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Parliamentary Joint Committee on Corporations and Financial Services
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Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

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

Whilst we are supportive of class action reform, LLS has substantial concerns:

- with the current Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (**Bill**); and
- that the Explanatory Memorandum (**EM**):
    - does not provide the necessary clarity for the ambiguities evident from the wording of the Bill; and
    - is incorrect in concluding that the Bill is compatable with human rights and freedoms as it does not promote access to the right to a trial where the funder cannot, because of the restrictions imposed, take on the risk of running an otherwise meritorious case; and
- that Treasury and the Attorney General have 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 and only now just publishing public submissions for the July and October Treasury consultations in November 2021.

Summary

LLS is of the view that:

1. the Bill fails to address or regulate each of the underlying costs of class action litigation, rather it bluntly restricts victims' ability to access funding, and also the amount of funding, that is required to pursue litigation. The Bill does not regulate the amounts charged for legal fees, counsel fees or expert fees for either the plantiffs or the defendants and LLS implores the Committee to consider whether the overarching purpose of the Bill is better performed with broader reforms in respect

of the amounts charged for legal services.

2. the Bill fails to address the fundamental differences between non-shareholder and shareholder class actions. For example:
    a. Shareholder class actions may be very well suited to restricting windfall gains by capping returns. This is because they generally involve settled legal issues, identifying potential claimants is not complex, and victims are often investors with financial literacy.
    b. Non-shareholder class actions are different. Victims' claims are often more novel and complex (negligence, breaches of contract/trust, racial discrimination, wage theft, breach of consumer laws). Identifying and communicating with victims is expensive and timeconsuming. LLS would propose that a progressive reform would be to limit returns to the funder, after being reimbursed for the costs of running the action, at 20%;
3. the Bill should not prejudice the funder's right to seek a common fund order where the circumstances allow for such an order to be made. If the Government's intention was that the Australian class action regime should change from an 'opt-out' to an 'opt-in' model, then the Corporations Act is a wholly inappropriate forum for this significant change to occur. In fact, the practical effect to change the regime to an opt-in model sits in direct contrast to the Government's prior regime that determined that an opt-out procedure was preferable on the grounds of equity as well as efficiency. This change also conflicts with the recommendations of the Australian Law Reform Commission and the Government's own recent Parliamentary Joint Committee supporting the current opt-out model. If enacted, the Bill will materially increase class action costs and the numbers of class action proceedings where several closed actions will be run against the same defendant;
4. the prescribed list in relation to section 601LG(3) of the Bill should not be exhaustive. The Court must retain an unfettered judicial discretion when being asked to consider whether a return to general members is "fair and reasonable";
5. 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 in order 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
6. the EM is incorrect to conclude the Bill is compatible with human rights and freedoms. For example, to have an "opt-in" regime as proposed by the Bill would make it impossible to bring a complex and risky legal matter such as pursuing the Government over their own human rights atrocities for First Nations peoples. We draw the Committee's attention to:
    a. the victims of the Stolen Generation of the Northern Territory. Although labelled a "stolen generation" they were victims of human trafficking and slavery. Despite a comprehensive report (Bringing Them Home) in 1997 by the Human Rights and Equal Opportunity Commission and an apology in Parliament some 11 years later from the then Prime Minister, it took a funder to support a class action that finally saw the Government announce a redress

scheme for a portion of those victims some 24 years later. If enacted the Bill would act to imose yet another hurdle for these victims in getting access to justice;

b. the victims of Stolen Wages, the conduct in respect of which dates back to the early 1900's. Here much of the necessary evidence of the theft of wages for the victims has either been destroyed or lost (including by the Government). Further, the majority of the victims are now deceased and having the Government impose a step to identify each deceased estate prior to establishing liability through the court process would add material cost and time to an already expensive and complex case. In *Pearson v State of Queensland (No 2) (Stolen Wages Qld)*, LLS funded a matter that the Honourable Justice Murphy highlighted:
    i. as being a large, complex class action with the funder's commission being fair and reasonable; and
    ii. that LLS took on substantial costs and risk from the outset of the litigation when the outcome was far from certain.

    The claimants in this action were First Nations people who had their wages stolen and the claims dated back to the 1930's. The class consisted of ~12,000 claimants of which the majority of victims were deceased. The fact that no one had previously funded this claim which was clearly known to exist over a long period of time, nor did any other funder launch a competing claim at the time, highlights the risk return challenge in pursuing access to justice for these First Nations people for these types of claims. This experience informs us that:
    i. A uniform and arbitrary cap on the amount of funding available to be allocated to such claims would materially disadvantage access to justice for these First Nations people;
    ii. a strict application of the MIS (Managed Investment Scheme) rules does not assist these First Nations people in having their claim pursued. For example, what language should the product disclosure statement be written in and is it misleading to communicate with a class member who is not familiar with a PDS and their preferred communication may be via local customs such as story, song or other cultural means?
    iii. The requirement for an "opt-in" regime will be nearly impossible for a funder to build an economic case to manage the risk of funding the pursuit of justice for these victims.

Recommendations

"Claim proceeds"

As currently drafted, the definition of "claim proceeds" for a class action litigation funding scheme is defined as 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 amended to exclude the legal costs reimbursed to the funder. That is, claim proceeds should be the total (net) money obtained for the scheme's general members after deduction of the reasonable amount of legal costs paid by the funder in respect 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.

The wording of new section 601LF(2)(c) couples these concepts together under the single definition of "common fund order".

[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.

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 on the one hand not opting out of the action while at the same time not 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.

Recommendation 2: **Section 601LF(2)(c)(ii) be amdended to read:**

"requiring one or more persons who are claimants mentioned in paragraph 9AAA(1)(a) for the scheme, but who are not members of the scheme, to contribute to the funder's remuneration *in the same proportion as if the funding agreement applied to them.*"

"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 scheme's claim proceeds distribution method, or any variation of that method, is fair and reasonable when considering the interests of the scheme's 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]

[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.

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. Whether victims have had wages stolen, been subject to slavery and human trafficking or suffered medical complications from defective implants, researching and collating the evidence of these types of atrocious conduct is time consuming and reaching the victims and their families is expensive. These are just some small examples of the types of class actions on behalf of disadvantaged minority groups that require clarity so that funders may have the confidence that they will be compensated for the risk of bringing the Government (and big corporates) to justice – the same Government that is now disadvantaging the exact victims it failed to protect. This is a massive and inherent conflict of interest of the Government and there needs to be independent oversight of any legislation to ensure current and future victims do not have their access to justice wholly and inappropriately eroded.

Recommendation 4A: 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".

Recommendation 4B: In order to address the necessity to distinguish between shareholder and non-shareholder class actions: A new subsection be included to the effect that the rebuttable presumption in s.601LF(5) only applies in respect of shareholder class actions.

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 the number of proceedings filed in Court. This driver of a multiplicity of proceedings will increase costs and uncertainty for defendants, who will be required to fight multiple actions that are more likely to be filed seqentially rather than concurrently. It also prejudices the overall group of plaintiffs, who will no longer be able to make use of economies of scale from running one large proceeding.

Recommendation 5: Subsection 601GA(5)(a)(iii) and (iv) should be removed from the Bill.

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 opposing 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.

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