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Consultation on Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders

Treasury is invited to accept for consideration the submission of Litigation Lending Services Ltd (**LLS**).

LLS has substantial concerns:

- with the current draft Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders (**Bill**); and
- that Treasury has not adopted a consultative approach to the introduction of the draft legislation including that it gave only three business days for submissions in response to the draft Bill.

Summary

LLS is of the view that:

1. the definition of "claim proceeds" should be net proceeds that is, after the deduction of all litigation costs of group members, rather than the gross amount of money obtained for a scheme's general members;
2. the definition of "common fund order" in section 601LF(2)(c) of the Bill should be amended to exclude Funding Equalisation Orders;
3. the prescribed list in relation to section 601LG(3) should not be exhaustive in setting out that the Court "must only have regard" to certain factors. The Court must have an unfettered judicial discretion when being asked to consider whether a return to general members is "fair and reasonable";
4. in relation to the rebuttable presumption contained in section 601LG(5), a prescribed list of factors and worked examples (such as those contained in ASIC's regulatory guides and the ATO's practical compliance guidelines) should be provided by Treasury to provide guidance to the Court as to when it would be appropriate for a Court to determine that a return to general members of less than 70% is considered

"fair and reasonable"; and

5. new section 601GA(5)(a) which requires a member's written consent to be a member of a scheme should not be enacted as it creates a significant prejudice to defendants (given the likelihood of increased court filings and cost for defendants fighting multiple closed class actions) as well as duplicates legal costs for members who sign up to different closed class actions.

Recommendations

"Claim proceeds"

As currently drafted, the definition of "claim proceeds" for a class action litigation funding scheme, means the total money obtained as remedies for one or more of the scheme's general members, as a result of a judgment made, or settlement approved, by a Court in relation to class action proceedings for the scheme. The Bill refers to the total (i.e. gross) money obtained for the scheme's general members before any deduction of legal costs for the proceeding.

The current drafting creates an inherent prejudice to plaintiff group members and a barrier to justice as it will make claims unviable to run if legal costs are not excluded from the definition of claim proceeds. The proposed wording unfairly discriminates against plaintiff group members by restricting them on legal budget as opposed to the defendant (often large corporations) who can afford access to top tier legal representation and deploy delaying tactics at will to increase the costs for general members, in full knowledge that once legal (and other) costs reach 30%, the action will become unviable and unlikely able to continue.[1]

Recommendation 1: The definition of "claim proceeds" in the Bill should be net of legal costs that is, claim proceeds should be the total (net) money obtained for the scheme's general members after deduction of members' legal costs of the proceeding.

"Common fund orders"

The common law in respect of class actions has long distinguished between:

- ***"Common Fund Orders"*** – which impose the obligation to pay the same commission in the funding agreement on all group members; and

- ***"Funding Equalization Orders"*** – which is an order from a court requiring the unfunded group members to contribute to the commission paid by the funded group members under their funding agreements so that all group members (funded and unfunded) *contribute equally* to the commission.

[1] We refer to our submission in response to consultation on "Guaranteeing a minimum return of class action proceeds to class members" dated 5 July 2021.

The wording of new section 601LF(2)(c) couples these concepts together under the single definition of "common fund order". According to the Draft Explanatory Memorandum (**EM**), the aim of this is so:

> *"[T]he relevant court would not be able to make orders which extend the funder's fee or commission to class members who are not members of the class action litigation funding scheme (i.e. who have not agreed to become a member of the scheme)."* (EM at [1.6])

This inclusion of this provision fundamentally misunderstands an important mechanism of the "Opt-Out" class action regime in Australia. That is, unless group members with the same claim Opt-Out of an open class action, they will be bound by the decision, and equally, share in its winnings. The making of a Funding Equalisation Order is a means by which the Court protects the interest of *all* members of the class action, including those who did *nothing* to further in the interests of the class by agreeing to give up some of their share of the winnings in order to enforce their rights (by entering into a funding agreement). The proposed amendments will see group members who have not opted out of the action (despite being notified of the ability and implications of doing so) to take all of the benefit of a successful result in the action, and to the detriment of the lead applicant(s) and all other 'funded' group members who were more committed and active in their pursuit of justice.

In short, the proposed amendment sits in *direct contrast* with the stated mantra of this government, aptly repeated by Mr Morrison, "If you have a go, you get a go".

Recommendation 2: **The definition of common fund order in the Bill be amended to exclude Funding Equalisation Orders.**

"Fair and reasonable test"

New section 601LG(3) sets out the *fair and reasonable* test, and provides a list of factors that "the Court must only have regard to" in considering whether the funding agreement's claim proceeds distribution method, or any variation of that method is fair and reasonable when considering the interest of the scheme's general members as a whole. That list is exhaustive and provides that the Court must not have regard to any other factors, which may be relevant. The result is a fettering of judicial discretion. This should be avoided.

Recommendation 3: **The wording of section 601LG(3) should be amended such that it reads "*For the purposes of subsection (1), in considering whether the funding agreement's claim proceeds distribution method, or any variation of that method, is fair and reasonable when considering the interests of the scheme's general members as a whole, the Court may have regard to the following factors…*".**

Section 601LG(5) - "Rebuttable presumption"

The proposed amendments contemplate that a Court may vary a proposed distribution to ensure it is fair and reasonable. In doing so, the Court must assume that the return of the

proceeds of the class action to general members that is less than 70% of the members' claim proceeds, is not fair and reasonable.

For completeness, LLS does not support the 70% minimum return of gross proceeds and remains of the view that it must be net of all reasonable legal costs.[2]

LLS has concerns that the Courts have been given no worked examples of previous class actions where it would be appropriate for general members to receive less than 70% of gross proceeds. In May of 1997, the landmark Bringing Them Home Report was tabled in Federal Parliament. This Report was the result of a national enquiry that investigated the forced removal of Indigenous children from their families. It took the Commonwealth Government 24 years to finally offer some compensation to a small proportion of victims. This was only after Shine lawyers and LLS launched a class action on behalf of the Stolen Generations.[3] There are still many victims of this human trafficking orchestrated by the Commonwealth Government that remain uncompensated. Researching the evidence from this atrocity is painstakingly time consuming and reaching the victims and their families is expensive. This is just one example of the types of class actions on behalf of disadvantaged and minority groups that needs clarity for funders to have the confidence that they will be compensated for the risk of bringing the Government to justice - a government that is now disadvantaging the exact victims it failed to protect. This is a massive conflict of interest on behalf of the Government and there needs to be independent oversight of any legislation to ensure current and future victims are not restricted to access to justice.

Recommendation 4: In relation to the rebuttable presumption contained in section 601LG(5), a prescribed list of factors and worked examples (such as those contained in ASIC's regulatory guides and the ATO's practical compliance guidelines) should be provided by Treasury to provide guidance to the Court as to when it would be appropriate for a Court to determine that a return to general members of less than 70% is considered "fair and reasonable".

Section 601GA(5) - consent to become a member

Treasury states that a key intention of the Bill is that plaintiffs must consent to become members to a class action litigation funding scheme before a funder can impose a fee or commission on them.

Legislating for such a requirement will prejudice defendants as it will drive multiple closed class actions, increasing court filings, the multiplicity of proceedings and increasing costs for defendants who will be required to fight multiple actions that may not be filed concurrently but more likely sequentially. It also prejudices plaintiffs who will not get economies of scale

[2] We refer to our submission in response to consultation on "Guaranteeing a minimum return of class action proceeds to class members" dated 5 July 2021.

[3] Eileen Cummings v Commonwealth of Australia.

from running one large proceeding, instead incurring duplicated costs as multiple proceedings are run.

Recommendation 5: Section 601GA(5)(a) should not be enacted.

Who is LLS?

LLS is an un-listed Australian Public Company, which is majority Australian-owned, pays tax in Australia, and whose employees are all Australian taxpayers. LLS' litigation funding business has been in operation for over 20 years

LLS operates a disputes funding business; it provides funding to third party clients in respect of their solicitor fees, counsel fees, court costs, expert and other costs that are related to court litigation, on a contingent basis. Where the litigation is successful (either via court determination or commercial settlement), LLS receives a share of the client's resolution proceeds calculated either as a multiple of the funding advanced or as a percentage of the resolution amount (as agreed between the client and LSS). This is in addition to the return of its original funding costs. In the alternative event of an unsuccessful outcome, LLS does not seek to recover the funding it has provided and additionally, may also be obligated to pay the opponent party/s costs.

LLS is also conscious that its obligations extend beyond the pecuniary. LLS takes seriously its responsibility to conduct its operations in a manner that affords both fairness to its clients and respect to the integrity of the Australian court system. To that end, LLS is proud that its funded cases have achieved successful outcomes for its clients, that reflect its corporate ethos.

LLS has been a member of the Association of Litigation Funders Australia (**ALFA**) since the ALFA's inception and was instrumental in its establishment.

Stephen Conrad
Chief Executive Officer

Shaun Bonétt
Chairman