can deploy unlimited budgets in a war of attrition against the Plaintiffs, which the Defendant cannot fail to win.

By handicapping only Plaintiffs' lawyers, the legislation is effectuating a massive legal "*gerrymander*" in favour of Defendants. Defendants with deep pockets, particularly big business, the Banks and Government, will be empowered like never before, to thwart just claims by Group Members, deploying the tools of litigation to drag out cases for years, to push up claimants' fees by attrition, to destroy the business case for litigation funders to make a cost-benefit assessment to support deserving plaintiffs.

Frequently:

- the Defendants' legal teams take one (1) legal point after another;
- bring or oppose one (1) Interlocutory Hearing after another;

- make excessive applications for Security for Costs; and
- wage big and expensive fights over every Subpoena, over providing discovery and force all parties to incur millions of dollars in avoidable legal expenses.

The 70:30 rule for complex civil litigation is unworkable.

Intimidation

Under the laws as it currently applies, banks, franchisors and large corporations can and do effectively intimidate Group Members during a Class Action by:

- scaring victims out of joining in or signing-up to a Funding Agreement;
- threatening the renewal of their franchise term, to an extension of their Lease or obstructing their ability to sell an asset at a reasonable price on a free market.
- by threatening them with a Cross-Claim and releasing them only if they sign a release of their own claims in a Class Action, without taking into account the lack of equivalence between the value of what is being sought by the victims in the Class Action and what is being demanded by way of release by the wrongdoer.

Common Fund Orders

That is why Common Fund Orders must be available. When a case is settled or won, the people who were too scared to join in, finally come forward in great numbers to claim their share, a share to which, without a Common Fund Order, they would otherwise not have to bear an appropriate share of the Funder's reward for risk.

This is not fair and free riders should not get free rein.

Book-building is often not possible in the face of the scare tactics and intimidation, commonly brought to bear against Class Action litigants by wrongdoers.

Recommendation

A root and branch review of costs in class action proceedings is required.

While we oppose the Bill before Parliament, we believe that up to forty percent (40%) of the legal costs for Class Actions could be shaved off by the following real reforms:

1. At the outset of a Class Action, require the Federal Court to assess the length and complexity of proceedings to estimate the costs of a class action proportionate to what is at stake. On this basis the Court should then adopt a sliding scale or formula for the staged payment of security for costs by plaintiffs for defendants. A great deal of Court time and millions of dollars in costs are racked up in arguing about security for costs in Class Actions.

2. Strike-out Applications against each other's pleadings. Instead of repeated applications being brought, two (2) dates should be fixed for the hearing of Strike-out Applications (if any): one before the filing of evidence and one after discovery, with any further Strike-out application or amendment applications to be left to the beginning of trial, except in exceptional circumstances.

3. There should be no fewer than two (2) Court-ordered mediations, one (1) after the filing of any Defence and/ or Cross-Claim and the other, after evidence and discovery.

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

5. There should be a limit on the amount which a subpoenaed party can claim for production of documents prior to trial, of one hundred thousand dollars ($100,000.00) with any additional sum only to be claimed at the end of the trial, to be determined by the trial Judge, following the witness' compliance.

6. Instead of lay witnesses having to file Affidavit evidence, as is already the practice adopted by some Federal Court Justices, lay witnesses should only be required to file Outlines of Evidence which then may be tested under Cross-Examination, if the matter proceeds to trial.

7. At a Directions Hearing, per side: no more than one (1) Senior Counsel, one (1) Junior Counsel, one (1) Senior Solicitor and one (1) Junior Solicitor should be entitled to charge for a Court attendance and at trial.

   No more than one (1) Senior Counsel, two (2) Junior Counsel, one (1) Senior Solicitor and two (2) Junior Solicitors should be entitled to charge for their attendance in Court, except in exceptional circumstances.

   Large Defendant firms often have a huge team of lawyers in Court which adds massively to the costs, not least because of the need of the Plaintiffs to match the resources of the opposing legal team, mostly by accessing litigation funding.

8. **It should state explicity** that there is no impediment or obstacle to group members' self-funding litigation.

Conclusion

While there should be law reform to reduce the costs of Class Action litigation, the law should not hamstring Plaintiffs' lawyers or have the effect of deterring or limiting litigation lending. To create an unlevel playing field, compromises our system of justice.

If it ain't broke, don't fix it". In *Bolitho vs Banksia Securities Limited (No. 18 (remitter))*[3], his Honour Dixon, J. expressed satisfaction with how the current system worked to identify wrongdoing and ensure that a proposed Settlement Scheme was rendered fair and reasonable and in the best interests of the Class Members, notwithstanding conduct by the litigation funder and the Applicant's lawyers which might otherwise have rendered it unfair.

"This judgment also records the restorative capacity of the civil justice system to protect fundamental values, to protect its integrity through the commitment of the judiciary and the profession to preserve, maintain and nourish the Common Law's absolute commitment to the proper administration of justice. Ultimately, despite the best efforts of the Contraveners, the spoils were never divided"[4].

Judicial supervision works. No new legislation or regulations are needed. This Bill is an attack on the rights of the impecunious to access funding to vindicate their legal rights, not a genuine exercise in law reform.

Yours Sincerely

LEVITT ROBINSON

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Senior Partner

[3] [2021] VSC 666
[4] Supra [2140]
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