

## Australian Federal Government Consultation on a minimum return to class action members

### Summary

- **Omni Bridgeway has published its [submission](#) to the Australian Federal Government consultation concerning a statutory minimum return of class action proceeds to class action members.**
- **Omni Bridgeway's submission confirms its views that:**
  - **there is no evidence of market failure which necessitates regulatory pricing intervention**
  - **the courts are best placed to continue to determine a fair and reasonable distribution of any class action proceeds**
  - **evidence shows that a minimum return of 70% of litigation proceeds to class members would have rendered unviable a highly significant proportion of class actions which have been successfully funded to date**
  - **the most significant issue for funded class actions is the lack of regulatory consistency between class actions funded by litigation funders and those funded by plaintiff law firms under Group Costs Orders in Victoria**

Omni Bridgeway Limited (**Omni Bridgeway**) confirms that it has lodged its submission in the consultation being undertaken by the Treasury and Attorney-General's departments of the Australian Federal Government (**Government**) entitled "*Guaranteeing a minimum return of class action proceeds to class members*" (**Consultation**).

The Consultation follows the Parliamentary Joint Committee on Corporations and Financial Services' report on Litigation Funding and the regulation of the class action industry, published in December 2020 (**PJC Report**). The PJC Report made 31 recommendations in all, including that the Government consults on a statutory minimum return of litigation proceeds to class action group members and whether 70 per cent was the most appropriate floor.

Omni Bridgeway's submission to the Consultation has appended to it reports commissioned by the company from PwC into the impact of establishing a statutory minimum return to class action members.

In summary, Omni Bridgeway submits:

- The courts are the best and most appropriate body to assess the risks of litigation undertaken by litigation funders and an appropriate return for that risk. Those risks vary across each class action and a 'one size fits all' cap to funder returns is inappropriate. The courts have a range of existing powers to determine a fair and reasonable distribution of proceeds from funded class actions and diligently exercise these powers.
- Price regulation implies that the courts are not capable of or willing to undertake this role, a proposition Omni Bridgeway rejects.
- Expert economic analysis by PwC shows that a 70 per cent minimum return to group members is likely to substantially constrain the viability of future funded class actions in Australia. It therefore risks damaging the very people the regime is ostensibly seeking to protect – potential group members who will have their options to access justice curtailed.
- Based on historical data, PwC's analysis shows that a 70 per cent minimum return would mean 36 per cent of cases would not proceed as they would not even cover legal costs (i.e. zero return to the funder). A further 55 per cent of cases would be impacted as the funder's commission would have been reduced.
- Sound regulatory theory suggests that pricing intervention should only follow market failure. There is no evidence of market failure in the litigation funding industry in which:
  - there are few complaints by group members;
  - there is no evidence of what has been described as 'opportunistic class actions';
  - competition is pushing down funding rates;
  - there are significant checks and balances in place already, including increasing intervention by the courts in the class action settlement approval process;
  - the 2020 regulatory reforms require litigation funders to hold an Australian Financial Services Licence (AFSL) and to comply with the Managed Investment Scheme (MIS) regime for class actions.
- The introduction of a 70 per cent minimum would be an arbitrary measure and is not supported by reference to any analysis of the negative implications for the funding of class actions or the risks being assumed by litigation funders.
- A 30 per cent cap on the returns to funders inclusive of legal costs will result in an inequality of resources between claimants and defendants. It is foreseeable that defendants may seek to defeat a claim by "deep pocketing" tactics, that is, prolonging and/or complicating proceedings (thereby increasing cost) making it unviable for group members to pursue their claim.
- Recognising the importance of ongoing public confidence in the class action system, Omni Bridgeway recommended a 50 per cent minimum return to group members to the PJC, intended to operate as guidance to the court or a rebuttable presumption.
- The recent advent of group costs orders (GCOs – a form of contingency fees for lawyers) in Victoria has created a dual system for class actions with some 'funders' regulated (i.e. licensing and MIS obligations) and others not. This appears to have contributed to an

increase in the number of class actions. The Federal Government should level the playing field so that law firms acting as funders are subject to the same regulation as third party funders.

**Authorised by the Disclosure Committee**

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