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Crackdown on class actions helps big end of town

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Recently a court found lawyers in the Banksia Securities class action fraudulently inflated fees and commissions. They were struck off and ordered to pay damages; the case was referred to the Director of Public Prosecutions.

The case is cited to justify the federal government's crackdown on class actions.

There's a saying: hard cases make bad law. When courts or governments try to solve for extreme behaviour they make laws that hurt innocent people. This is an example. Let's look at the kinds of cases the government wants to crack down on.

Johnson & Johnson, an American conglomerate worth billions, developed a mesh product for women with a weakened pelvic floor and aggressively marketed it. Thousands of women suffered debilitating, life-changing injuries, including chronic pain, organ damage, even marriage breakdowns. The court awarded damages and found the company was negligent, misleading and deceptive; the products defective, unfit for purpose and carrying risks patients weren't warned of.

The company appealed and lost. It's appealing again. The case has spanned a decade already. With the company's latest profits soaring 73 per cent, it is cashed up to fight to the bitter end. Without a no-win, no-fee class action, this case wouldn't have proceeded.

In 2012, hundreds of self-funded retirees lost millions of their nest eggs when Wickham Securities collapsed amid criminal fraud and a Ponzi scheme. A class action supported by litigation funding secured them compensation. Without litigation funding they wouldn't have received a penny.

Before the 1970s, wages of Indigenous workers on missions and reserves were paid to governments and not spent for their benefit. Governments have flatly refused to repay.

But a Queensland class action was settled in 2019 for a substantial amount. Litigation funding delivered this because the government knew claimants could pursue their claim in court. The proposed laws will kill off stolen wages claims in other states and territories.

Proposed legislation will require a minimum 70 per cent return to claimants in funded litigation. The government says this gives victims a greater share of winnings. Not if there are no winnings to share.

Litigation funders and lawyers working for contingency fees underwrite the costs of claims, invest in costly research and claim preparation over years and take all the financial risk, including paying the defendant's costs if they lose. In return, they share in awards or settlements, if any.

This newspaper incorrectly stated on Monday that “the profits of class action funders and lawyers would be capped at 30 per cent of the settlement”. On Wednesday, this newspaper’s opinion page said “lawyers and funders are pocketing about half of the median return to class members”. That’s not correct. Any amount recouped must cover legal fees, research and other costs.

Capping the share of funders and lawyers at 30 per cent hurts victims. Analysis by PricewaterhouseCoopers concludes more than a third of all class actions wouldn’t have proceeded with this cap because it wouldn’t have covered legal costs and more than 90 per cent of claims would have been adversely affected.

Cases such as Johnson & Johnson, Wickham Securities and Indigenous stolen wages will be the most affected because they’re the most complex, generate the highest fees and require the longest preparation. None of these cases would have been backed by lawyers on no-win, no-pay or litigation funding if there were a 30 per cent cap. Lawyers and funders couldn’t take on the risk.

When victims’ legal spending is capped it allows defendants with deep pockets to defeat claims by dragging them out for years to push up claimant fees. Claimants under pressure will accept hasty, lower settlements (if even offered). If the government really cared about legal fees it would impose a cap on how much defendants can spend on lawyers, too.

Caps are just one example of changes falsely sold as beneficial to victims. Another is changes to the opt-out/opt-in rules. Current rules allow all victims of a class action to be part of the claim but they can opt out. Proposed laws will effectively limit participation to those who’ve expressly opted in. This prejudices cases such as Indigenous stolen wages where it’s hard to track down claimants and drives higher legal costs and uncertainty for all parties. Opt-in would be fine in a world where everyone has unlimited resources. Opt-out levels the playing field.

The government’s proposed changes will impact beyond class actions. Under legislation headed for parliament, many of the recent cross claims against wrongdoers by insurance companies on behalf of policyholders following bushfires would be considered class action litigation funding schemes. This legislation has several flaws such as this, indicating it has been hurried and needs serious review.

Litigation funders and class action lawyers support sensible regulation, including incentives against bad behaviour, for claimants and defendants. They’ve worked with the government to get the right outcome. The government hasn’t listened because its goal is to stop class actions at the behest of the big end of town.

When big corporations and governments do the wrong thing, these laws will protect them. The crackdown on class actions is a crackdown on justice.

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