



Australian Government
The Treasury
Attorney-General's Department

Guaranteeing a minimum return of class action proceeds to class members

June 2021



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Consultation process

Request for feedback and comments

Interested parties are invited to comment on the issues raised in this consultation paper.

While submissions may be lodged electronically or by post, electronic lodgement is preferred.

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose.

Legal requirements such as those imposed by the *Freedom of Information Act 1982* (Cth), may affect the confidentiality of your submission.

View Treasury's [Submission Guidelines](#) for further information.

Closing date for submissions: 28 June 2021

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Guaranteeing a minimum return of class action proceeds to class members

Background

Litigation funding in Australia

Prior to 2020, litigation funding was subject to general regulatory requirements under the *Corporations Act 2001* (Cth) (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (Cth) and general law, including equity.¹ However, litigation funding schemes and arrangements were specifically exempted in July 2013 from the requirement to hold an Australian Financial Services Licence (AFSL) and from the managed investment scheme (MIS) regime established under the Corporations Act, provided that the litigation funder had appropriate processes to manage potential conflicts of interest.²

On 22 May 2020, the Australian Government announced it would require litigation funders to comply with the MIS regime and hold an AFSL to ensure that funders face the same regulatory scrutiny and accountability as other financial services and products.³ To this end, the Corporations Amendment (Litigation Funding) Regulations 2020 were registered on 23 July 2020.

In its December 2020 report, 'Litigation funding and the regulation of the class action industry' (the PJC Report), the Parliamentary Joint Committee on Corporations and Financial Services (PJC) found that these reforms were 'a step in the right direction.'⁴ It noted the 'regulation of litigation funding in class actions is now appropriately aligned with that which applies to other financial services.'⁵

Litigation funding arrangements for Federal Court of Australia matters

The Federal Court of Australia exercises a supervisory role over litigation funding that supports matters brought under the class action regime in Part IVA of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act). This supervisory role enables the Federal Court to protect class members, including through an ability to approve class action settlements. As part of this supervisory role, the Court must be notified of:

- the relevant costs agreement in a class action prior to the first case management hearing and any changes to this agreement
- any change to the litigation funder involved in the class action
- when the litigation funder has become insolvent or otherwise unable or unwilling to continue funding the action.⁶

¹ Australian Law Reform Commission (ALRC), *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, ALRC, Australian Government, 2018, p 62.

² Corporations Amendment Regulation 2012 (No 6).

³ The Hon Josh Frydenberg MP, *Litigation funders to be regulated under the Corporations Act* [media release], Australian Government, 22 May 2020.

⁴ Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, Parliament of Australia, 2020, p 311.

⁵ *Ibid.*

⁶ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl 6.

The Federal Court can also be assisted by professionals in determining the fairness and reasonableness of a proposed settlement.⁷

Report of the Parliamentary Joint Committee on Corporations and Financial Services

The PJC observed that when working as originally intended, the class action regime in Australia ‘should facilitate access to justice, discourage wrongdoing and promote the efficient and effective use of court resources.’⁸ The PJC also acknowledged that litigation funders play an important role in the class action regime, to the extent that ‘in many instances, a class action in Australia may not proceed without a litigation funder.’⁹ Litigation funding can reduce gaps in financial resources between parties to a class action, levelling the economic playing field so that an applicant may pursue their case.¹⁰

However, the PJC also expressed strong concerns that the regulation of litigation funding is too light touch and greater oversight of the industry is required. Due to the growth in scale of litigation funding and the frequency of ‘windfall profits’, the PJC highlighted the need to reassess whether representative plaintiffs, class members and defendants are achieving reasonable, proportionate and fair outcomes.¹¹

Critically, the PJC found ‘systemic and inappropriate’ skewing of successful class action proceeds in favour of litigation funders, at the expense of class members’ share of the proceeds.¹² The PJC noted litigation funders should be reimbursed for the costs they incur and make a profit which is reasonable and proportionate to the risk they undertake.¹³ However, it found that the proportion of proceeds going to litigation funders is often disproportionate to the cost and risk undertaken.¹⁴ The PJC noted that this created an unfairness that is primarily borne by the class members, as their share of the settlement is ‘significantly reduced by the excessive proportion going to litigation funders’.¹⁵

In particular, the PJC highlighted that the practice of percentage-based billing enables windfall profits to be obtained by funders.¹⁶ It noted that percentage based billing can significantly reduce class members’ share of settlement proceeds and is often disproportionate to the actual financial contribution outlaid by the litigation funder.¹⁷

The Federal Court has also acknowledged concerns with the unreasonably low proportion of judgment or settlement sums being received by class members, once litigation funding commissions and legal costs are deducted.¹⁸

⁷ Ibid, cl 16.

⁸ Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, p xiv.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid, p xv.

¹² The PJC cited analysis in the ALRC report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (December 2018) that when litigation funders were involved in a class action, the median return to plaintiffs was 51 per cent, compared to 85 per cent when a funder was not involved.

¹³ Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, p 204.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719; *Petersen Super Fund Pty Ltd v Bank of Qld Ltd (No 3)* [2018] FCA 1842.

In Recommendation 20 of the PJC Report, the PJC recommended the Australian Government consult on:

- the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements)
- whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor
- whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.

Consultation objectives

This consultation implements Recommendation 20 of the PJC Report. It seeks to consult on the best way to guarantee a statutory minimum return of gross proceeds of a class action to class members. In particular, views are sought on the potential design elements of a guaranteed minimum return, the appropriate rate and how the rate might be differentiated based on the risk, complexity, length and likely proceeds of a particular case.

A guaranteed statutory minimum return for class members

Design of a guaranteed floor for returns

The first two elements of Recommendation 20 of the PJC Report concern the best mechanism to establish a statutory minimum return of class action proceeds to class members, as well as the quantum of the guaranteed minimum as a percentage of gross proceeds.

As noted, the PJC recommended consultation on the appropriateness of a minimum gross return of 70 per cent to class members.

There are a range of options to legislate a statutory minimum return. These include amending the Corporations Act to ensure, as a condition of the AFSL or MIS regimes, that litigation funders do not impose costs where doing so would result in plaintiffs receiving less than the guaranteed minimum, or setting a statutory cap on returns with court oversight. Further, Australian courts have had a significant role to date in regulating litigation funding in class actions by supervising and approving class action settlements and other case management processes. The PJC makes recommendations that would enhance the power of the Federal Court. Notably, Recommendation 11 is for the Federal Court Act to be amended to introduce:

- a requirement for the Federal Court to approve a litigation funding agreement in order for it to be enforceable
- a power for the Federal Court to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.

Any mechanism which guarantees a minimum rate of return will necessarily interplay with the courts' existing supervisory role in representative proceedings regimes, while also needing to maintain conceptual coherence with the broader suite of recommendations in the PJC Report.

Consultation questions

1. What is the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements)?
2. How would the suggested mechanism interact with the class action system (including court processes) and the litigation funding regime?
3. Is a minimum gross return of 70 per cent to class members the most appropriate floor for any statutory minimum return? If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?

A graduated approach

The third element of Recommendation 20 contemplates a graduated approach to guaranteed class member returns, which takes into account the risk, complexity, length and likely damages award or settlement to flow from the case. This mechanism would entitle class members to a higher proportion of gross proceeds in less complex cases.

Consultation questions

4. Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?
5. How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.

Additional issues

Submissions are also welcome on any additional matters that are relevant to issues raised in this consultation paper.

Consultation question

6. What other implementation considerations would be relevant to the issues raised in this consultation paper? Please provide examples

It would assist if relevant examples could be provided where possible to support submissions made in response to the above questions.