Exclusive

Directors wary of 70pc floor for class action payouts

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Jul 13, 2021 – 7.36am

Company directors and lawyers have rejected a Morrison government proposal to ensure class action members receive at least 70 per cent of any payout, saying they fear "the floor will become the ceiling".

The Australian Institute of Company directors warned of windfall profits on big claims while the Law Council of Australia said it would make other claims uneconomic for litigation funders.

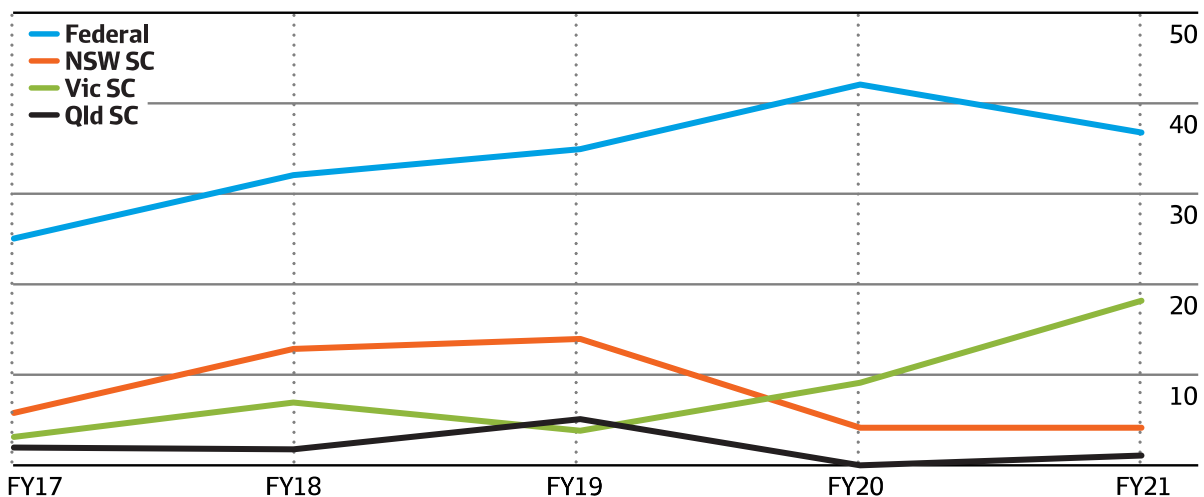
Australia had a record year for class actions in 2020-21. **Daniel Munoz**

A joint parliamentary committee into litigation funders late in 2020 recommended the introduction of a guaranteed rate of return and Treasurer Josh Frydenberg and Attorney-General Michaelia Cash called for submissions on the idea in May.

They said the measure was "of particular importance to ensure successful applicants were adequately compensated in their cases as well as preventing litigation funders and law firms from taking disproportionate fees in the process".

The Morrison government is also looking at whether the Federal Court should be given exclusive jurisdiction to hear shareholder and financial-product class actions. The change would be aimed at stopping "jurisdiction shopping" and would effectively cut out Victoria, where lawyers can now charge contingency fees.

Australia had a record year for class actions in 2020-21, with at least 60 filed over the year. Close to 40 were filed in the Federal Court, while almost a third were filed in the Victorian Supreme Court.



The AICD only offered "in principle" support for the proposal to ensure a 70 per cent return of the gross proceeds, saying it preferred "a graduated approach" where the minimum percentage to class members progressively increases as the amount recovered increases.

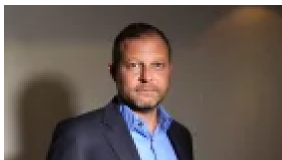
"In the AICD's view, however, a 50 per cent of gross proceeds back-stop should be established to ensure that in no circumstances will claimants receive less than that amount."

It said it recognised that funders "should be able to pursue a financial return that is reasonable and proportionate to the risk they undertake" but said "even a 20 or 30 per cent return of gross proceeds to litigation funders carries with it the risk of windfall profits for higher value claims".

"In such a scenario, say where $200 million in compensation was provided to claimants, a funder could receive up to $40 million-$60 million in returns having only outlaid $6 million to $7 million in legal and associated costs.

"Conversely, for smaller claims, it is possible that a large proportion of the proceeds of litigation could be consumed by legal fees."

The Law Council said it supported "the objectives of enhancing protections for class action members and improving access to justice". But it said a guaranteed statutory minimum return was "an inferior means of securing the first objective and would positively undermine the second".



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It added that "such price control mechanisms are blunt and inflexible instruments incapable of adapting to the complexity of the class actions regime".

"The Law Council considers that the introduction of any minimum return will suffer from arbitrariness," its submission says.

"Focus should instead be placed on why a low return to members has occurred in particular cases. For example, is the low return due to excessive legal costs or an unreasonable funder's commission, or is the low return a result of unforeseen litigation events?"

Both groups said any mechanism that guaranteed a minimum rate of return for class members should rely on oversight by the courts.
The AICD said courts should approve any funding agreements and "have the power to reject, vary or amend the terms of any litigation funding agreement if it considers the funding fee is not fair or reasonable".

Australia's largest litigation funder, Omni Bridgeway, said in its submission that returns to each party should be left to the courts based on the risk profile of each case.

"Price regulation implies that the courts are not capable of or willing to undertake this role, a proposition Omni Bridgeway rejects."

Patrick Moloney, chief executive of Litigation Capital Management, said most actions were pursued against well-heeled defendants represented by top-tier legal teams with near limitless budgets.

"This unprecedented restriction would place class members at a significant tactical disadvantage," he said.

"Most class actions will become uneconomic to run and class members will be deprived of the opportunity to recover anything for their losses."

The parliamentary committee also recommended Federal Court have sole jurisdiction, a proposal that was first made by the Australian Law Reform Commission in 2019.

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It has support among senior ministers because it would eliminate forum shopping, after Victoria introduced reforms last year allowing for group costs orders that pay plaintiff lawyers a percentage of any award.

Most securities and financial-product class actions are filed in the Federal Court, according to King & Wood Mallesons analysis, but there has been a trend towards Victoria.

The government believes limiting filings to the Federal Court would also make class action management more consistent and reduce competing actions. It would consult on the idea before making a final decision.

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