SHINE LAWYERS

Submissions to the Treasury and Attorney-General's Department

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

6 October 2021

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

Submissions by Shine Lawyers

A. Introduction

1. In 1992, the Federal Court class action regime was introduced with a view to ensuring enhanced *access to justice*, *reduced costs of proceedings* and *efficiency in the use of Court resources*.
2. Since that time, the regime has provided access to the courts and the opportunity for justice to those whose claims were too small to pursue individually, who were unable to afford adequate representation because of their personal circumstances or because of the nature of their claim and the defendant in the proceedings.
3. Shine Lawyers appreciates the opportunity to provide submissions to Treasury and the Attorney-General's Department on the exposure draft Bill.

B. Executive Summary

4. It is Shine Lawyers' position that the question of *fair and reasonable distribution of class action proceeds* is already managed by the Courts equitably and in a principled manner and for that reason there is no need for a minimum 70% return to group members[1] to be legislated. In addition, the proposed Bill will limit the Court's consideration to only six specific matters when determining whether a claims distribution scheme is *fair and reasonable*[2]. This will result in matters relevant to both the claimants' and defendants' positions in the action not being permitted by the Court to be considered at that time. Such a step would result in unfairness to all parties and unjust outcomes in those cases.
5. Shine Lawyers strongly urges the Government to reconsider the proposals that:
    5.1. group members must provide written consent to participate in a class action litigation funding scheme[3]; and
    5.2. for any claim proceeds distribution method to be enforceable in respect of a class action litigation funding scheme, a common fund order (**CFO**) cannot be made[4].
6. These proposals do nothing to ensure that the distribution of claim proceeds will be *fair and reasonable* and indeed in some cases will ensure that the distributions of claim proceeds *will not* be fair and reasonable, particularly as between group members. Additionally, these proposals

[1] Treasury Laws Amendment (Measures for Consultations) Bill 2021 (Cth) ("Bill"), Schedule 1, item 5, s 601LG(5) of the *Corporations Act 2001* (Cth) ("Corporations Act").
[2] Bill, Schedule 1, item 5, s 601LG(3) of the Corporations Act 2001.
[3] Bill, Schedule 1, item 4, s 601GA(5) of the Corporations Act.
[4] Bill, Schedule 1, item 5, sections 601LF(2)(c), 601LF(3)(d) and 601LF(4)(d) of the Corporations Act 2001.

will raise significant barriers for Australians to gain *access to justice*, will increase the *costs of proceedings*, and cause inefficient *use of Court resources*.

7. An important and unintended consequence of the proposals referred to in paragraph 5 above is that funded class actions would become far more likely to be commenced as "closed class" proceedings (limited to group members who sign a litigation funding agreement). Among other things this will:
    7.1. increase the need for "book building" (the process of identifying eligible claimants and arranging for them to enter into litigation funding and costs agreements), which is an expensive and time-consuming undertaking;
    7.2. increase the proportion of costs borne by members of the class, as costs are spread between a smaller numbers of group members compared to an "open class";
    7.3. increase the likelihood of separate claims being brought by claimants who did not sign a funding agreement and were not part of the "closed class" (leading to more, not less, class actions and to duplication of costs for both claimants and defendants); and
    7.4. increase barriers to negotiating settlements, as defendants place a very high value on finality when reaching a settlement.

C. Key Concerns

Background

8. Class actions in Australia can presently be commenced as either:
    8.1 a closed class, which requires group members to "opt in" if they want to be bound by the proceeding; or
    8.2 an open class, which requires group members to "opt-out" if they do not want to be bound.
9. The definition of the "class" or "group member" is set out in the statement of claim filed in a class action proceeding.
10. *Closed* class actions, which have become uncommon due to the availability of CFOs, are limited to those persons who sign a funding agreement (or a costs agreement with a law firm) and who fit within the definition of the class. Any person who does not enter into a funding agreement is not part of the class, is not bound by the proceeding or any settlement, and may be able to pursue the same claim in a duplicated action.
11. *Open* class actions permit any person who falls within the class definition to be a part of the class, regardless of whether they have signed a funding agreement or have taken any other active step. Open class proceedings are an essential feature of the class action regime, to protect the interests of group members who would otherwise be unaware of their right to litigate their claim(s) and/or face barriers to providing active consent[5], and to ensure that defendants can, in a single proceeding, have all issues in the dispute ventilated and finalised.

[5] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–3175 (Duffy) ("Duffy House of Representatives Speech"); Australian Law Reform Commission, *Integrity, Fairness and Efficiency-An*

12. The Parliament has previously expressed a preference for open class proceedings with an opt-out procedure as this:

> . . . ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision . . .[6]

13. Shine Lawyers also emphasises and agrees with the Australian Law Reform Commission's concerns in respect of a consent model, in particular:
    13.1 any finding of liability of a respondent will only be binding on group members who have consented to being part of the proceeding;[7]
    13.2 there is a risk of group members not being made aware of the proceeding and effectively being deprived of the opportunity to participate;[8]
    13.3 an affected person could subsequently seek relief against the respondent for the same cause of action of the "closed" proceedings, which could be recontested by the respondent[9];
    13.4 in respect of respondents with limited funds, a closed class may deplete those funds leaving group members who did not consent, without recourse to those funds[10];
    13.5 the impact of the proportion of the costs of the proceeding, which would otherwise be spread across all group members in an open class;[11] and
    13.6 the uncertainty for respondents arising out of the prospect of additional claims, if only group members of the closed class proceeding have their claims settled.[12]

Written Consent

14. The proposed Bill, in its current form, will require eligible group members of a funded class action to provide written consent to participate in a class action litigation funding scheme.[13]
15. Theoretically a class action might still be able to proceed as an open class, with only some group members providing written consent to participate in the class action litigation funding scheme and contributing commission to the litigation funder. However, this would lead to inequality between group members, with the "free riders" receiving greater proceeds than those members who have given their consent. Such inequality between group members would not represent *a fair and reasonable distribution of class action proceeds in proceedings involving third party litigation funders*, which is the stated objective of the Bill.
16. Practically this will lead to funded class actions being commenced as "closed class" proceedings so as to:

Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report No 134, December 2018) 89 [4.1]; 90 [4.4]–[4.5].
[6] Duffy House of Representatives Speech (n 3) 3174–3175 (Duffy).
[7] Australian Law Reform Commission, *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 35 [1.55].
[8] Ibid 90 [4.5].
[9] Ibid 35 [1.55].
[10] Ibid 35 [1.56].
[11] Ibid.
[12] Ibid 248 [8.52].
[13] Bill, Schedule 1, item 4, s 601GA(5) of the Corporations Act.

16.1 eliminate the so-called "free riders", who would otherwise benefit from the class action but would not contribute to its funding; and

16.2 incentivise claimants to enter into the class action litigation scheme and litigation funding agreement.

17. Obtaining written consent from claimants will therefore necessitate a "book build" as a pre-requisite to the commencement of an action.
18. Book building is a highly expensive and time-consuming process, often requiring hundreds or thousands of eligible claimants to be contacted and provided with detailed explanations of complex legal documents.
19. Book building not only *increases costs of proceedings*, it also presents a *barrier to access to justice*. In particular, it often causes delay in the commencement of a proceeding while the book build is being completed thereby ensuring justice is delayed and the recovery of on-going loss and damage caused by the wrongdoing is also delayed.
20. This presents severe disadvantages for bringing important cases on behalf of marginalised Australians where there can be numerous logistical difficulties in meeting the requirement for written consent. For example, in the case of the Stolen Wages claims on behalf of indigenous Australians, the logistics of obtaining written consent will pose significant difficulties, putting at risk the right of indigenous, marginalised, less educated and geographically remote Australians to seek justice. Currently, the Court addresses any concerns regarding knowledge and consent by ordering extensive and appropriate outreach and notification programmes, so as to ensure claimants are aware of their rights and the legal implications to them of the class action. In a similar proceeding in Queensland, a CFO was ordered thereby ensuring equity amongst group members as to the cost of the action and the payment of commission to the funder.
21. The Bill, in its current form, also does not make explicit whether claimants who wish to join the class action litigation funding scheme must provide written consent prior to the commencement of the proceeding, when the scheme is registered, or by any particular stage of a proceeding.
22. Another concern in respect of "closed class" proceedings is the risk that parties will experience greater difficulty in negotiating a settlement, leading to more matters proceeding to trial. This is due to the need for defendants to assess additional risk exposure in the context of potential further litigation, relating to the same facts and issues, by claimants who have not signed funding agreements and are therefore not group members of the closed class.
23. Such multiplicity and/or an increase in matters proceeding to trial will, contrary to the purpose of class actions, result in *increased costs of proceedings* and *reduced efficiency in the use of Court resources*.

<u>Common Fund Orders</u>

24. Litigation funding agreements set out the way in which any proceeds of the action are intended to be distributed amongst the litigation funder and group members at settlement approval.
25. It is common for a lead applicant to seek a CFO that certain terms of a litigation funding agreement, in particular the basis of distribution and the litigation funder's commission, are to be

applied to all group members, whether or not all group members have themselves entered into the litigation funding agreement.

26. CFOs are made in order to distribute the benefits and burdens of the proceedings across all group members in an "open class" proceeding.
27. In balancing this, the Court has the discretion to alter the way in which claim proceeds are distributed in approving any settlement[14]. This involves the Court making a determination, after careful consideration of all relevant factors, as to whether the amount and terms of a settlement are in the interests of group members, including whether the costs and commissions claimed by the funder and lawyers are fair and reasonable.[15] Accordingly, the question of *fair and reasonable distribution of class action proceeds* is already managed by the Courts equitably and in a principled manner.
28. The proposed Bill seeks to prevent or limit CFOs by introducing a requirement that, for any claim proceeds distribution method to be enforceable in respect of a class action litigation funding scheme, a CFO must not be made[16].
29. In the absence of allowing CFOs, there is an unacceptable risk of so-called "free riders", who benefit from the class action, such as by receiving claim proceeds, but who do not enter into litigation funding agreements and pay commissions to the litigation funder. Practically this makes it almost certain that all class actions funded by litigation funders will be commenced as a "closed class".
30. CFOs are therefore critical to the continuation of funded open class actions. As outlined above (see paragraphs 16 to 23), closed classes present numerous disadvantages to the claimants, defendants and the Court compared to "open class" proceedings.
31. Without CFOs, meritorious claims involving large class sizes (in some cases tens of thousands of eligible claimants), but involving lower individual claims, are more likely to become uneconomical for funders, which would result in those matters not being progressed. For example, many of the meritorious claims involving tens of thousands of individual claims worth less than $20,000 each, arising out of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry will, in all likelihood, not be brought if this Bill is passed in its current form. Such an outcome would give a green light to corporate wrongdoing where the value of individual claims is relatively modest even though there might be tens of thousands of Australians impacted who collectively have claims valued at tens of millions of dollars or more. This is because corporations know that the prospects of having sufficient people sign funding agreements at the outset is challenging and risky for a funder. Denying access to justice to those who have been evidently wronged must not be permitted to become a consequence of the objective of ensuring fair and reasonable distributions of claim proceeds in funded class actions.

[14] *Federal Court of Australia Act 1976* (Cth) s 33V.
[15] Ibid.
[16] Bill, Schedule 1, item 5, sections 601LF(2)(c), 601LF(3)(d) and 601LF(4)(d) of the Corporations Act.

Retention of Status Quo

32. Shine Lawyers submits that the current position whereby the question of *fair and reasonable distribution of class action proceeds* is already managed by the Courts equitably and in a principled manner. For that reason there is no need for a minimum 70% return to group members to be enacted by the proposed Bill.
33. Courts have the benefit of submissions and evidence from both the claimants and the defendants when approving the distribution of class actions proceeds. This ensures that **all** matters relevant to the proceedings are considered by the Court in approving the distribution as *fair and reasonable*.
34. Draft s 601LG(3) includes the word 'only' in the chapeau, having the effect of limiting the Court's consideration to the matters listed in subparagraphs (a) to (f). An unintended consequence of this limitation is that other relevant and important matters to both claimants and defendants will be omitted by these amendments. For example, in the context of settlement approval, the defendant's ability to meet a judgment (such as where there is limited insurance cover) would be a matter that a claimant and defendant would want the Court to be aware of and to take into account. Existing Court approval mechanisms, which already examine whether the costs and commissions claimed by the funder and lawyers are *fair and reasonable*, allow for a more principled evaluation of *all* relevant factors.

D. Additional concerns

35. Shine Lawyers wish to raise the following additional matters upon which we do not provide substantive commentary or analysis. These matters in our submission ought to be very carefully considered before the draft Bill is finalised as a failure to do so is likely to lead to uncertainty and significant and costly litigation, peripheral to the substantive matters, the subject of class actions litigation. Those matters are:
    - 35.1 The requirement for the funding arrangements to specify at the outset the method for determining the claim proceeds distribution method is highly problematic and in many cases impossible to achieve in practice. If this proposal remains, it will result in increased cost for both claimants and defendants and delay in settlements being approved because of the need to amend the public disclosure documents and meet any relevant compliance requirements. This benefits neither claimants nor defendants;
    - 35.2 The definition of 'a class action litigation funding scheme' is defined in draft s9AAA by reference to five components, including a non-lawyer third party providing financial support or an indemnity. That definition clearly encompasses circumstances beyond litigation funding, including not for profit support offered to litigants, co-plaintiffs pooling financial resources to bring litigation, after the event ("ATE") insurers offering an indemnity against adverse costs risks and security for costs, and even insurers who bring one action on behalf of multiple plaintiffs in subrogated litigation. These consequences seem to fall outside the stated objectives of the draft Bill and if not

addressed will cause significant, unintended hardship in a number of circumstances; and

35.3 Shine Lawyers is concerned with the proposal for the legal costs to be included within the definition of '*claims proceeds'.* This creates an obvious unfairness between the claimants and the defendants as to the extent of legal costs that can be incurred by each party, particularly in complex or claims with a value of less than $50 million. It also gives rise to a real risk that unmeritorious and costly steps in the action will be taken by defendants with a view to defeating the action not on the basis of the merits of the case but on the basis of outspending the claimant thereby stifling the claimant's ability of achieving a favourable outcome.

E. Conclusion

36. For the reasons outlined above, Shine Lawyers submits that the proposed Bill, in its current form, will unnecessarily *inhibit access to justice*, *increase the costs of proceedings* and *reduce efficiency in the use of Court resources*. These outcomes are contrary to the very purpose of the class actions regime and for that reason Shine Lawyers submits that the current approach remains unchanged.
37. Shine Lawyers strongly urges the Government:
    37.1 to omit the requirement for group members to provide written consent to participate in a class action litigation funding scheme;
    37.2 not to preclude or limit the use of CFO;
    37.3 to amend the draft Bill to provide that the factors listed in draft s601LG(5) be indicative rather than exhaustive so as to ensure that all relevant factors can be considered by a Court when determining whether a claims proceeds distribution scheme is '*fair and reasonable'*; and
    37.4 to amend the draft Bill to provide that the definition of '*claims proceeds'* be net of legal costs so as to ensure fairness and equity as between claimants and defendants.