

'Orwellian gaslighting': Class action reform bill takes heat in parliament

Class Actions



🕒 November 23, 2021

✍️ Miklos Bolza

📍 Sydney

A committee report recommending passage of the Morrison government's controversial class action reform bill was tabled in federal parliament Monday, with the committee's chair touting the proposed legislation as putting an end to funders' "windfall" profits and Labor panning the bill as a study in "Orwellian gaslighting".

In the House of Representatives on Monday, Labor MP Steve Georganas recommended the bill be withdrawn. He tabled a dissenting report from the opposition, and highlighted the "overwhelming evidence" that both class action plaintiffs and defendants would be worse off if the bill were passed.

"The matters handled in this bill could have serious ramifications on citizens' access to justice. So it begs the question: just who is this bill aiming to protect? Is it the people or big corporations? As it stands, it's clear that if this bill goes through it will only protect big corporations. That is quite clear. It's also clear that it's the people who stand to lose the most if this government has its way and introduces this bill in its current form," he said.

The final report by the parliamentary joint committee on corporations and financial services, which was released late on Friday, suggests one minor change to the proposed legislation -- that the word 'only' be removed from a section of the bill, which served to limit the factors judges can consider when determining the fairness and reasonableness of how class action recoveries are distributed among group members.

The Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Act [was introduced into parliament in October](#) following recommendations from two class action inquiries. The bill contains a controversial rebuttable cap on law firm and litigation funder returns of 30 per cent of class action proceeds, and a requirement for group members to register for a litigation funding scheme.

Liberal chair commends report on bill

Committee chair and Liberal MP Andrew Wallace commended the report to the House of Representatives on Monday, maintaining the Morrison government's claims that the changes would stop funders reaping "disproportionate" profits and improve returns to group members.

"Returns to plaintiffs in cases involving litigation funders remain well below those received by class members in non-funded actions. This bill seeks to regulate class action litigation funders and limit the windfall profits they stand to make. It does this by ensuring funding agreements are fair and reasonable for both plaintiffs and funders," he said.

The bill includes provisions that only group members who sign funding agreements can be bound by the terms of those contracts, offers judges the power to vary funding agreements, and regulates a new kind of managed investment scheme, the class action litigation funding scheme.

"The provisions in this bill will encourage book building, deter speculative class actions and restrain windfall funder profits while ensuring a fairer return to plaintiffs involved in class actions," Wallace said.

The legislation has previously faced heavy criticism, with legal experts arguing it will introduce barriers to entry for group members and [bar common fund orders](#).

The International Legal Finance Association has [slammed the laws as a "wish list of procedural hurdles"](#), that would make certain class actions unviable. Barristers have also joined the chorus of dissent, saying the reforms [would lead to the "rapid abandonment" of open class actions](#).

Single word removed from Act after community consultation

The committee refrained from making any major changes to the bill, despite acknowledging the "widely divergent views" from those supporting and opposing the reforms.

Rather than making any substantial changes in response to criticism, which included [questions about the constitutionality of the bill](#), the word 'only' will be removed from section 601LG of the Act which lists factors for judges to consider when assessing the fairness and reasonableness of how funds are sent to group members.

"The committee acknowledges concerns raised by some witnesses and submitters at the exhaustive list of factors the court would be required to consider under these reforms when determining the fairness and reasonableness of a claim proceeds distribution method. The committee is concerned this may unduly fetter the court's discretion and therefore recommends subsection 601LG(3) be amended to remove the word 'only'."

The committee rejected claims that the proposed bill would lead to the death of class actions or claims, including from former Solicitor General Justin Gleeson SC, that the bill was constitutionally invalid.

"The committee places significant weight on the evidence from the Attorney General's Department that these constitutional questions (and other legal issues) were sufficiently canvassed in the legal

opinions it received. The committee therefore defers to the Department's conclusion -- and that of the Solicitor-General -- that the bill is constitutionally valid," the report said.

Committee defends rapidity of process

Criticism of the lightning speed progress of the bill since introduction of a [draft bill in September](#), which included a one-week public consultation period was rejected by the committee, which said that there had been "widespread public consultation" about class actions and litigation funding since 2017.

The committee specifically pointed to [the Australian Law Reform Committee's inquiry report](#) which was tabled in January 2019, and [a report from the Parliamentary Joint Committee](#) tabled in December 2020.

"The committee acknowledges the concerns raised by some submitters and witnesses at the condensed period of consideration around this bill. The committee nevertheless notes the central issues addressed through this bill have been the subject of widespread public consultation since 2017 -- through the ALRC inquiry, the PJC inquiry, and the exposure draft.

"The committee believes these consultations have provided adequate opportunity for stakeholders to inform the process. The committee therefore remains confident in the adequacy and integrity of the multi-year consultation process around this bill."

Supporters of the bill include the Federal Chamber of Automotive Industries, Australian Industry Group and the National Council of Women Australia.

Detractors include the Law Council of Australia; Association of Litigation Funders Australia; funders Omni Bridgeway, Investor Claim Partner, International Litigation Partners, Litigation Lending Services, and Litigation Capital Management; plaintiff law firms Shine Lawyers, Maurice Blackburn, Phi Finney McDonald and Levitt Robinson and defence firm Herbert Smith Freehills.

Labor slams 'Orwellian gaslighting'

In their dissenting report, Labor quoted from submissions by Phi Finney McDonald that the government's description of the reforms as a consumer protection measure was "Orwellian gaslighting".

"Further highlighting the idiocy of this legislation is that it is opposed by leading class action defendant lawyers Herbert Smith Freehills," PFM said.

In parliament on Monday, Georganas said it was "bizarre" the government would attempt to change current class action legislation.

There was "overwhelming evidence" that the bill would leave both class action plaintiffs and defendants worse off, Georganas told parliament.

"The committee was told repeatedly that the bill does nothing to resolve the current uncertainty in relation to the availability of common fund orders, as recommended by all members of this committee in December 2020. Instead, we were overwhelmingly told that the bill promotes uncertainty, that it promotes confusion around common fund orders, to the detriment of plaintiffs and defendants in class action," he said.

"In addition, the bill requires class members to agree in writing to be members of a litigation funding scheme. This, the committee heard, would lead to an increase in the number of closed class actions and possibly also multiple class actions for a given event. Then, from evidence we received,

there is a question mark over whether or not this bill is actually constitutional. Clearly this is a serious problem."

Longer inquiry needed to answer constitutional questions, Labor says

Labor has proposed that the government withdraw the bill or at least hold a "proper inquiry process" providing witnesses with sufficient time to respond to questions and addressing Gleeson's concerns about the constitutionality of the bill.

"The Attorney-General's Department was unable to provide the committee with any meaningful assurance that the bill is constitutional or offer any rebuttal whatsoever to any of the concerns set out in Mr Gleeson's legal opinion," the opposition's report says.

"There was literally no explanation offered as to how or why the bill is constitutional. Indeed it was clear from the long silences, non-answers and visible discomfort at the questions that the officials from the Attorney-General's Department harboured doubts as to the bill's constitutionality.

"So with no evidence, no answers and an acknowledgment that the Attorney General's Department had not considered the issues raised by the former Solicitor-General, the Liberal majority nevertheless conclude that everything is tickety-boo and confidently predict the content of responses from the public service not yet received."

Greens criticise 'selective' approach to curbing windfalls

A dissenting report by the Australian Greens was also tabled. In the report, the minority party vehemently opposed the bill.

"The purpose of this bill is at the macro level. It is designed to attack the business model of litigation funders to reduce the quantum of class actions. Access to justice and fair remedy are of no concern. The intention is pure and simple: to protect the power and wealth of the government's corporate mates."

The bill was a way to "stymie litigation funders" through a "selective" approach to curbing windfall profits, the Greens said.

"For this government: if you're making windfall profits exploiting consumers, small business or workers, or trashing nature or cooking the planet, then that's OK. But if you're making windfall profits protecting consumers, small business or workers, or helping preserve nature and our climate, then that's a problem."

Claims the committee had delivered its findings as a body independent of the government despite being constituted of members of the government were criticised by the Greens as "poppycock" and an "Orwellian inversion of the truth".

The timing of the bill and the committee's report was also slammed by the Greens.

"Clearly, the government is making a play to ram this bill through the last sitting week of the year. And it cares little for any informed opinions on how best to structure litigation funding, let alone whether the bill will be of any benefit to any particular plaintiff or defendant."

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