

Reformers naive to think one size fits all

Opinion

Stephen Conrad



Driving the reform: Attorney-General Michaelia Cash and Treasurer Josh Frydenberg. PHOTO: ALEX ELLINGHAUSEN



The truth about class actions, which the Treasurer and Attorney-General fail to recognise, is that they are not all created equal. Why is it then that the government has indiscriminately grouped the reform of class actions into a one-size-fits-all regime?

Is it that the government is simply corroding access to justice at a time that, conveniently, coincides with a peak in the number of claims against it (doubling over the past 12 months and quintupling over the past four years)?

Does the government not see its conflict of interest in this regulatory reform?

Any consideration of class action reform must start with acknowledging fundamental differences between types of class actions. For example, shareholder class actions may be suited to capping returns; given they generally involve standard legal issues, identifying potential claimants is not complex, and victims are often investors with financial literacy.

Non-shareholder class actions are different. Victims' claims can be novel and complex (negligence, breaches of contract/trust, racial discrimination, wage theft, breach of consumer laws). Identifying and communicating with victims is expensive and time-consuming. The laundry list of royal commissions in recent years has shown it's certainly not the government, regulators or big companies holding themselves to account.

Consider the victims of the stolen generations in the Northern Territory. Although labelled a "stolen generation", in reality they were victims of human trafficking and slavery.

The 1997 report *Bringing Them Home*, by the Human Rights and Equal Opportunity Commission, recommended compensation, but it took a funder to support a class action against the government to finally obtain an offer of redress.

There's a plethora of significant non-shareholder class action examples that have needed painstaking levels of commitment and funding towards protracted and expensive research.

A PwC report commissioned by Omni Bridgeway says the imposition of a minimum 70 per cent return to victims would have made 36 per cent of class actions commercially unviable for funders; 91 per cent of settlements would have been adversely affected by the constraints.

Under the proposed changes, it's not an even playing field. Victims, by virtue of limiting what the funder can recover to obtain justice, will have a cap on legal spend, while big companies with deep pockets are free to tie victims up in expensive knots. It is a contradiction for the government to say it is in the best interests of victims to cut costs.

Litigation is expensive and unpredictable, and funders must agree to pay the costs of the defendant if the case is lost.

Funders are also routinely required to pay six- or seven-figure sums as security for the defendant's costs. The funder bears all the risk of the litigation, and the victims don't need to ever reach into their pockets, even if they lose.

The reality is that financial support for a claim that will cost millions, even if you win, shouldn't, and can't, be cheap – not with well-resourced defendants.

Everyone will cite the recent Banksia Securities class action as an example of why the landscape is in dire need of reform. The lawyers who masqueraded as funders in that case were not just bad apples, they were criminals, guilty of egregious conduct.

However, to paint a whole industry of funders and class action lawyers with the same Banksia brush is naive.

We have always supported and already use contradictors to ensure fair returns to victims, and are pleased to see the government adopt our practice in its proposed reforms.

No victim deserves to be stripped of access to redress in the legal system. The Treasurer and Attorney-General must establish a transparent consultative process for reform and acknowledge their conflict of interest.

It's now up to the Labor Party and the crossbenchers to stop these uninformed and misguided reforms.

Stephen Conrad is chief executive officer of Litigation Lending Services.