

# Class action law reform too rushed

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**I**t's make or break time for the Morrison government's bill to reform the billion-dollar class action and litigation funding industry.

On Friday afternoon, a 68-page report was tabled out of session by the government-controlled parliamentary committee, which is chaired by Andrew Wallace, the likely next speaker of the house. Not surprisingly, the committee supported the bill.

The government's argument for the change in law was that "in many cases litigation funders appear to be making windfall profits that are disproportionate to the costs incurred and the risks undertaken".

It sounds reasonable at face value, but the way it has gone about it, and the unintended consequences particularly for vulnerable Australians, if the ability to run class actions is curtailed, has raised more than a few eyebrows.

For starters, for such important legislation, the truncated consultation process, including four days of consultation on the draft legislation, one week to make submissions on the final legislation and a day for a public hearing, left many frustrated and concerned at the haste.

This continued with the release of the final report on Friday. Non-government committee members were given less than a day to read the final report, digest it and respond, despite former solicitor-general Justin Gleeson, SC, and the powerful Law Council warning that the bill might not be constitutional.

The plan is to put the report before the chamber today, where it will be debated, then moved to the Senate in the afternoon for further debate, time permitting, then voted on in the last sitting week of Parliament.

But given the strong language used in the dissenting reports from Labor and the Greens, who have joined forces to block it, and warnings about the bill's constitutional validity, it may not be a done deal. And if it is, it may come back to bite the government.

The report acknowledges there are "widely divergent views" and says the best way forward is to pass the bill subject to the deletion of the word "only".

One of those "divergent" views, by law firm Phi Finney McDonald, which was quoted in Labor's dissenting report, gives a taste of the level of industry anger at the way it has been handled: "That the government is seeking to present this reform as a consumer protection measure is Orwellian gaslighting."

Labor recommends the withdrawal of the bill. But it says if it proceeds it should not do so until the bill has been subject to a proper inquiry and the Attorney-General's department has addressed in writing the concerns raised by Justin Gleeson, SC, and others about its constitutional validity.

One of the committee members, senator Deborah O'Neill, put it in a nutshell when she questioned whether the legislation was fit for purpose to deliver fairness.

"The goal is clear, but there is critique of the way in which the legislation is constructed by those who are saying: 'Don't pass it yet. Really, take the time to look at it. Really, give it proper consideration,'" she said. "There are concerns about the way this piece of legislation is constructed."

From the perspective of getting the numbers, its fate rests with the crossbenchers, including Pauline Hanson's One Nation, Jacqui Lambie, Rex Patrick and Stirling Griff.

Senator Patrick, who will be one of the crucial votes in determining whether the bill lives or dies, says for him it is about access to justice. "My default position is to support access to justice, which means my inclination is I wouldn't support the bill."

It means there will be a lot of behind-the-scenes arm twisting of crossbenchers between now and voting day.

The bill aims to restrict the payout of litigation funders on class actions to a maximum of 30 per cent, leaving the rest for the members of the class action, to stem "disproportionate" returns.

According to consulting giant PwC,

which was commissioned by Australia's largest litigation funder, Omni Bridgeway, to conduct research into the proposed changes, a 30 per cent cap would render a large number of class actions financially unviable, which would have an impact on Australians' access to justice.

The research was based on 20 years of class actions and found that 36 per cent of matters would not have covered the legal costs of running the case, let alone adequate returns to the funder. Class actions have long been a thorn in the side of business. During the global pandemic last year, business lobbyists finally got the cut-through they had been seeking for years.

It began with then attorney-general Christian Porter announcing a parliamentary inquiry into class actions and litigation funders. Then on May 22, Treasurer Josh Frydenberg announced a series of measures for litigation funders and, on May 25, followed it up with a temporary easing of continuous disclosure provisions to "make it harder to bring actions against companies and officers during the coronavirus crisis and while allowing the market to continue to stay informed and function effectively".

Those temporary changes became permanent in August, which means a continuous disclosure breach can only occur when a company fails to update the market in a way that is intentional, reckless or negligent. As my colleague James Thomson argued in a column at the time, it makes it that much harder for shareholder class actions against companies to get up.

Indeed, the Australian Securities and Investments Commission wrote in a submission: "The continuous disclosure obligations are critical to protecting shareholders, promoting market integrity and maintaining the good reputation of

Australia's financial markets." It said the economic significance of fair and efficient capital markets dwarfed any exposure to class action damages.

In other changes, the government



introduced a licensing regime for litigation funders, which is overseen by the corporate regulator and requires them to comply with the rules for managed investment schemes.

Changing the business model is the next step in the squeezing of class actions.

There is no question there needed to be an examination of the class action regime given some scandalous cases, including the failed management scheme company Timbercorp and Great Southern, which was a disgrace.

More lately was the case of Banksia Securities, which collapsed in 2012, and had a court-sanctioned third party, known as a contradictor, appointed to investigate fees of almost \$20 million taken from a \$66 million settlement.

It culminated in a jaw-dropping, 969-page judgment, which resulted in two barristers being struck off the practice role and a referral to the Director of Public Prosecutions for further investigation.

As egregious as it was, Banksia showed that the courts already have the power to examine the pay structure through the appointment of a contradictor. It is something that should be used more.

Labor's dissenting report says the bill fails to achieve its stated objective, which is to protect the interests of plaintiffs in class actions, as the overwhelming evidence was that it would leave plaintiffs significantly worse off.

"The real – though unstated – objective of the bill is to protect the interests of powerful defendants by making it more difficult for people to bring class actions in the first place," the dissenting report says.

Like Labor, the Greens' dissenting report doesn't pull its punches.

"The purpose of this bill is at the macro level," it says. "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."

Politics aside, the risk of constitutional challenges is real. In its submission the Law Council says in the time frame provided for submissions, it didn't have the opportunity to consider constitutional issues in depth. It recommends Parliament give significant

consideration before the bill proceeds.

"Should the bill be enacted, it is likely that a significant level of litigation will result in order to determine the constitutionality issues. That is an undesirable outcome."



The parliamentary committee chaired by Andrew Wallace, the likely next speaker of the house, supported the bill. PHOTO: ALEX ELLINGHAUSEN

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Phi Finney McDonald, law firm