Companies Professional Services Class action

Judge backs class action orders that government wants to abolish

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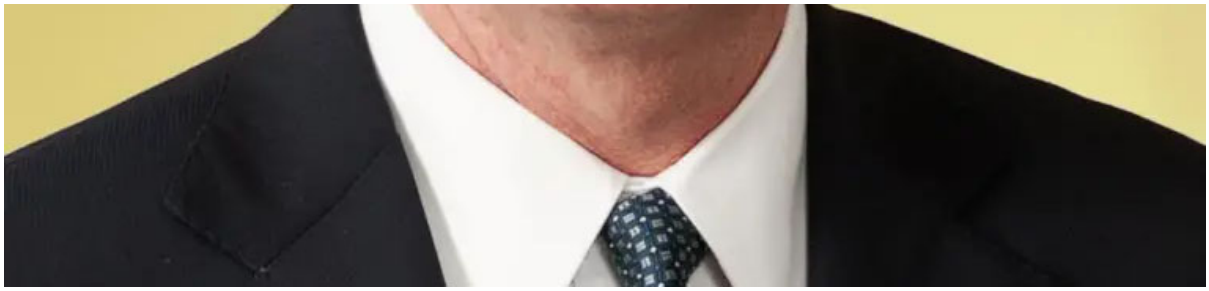
A Federal Court judge has provided a staunch defence of common fund orders (CFOs) in class actions as the government pushes ahead with reforms that would stop litigation funders taking a commission from anyone who was eligible to join a claim.

Justice Jonathan Beach said a class action involving alleged overcharging of electricity consumers in Queensland was an argument against "book-building", the process by which funders sign up claimants one by one.



Justice Jonathan Beach

The Coalition government wants to abolish CFOs, which have allowed funders to frame a claim based on all potential members of a class to stop people having a "free ride" to a payout once it is settled.

It believes mandating book-building will "ensure that actions involving litigation funders are commenced with the genuine support of plaintiffs".

However, the CFO provision has become the principal stumbling block to the legislation – the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* – proceeding through the senate, with some crossbenchers picking up on concerns that it could make some claims unviable.

The government also wants to ensure class action members receive at least 70 per cent of any payout.

The High Court has declared CFOs cannot be granted at the start of the case, but doubt remains over whether a CFO can be part of a final settlement.

'Closed class'

Justice Beach suggested the class action against Stanwell Corporation and CS Energy, which is being funded by LCM with Stillwater Pastoral Company as lead plaintiff, should not proceed as a "closed class" involving about 50,000 parties,

“It is not a plain-vanilla commercial class action where investors seek to recover the value of their investments. Rather, it is one where the breadth of the alleged gaming strategies of these electricity generators has adversely affected all Queensland electricity consumers.

“The proceeding is a paradigm case of one that should be open. ”

Justice Beach said he doubted that “all consumers were notified of or given the opportunity to sign up” and that the case “dispels the myth of the so-called advantages of book building in a case of this type”.

‘Unnecessary, costly and inefficient’

“The book-building here has resulted in an unnecessary, costly and inefficient delay of seven months in order that over 50,000 retail customers be separately signed up to individual funding agreements.

“There is little justification for such a barrier to entry, so to speak, or justice.

“Fourth, to allow the proceeding to remain closed will incentivise others to launch parasitic actions to cover the balance of the universe of electricity consumers.“

He said that could be “all but inevitable if I later deliver a judgment in favour of the present closed class, unless I open the class after judgment”.

to federal and state attorneys-general and written two books, one a biography of former High Court Chief Justice Murray Gleeson. *Email Michael at michael.pelly@afr.com*

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