

Inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

Submission by Omni Bridgeway Limited

5 November 2021

Omni Bridgeway welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (**Bill**).

About Omni Bridgeway

Omni Bridgeway is Australia's largest and most experienced litigation funder and is a global leader in dispute resolution finance. As the only litigation funder presently funding more than one class action proceeding through a managed investment scheme (**MIS**) structure¹, Omni Bridgeway is uniquely placed to comment on the impact of the Bill.

A summary of Omni Bridgeway's views

- The 70% figure for minimum expected returns to scheme members is arbitrary and is not based on any proper analysis of appropriate costs and returns. This undermines any basis to use it as the starting point for a presumption. A report by PWC² is testament to the adverse outcomes that will flow for the availability of class actions for victims of wrongdoing, from prescribing such high levels of minimum returns.
- The inclusion of costs in the definition of claim proceeds is unjust and unreasonable, and will reduce the availability of funding to the detriment of potential group members.
- The courts already determine what constitutes a fair and reasonable funding fee in the circumstances of each case, and should remain free to do so. The proposed legislation runs a real risk of constitutional challenges.
- All types of litigation funding should be regulated in the same way and that will not occur under the Bill as Group Costs Orders are not expressly covered.

While Omni Bridgeway accepts the application of the MIS regime to funded class actions, that acceptance is conditional on appropriate modifications to the MIS regime, including the changes to the Bill recommended below.

70% statutory minimum returns to scheme members (framed as no more than 30% to go to non scheme members)

¹ The company is presently funding six class actions through a MIS structure.

² Models for the regulation of returns to litigation funders, PWC, 16 March 2021 (<https://tinyurl.com/2whfe3d2>)

The proposed s601LF(5) provides for a rebuttable presumption that a proposed claim proceeds distribution method (**CPDM**) is not fair and reasonable if less than 70% of the claim proceeds is paid to the scheme's members. The lawyers and the funder are **not** scheme members.

This element of the Bill will reduce the availability of litigation funding for meritorious actions and reduce claimant's ability to access justice. The danger of a blanket rule for all cases was highlighted by the Federal Court in the settlement approval of the Omni Bridgeway funded Sirtex Medical Limited class action³. In that case Justice Beach commented on an example of a complex, high risk case that settled for a modest amount and the suggestion that group members should get 50% of the settlement sum. He said:

18. ... Take the following situation. Assume that a litigation funder and external lawyers take on a very complex and high-risk case (with a commensurably higher commission rate than normal) on behalf of say a large group of persons who have contracted cancer. Say that proving causation by the alleged carcinogen is extremely difficult. Assume that the action has been launched on the basis only of problematic epidemiology showing a heightened risk and some biology that shows only a possible biological pathway. Then assume that after extensive discovery and expensive expert reports it becomes clear that there is no viable biological pathway demonstrated, such that it is apparent that the group members have no cause of action for damages. Let it also be assumed that nevertheless the respondent is prepared to pay a modest amount to settle the matter, and let it also be assumed that legal expenses and the funding commission would soak up 90% of that modest settlement sum. Is it seriously suggested that the group members should receive at least 50% of the settlement sum for what, after forensic investigation that group members did not have to pay for and where the risk for this on their behalf was taken on and funded by others, are shown to be likely valueless claims? One can multiply such examples.

19. No power contained in or philosophy underpinning Part IVA⁴ provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery. Moreover, to so artificially allocate is economically distortive and unnecessarily disincentivises the reasonable investment of time and expense in investigating, funding and prosecuting class actions.

As Justice Beach's judgment shows, a blanket rule is entirely artificial and may increase unfairness as between funders, lawyers and claimants. A rebuttable presumption assists in part to address that unfairness, but there is no sound evidentiary basis to conclude that the 70% figure is a fair or sensible starting position. As such, it is potentially invalid as being beyond power⁵.

As further evidence of the lack of any sound basis for the 70% presumption a report by PWC⁶ into class action settlements showed that with 70% as a minimum return to group members, in 36% of class actions the funder would not have generated any return on investment at all. In other words, the legal costs comprised the entire 30%.

³ Kuterba v Sirtex Medical Limited (No 3) [2019] FCA 1374 (<https://tinyurl.com/fz9zt59j>)

⁴ The section of the Federal Court of Australia Act containing the class action regime.

⁵ "The justification for all presumptions is human experience of the association between the known and the presumed facts or circumstances" Actors & Announcers Equity Association v Fontana Films Pty Ltd [1982] HCA 23 at [6] per Murphy J

⁶ Models for the regulation of returns to litigation funders, PWC, 16 March 2021 (<https://tinyurl.com/2whfe3d2>)

Inclusion of costs in statutory minimum returns to scheme members

Claim proceeds for the purpose of the proposed s601LF(5) is defined to include any 'award of legal costs' and any agreement to pay legal costs. This wording was not included in the exposure draft released on 30 September 2021 which was to the opposite effect as claim proceeds was limited to "the total money obtained as remedies." Including any costs recoveries is a very substantial change to the Bill.

In a funded class action, the funder provides money to the class action's representative plaintiff to allow the plaintiff to meet their costs of the litigation. Upon success, the plaintiff is entitled to recover their costs from the defendant by way of a costs order or in a settlement the defendant may agree to pay the plaintiff's costs. The funding agreement would then require the plaintiff to reimburse the funder these amounts.

The Bill now provides for a presumption that no more than 30% of the "claim proceeds" are paid to entities who are not scheme members (and lawyers and funders are not scheme members), meaning 70% goes to scheme members. The effect of this is that 70% of the plaintiff's recovered costs, which is now included in "claim proceeds", must be paid to the scheme's members.

The scheme members are getting a windfall of 70% of costs they did not pay,

Such a presumption is inherently unjust and unreasonable as the plaintiff's recovered costs are not the property of the scheme's other members and they otherwise have no entitlement to them. They did not pay them and they did not risk them on the litigation. There are no policy grounds for the Bill to require group members to receive 70% of costs recovered which they did not pay, unless the policy is to adversely affect the availability of class actions for the Australian public.

Requiring the plaintiff to pay 70% of the plaintiff's recovered costs to the scheme members means that the funder may not recover the amount of their investment being the costs the funder has paid, even if there is an ostensibly poor outcome entirely outside the control of the funder. Justice Beach addressed this scenario in the settlement approval of the Davantage Group motor warranty class action⁷ in the context of a resolution for a modest sum based on a risk of recoverability that had come to fruition:

68. Who then should bear the risk on recoverability? The funder? Or the group members whose claims are being compromised? Or should they share equally after the subtraction of the applicant's legal costs and other associated costs apart from the funder's commission or remuneration? I am inclined to this latter solution. Further, I should say that the risk of recoverability should not be applied to the reasonable legal and other associated costs, which should come off the top as in essence a priority payment.

The effect of Justice Beach's decision was that the amounts financed by the funder were to be reimbursed to the funder **before** the group members received a return. Omni

⁷Evans v Davantage Group Pty Ltd (No 3) [2021] FCA 70 (<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/70.html>)

Bridgeway agrees with His Honour's approach, which strikes the right balance of risk and reward and which was reflected in the first exposure draft version of the Bill.

A further consequence of 'claim proceeds' including costs orders would be that Funders will be careful to avoid the situation described above. This means otherwise meritorious litigation against defendants will not proceed if there is uncertainty around the proposed defendant's insurance or asset position. It will also curtail the funding of smaller actions where costs as a proportion of claim size tend to be higher⁸.

What is dressed up as reform to increase returns to group members is in reality a bid to place more hurdles in the way of funded class actions, removing an avenue for redress to the Australian public.

Recommendation: The rebuttable presumption that scheme members are to receive 70% of the claim proceeds, which includes costs they did not pay, should be removed. If there is to be a rebuttable presumption in relation to claim proceeds (that excludes costs recoveries) this should be set at a percentage that is a more realistic number as a starting position, being 50%⁹.

Proscribed factors can be changed by regulation.

Under the proposed s601LF, an order to approve a CPDM can only be made once a proceeding is "sufficiently progressed to enable the court to determine whether the claim proceeds distribution method, or any variation of that method, is fair and reasonable". In determining whether the CPDM is "fair and reasonable" the court can only have regard to the factors set out in the Bill. The factors can be varied at any time by regulation.

The effect of the proposed 601LF is that a funder will continue to take all of the many risks of financing class actions but will have further and significantly reduced certainty as to the level of its return.

Presently, funders are beholden to the courts to determine that a class action distribution scheme is fair and reasonable. Whilst this comes at the end of a class action, funders have been prepared to carry the risk of an uncertain return during the life of a class action investment due to the court's adherence to precedent. Under the proposals, the government will limit the factors the court can take into account when determining a CPDM and will have the power to amend the prescribed factors by regulation *after* a funder has made its investment.

By reserving to the responsible Minister the ability to change what the court can and cannot consider when determining if a CPDM is fair and reasonable, the provisions circumvent the court's discretion and provide far too much power to the government of the day. Who is to say that a future government which is a defendant to funded litigation would not seek to stymie the litigation by amending the list of factors?

⁸ A report by PWC concluded that class actions with a gross return of less than \$25m would generally not be viable if claimants were guaranteed 70% of the claim proceeds. See, A Possible Approach to the Regulation of Litigation Funding – Supplementary Report, PWC, 5 July 2021 (<https://tinyurl.com/3bhtpma3>)

⁹ See Omni Bridgeway submission of 5 July 2021 to Treasury referring to a rebuttable presumption of a 50% return to group members

The courts should not be hamstrung by an exhaustive list of factors and commercial investors should not be subject to post investment political goalpost shifting.

Omni Bridgeway notes that former Solicitor General Justin Gleeson SC describes this element as one of the Bill's "nastiest stings". Mr Gleeson SC also said the entire Bill "probably should be withdrawn and rethought"¹⁰ and identifies the potential for constitutional issues to arise.

Recommendation: the list of factors in s601LF(3) be made non-exhaustive so that the courts can consider any relevant factor and are not limited to those prescribed by regulations.

Law-firm funding

With the introduction of the 'group costs order' contingency fee regime in 2020¹¹, lawyers in Victoria are now able to receive a percentage of claim proceeds in exchange for meeting the full costs of the litigation including adverse costs. The Supreme Court of Victoria has recognised that group costs orders are a form of litigation funding¹².

The Bill provides that a class action litigation funding scheme as defined in the proposed s9AAA is a managed investment scheme. By definition, a group costs order-funded proceeding would not be a class action litigation funding scheme if the funder is also "a lawyer or legal practice that provides a service for which some or all of the legal fees or disbursements or both are payable only on success". In the case of a group costs order, the relevant Victorian legislation allows the "legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award of settlement that may be recovered"¹³.

The Bill arguably includes group costs order litigation funding in the definition of a class action litigation funding scheme. This is because the Victorian legislation sets out *how* legal costs are to be paid, not *when* they become payable as required by the words "payable only on success" in the proposed s9AAA. However, the position is unclear and this may lead to expensive and wasteful satellite litigation as defendants challenge group cost order funded litigation which does not comply with the MIS regime.

In Omni Bridgeway's submission, third party litigation funding and law-firm group costs order litigation funding are sufficiently similar and should be subject to one consistent set of rules and regulations. Inconsistent regulation would create regulatory arbitrage and encourage funders and lawyers to use the group costs order regime to sidestep these regulations. This cannot be the desired effect of the Bill and should be clarified.

Recommendation: regulation of litigation funding apply on the same terms to all types of litigation funding, including group costs order law firm funding.

¹⁰ The Australian Academy of Law's 'Class Actions exposure draft bill concerning third party litigation funders' webinar, 28 October 2021 (<https://tinyurl.com/s6ddxv7a>)

¹¹ See section 33ZDA of the Supreme Court Act 1986 (Vic)

¹² Fox v Westpac [2021] VSC 573 at [12]

¹³ See section 33ZDA of the Supreme Court Act 1986 (Vic)