

Cap on litigation funder returns could make class actions unviable

Omni Bridgeway chief executive Andrew Saker said a 70 per cent floor for member returns would not lead to adequate revenue for litigation funders when balanced with the “considerable risks” associated with “long, expensive, complex and bitterly fought actions with uncertain outcomes”.

“In other words, many funder-backed class actions that have led to recoveries for group members arising from negligence, misleading conduct and other illegality, would not have been brought, denying a significant number of Australians any financial recovery,” Mr Saker said.



“To the extent that proceeds from a successful action are eroded by legal fees, this is largely a function of the high costs of pursuing litigation in Australia and not a reflection of litigation funding.”

A parliamentary inquiry looking into litigation funder-backed class actions last year was generally scathing of the sector, which it accused of using the justice system for the primary motive of generating a return on investment.

The final report recommended the government consult on the best way to introduce a statutory minimum return of gross proceeds from class actions (including where the matter is settled out of court) to members.

It also recommended the government explore a minimum gross return of 70 per cent to class members from any damages awarded; and whether a graduated approach could be taken based on risk and complexity.

[One Nation Leader Senator Pauline Hanson](#) previously recommended a similar floor to exempt litigation funders from having to comply with Managed Investment Scheme rules imposed by Treasurer Josh Frydenberg in August last year. Under this approach, funds which guaranteed a return of 70 per cent or more would not have to register the action as an MIS.

Omni Bridgeway is advocating for a 50 per cent cap – or a 50 per cent floor on member returns – which according to the report would only make 12 per cent of cases unviable and put about 33 per cent cases in doubt.



“In Omni Bridgeway’s view, a 50 per cent minimum return for members strikes the right balance, beyond which the courts and their expert advisers are best placed to remain the arbiter of the reasonableness of returns to a litigation funder,” Mr Saker said.

The PwC report said a cap was not based on a consideration of economic returns or economic efficiency in a conventional regulatory sense, but was instead directly based on considerations of proportionality and allocation.

“This approach is not consistent with regulatory theory and does not provide a balanced economic basis for the form of price regulation proposed in the report.”

The government’s response to the parliamentary committee report is scheduled to be tabled in Parliament in the next fortnight.