

FLAWS IN CLASS ACTION BILL

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The new law will have a big impact on access to justice

There are so many problems with the federal government's latest round of reforms to the class action regime that it's hard to know where to start.

The government says the proposed legislation, which is the subject of a risibly truncated "consultation" period, is designed to improve returns for members of successful class actions.

But the oxymoronic Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 instead risks become a case study in unintended consequences.

Now that we have seen the proposed legislation, there is widespread agreement that it will have a significant impact on the ability of ordinary Australians to access justice through class actions.

In addition, it is potentially unconstitutional because it appears to override the power of state courts, as well as effectively repealing parts of the Federal Court of Australia Act.

And it could even be detrimental to the big business defendants of class actions – the very group the government seems determined to protect.

Those are not just our views. They are the views of the Law Council of Australia, our peers, respected academics and legal professionals – and a former solicitor general of Australia.

The government has been busily reviewing and restructuring

the class action regime for the better part of three years.

Last month, it released its response to two reports it commissioned into the class action system and the role of litigation funders in supporting Australians to group together through class actions.

The long-awaited response to the Australian Law Reform Commission report (handed to government in January 2019) and the Parliamentary Joint Committee report (December 2020) provide some clarity on the government's intentions in this space.

In many respects, the response merely provides rhetorical cover for the number of far-reaching decisions the government has already made regarding the conduct of class actions and litigation funders – decisions made on flimsy arguments and evidence.

Shortly after releasing its response to the reports, the government tabled its bill in parliament, where it was promptly sent back to the same Parliamentary Joint Committee for a perfunctory review.

Alert stakeholders who were able to meet the one-week deadline to make a submission have punched holes in the proposed legislation, pointing out the myriad flaws and likely consequences should it be passed into law.

The centrepiece of the bill is the proposal to mandate a minimum 70 per cent to class action members by curtailing the long-established role of the courts in judging whether the distribution of proceeds from a successful class action is fair and reasonable.

No one argues with the concept of ensuring members get the maximum return possible, but that must be balanced against the very real risk that the reforms will have the opposite effect of the government's stated intentions by killing off all but a handful of class actions.

To date, the government has presented no analysis regarding the impact of its proposals on the

number of class actions. Expert analysis shows it could be devastating.

Earlier this year, PwC conducted modelling on what a 70 per cent minimum return to class action members – effectively a 30 per cent cap on funders' and lawyers' returns – would have meant for historical class actions.

PwC found that more than 90 per cent of cases may not have gone ahead because the funders and lawyers would have been left with either a loss or without an adequate return to justify the risks of taking on a long, complex case with uncertain outcomes against a well-resourced defendant.

Class action members are the voiceless victims of bushfires, floods, toxic chemical contamination, quarantine failures, dodgy financial products, underpayments and medical negligence.

The government's proposals would have denied justice to hundreds of thousands of Australians who have turned to class actions to help rebuild their lives.

In fact, the Law Council, among others, believes vulnerable people could suffer the most from the government's proposed reforms because a 30 per cent cap

would encourage litigation funders to prioritise very large cases, where the claim size is sufficiently large to allow funders to earn an acceptable fee compared to the risks involved.

That would lead to a scenario where lower-value, higher-risk claims, which have proportionally higher legal costs, will be swept under the carpet. Such cases, the Law Council says, "are often based on common law causes of action arising from faulty products, property damage consequent upon environmental disaster, misleading conduct by financial services providers and institutional abuse."

There are other likely consequences, including a potential increase in multiple class actions against the same defendant if the legislation encourages a return to opt-in closed class actions. The

losers there are corporate and institutional defenders of class actions, who will find it harder and more expensive to reach multiple settlements.

Perhaps the biggest issue, which has only emerged since the release of the bill, is that the legislation is potentially unconstitutional because it overrides the power of state courts.

In a recent address to the Australian Academy of Law, former solicitor general Justin Gleeson SC questioned "whether the terms of the state referrals of power support the entirety of this bill". Even

if the bill was constitutionally valid, Gleeson warns it probably produces an "implied repeal of the Federal Court of Australia Act" and renders some state acts "partially inoperative under section 109 of the Constitution".

"Now, those are matters which the federal parliament can do," he said, but "they're matters which it should not do without due care and due consultation with the persons affected, which include the states and include the courts – federal and state. In the manner in which this bill is being ... rushed through parliament, that consultation is not occurring."

Without making a judgment on constitutional questions, we could not agree more with the need for these issues to be resolved before the legislation passes through parliament, not through expensive, court-clogging constitutional challenge.

That will only happen if the parliament does its job on behalf of all Australians and subjects this important bill to proper scrutiny.

There is only one group of people who gain from rushing these reforms through parliament to stop Australians coming together through class actions – big powerful institutions who do not like being held to account.

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