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Class actions offer access to justice for many now excluded

JOHN WALKER THE AUSTRALIAN 12:00AM January 26, 2018

Hundreds of thousands of Australians who have benefited from funded class actions over the last 15 years would dispute, if asked, that they have been denied justice as postulated by Clayton Utz consultant, Stuart Clark in his article last Friday headed “Justice denied when only the lawyers and litigation funders win”.

Funding costs as a percentage of recoveries decrease over time as the litigation funding market matures, becomes less centralised and grows.

However, funding costs will always be relative to the risks, costs and delays inherent in the civil justice system. Any reforms seeking to enhance the delivery of justice through decreasing litigation funding costs must focus on civil justice reform.

Increasing access to justice through class actions will involve looking at trading in the Rolls Royce for a Mini Minor, to borrow CJ Wayne Martin’s prophetic metaphor, by designing and developing a civil justice system that:

● Is less adversarial, with greater case management by the courts;

● Enforces laws that have a greater statutory/common law ratio; and

● Is based on the courts, lawyers and funders being more accountable through the collation and disclosure of data referable to each participants’ productivity in achieving just, quick, inexpensive and efficient resolution of claims (the overarching objective).

That said, litigation funders are currently not required to be licensed, are not regulated as credit providers, have no prudential supervision and their personnel are not subject to vetting under any fit and proper person test.

Last month, George Brandis, one week before his appointment as attorney-general ceased, referred to the Australian Law Reform Commission for consideration whether class actions, together with lawyers and litigation funders, ought to be subject to commonwealth regulation.

This federal inquiry follows the inquiry last year by the Victorian Law Reform Commission, which was asked to report this year on concerns that litigants not be exposed to unfair risks or disproportionate cost burdens when accessing litigation funding services or through class actions.

What, then, is the context within which we can address these concerns?

First, the courts have long ceased to require the common law to protect their processes from litigation funders maintaining actions for reward. The overarching objective is almost invariably assisted by the parties having equality of arms.

Secondly, there already exists oversight of funding arrangements by the courts and lawyers owing fiduciary duties to their claimant clients.

Thirdly, funders fund the open-ended costs of both claimants and (if the case is lost) defendants. The interest in not funding spurious claims and the interest in maximising the net return from valid claims as efficiently as possible are interests claimants and funders have in common.

Nevertheless, for more than 10 years I have publicly proposed litigation funding regulation in five key areas: capital adequacy and other issues addressed by the Australian financial services licence regime; ensuring funders remain independent of lawyers; disclosure and duties to the court; disclosure and duties to claimants; and the introduction of a fit and proper person test.

No changes to court rules for class actions are necessary.

Consumer protection through licensing would include prudential requirements and ASIC’s supervisory role with powers to cancel licences and make banning orders.

Policy considerations for requiring a clear demarcation between independent funding and legal services are compelling; contingency fees are a second-best option.

The courts would be assisted by litigation funders, including insurers funding defences that exercise control or influence over the conduct of the case, to notify the court of their involvement (and disclose their contracts) and, as in Western Australia, have duties to the court not to engage in misleading conduct and to use reasonable endeavours to achieve the court's objective.

Requiring disclosure to potential clients through a financial services guide, product disclosure statement and a framework for clauses within which comparisons between funders' terms could be made would provide further consumer protection through greater transparency and commoditisation.

In addition, like insurers, there ought to be the imposition of a duty of good faith upon funders and funded claimants.

Litigation funding has, quite rightly, been subjected to intense judicial and regulatory scrutiny over the past 20 years or so since it emerged as an important option for claimants seeking to finance their litigation. It has gained acceptance by the courts, the legal profession, policymakers, capital markets and consumers around the world.

Viewed objectively, litigation funding is a positive development for civil justice systems. It unarguably enhances access to justice for many with genuine claims who are excluded from the system.

It also improves the effective enforcement of the law, especially in investment cases, being the principal concern of the big end of town and their agents — a lobby platform which ought be given the influence it deserves in the coming litigation funding regulation and civil justice reform discussion.

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