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Litigation funders give ordinary Aussies access to justice

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There is room for improvement in Australia's class action system and for greater oversight of the litigation funding industry that supports it. No one sensible is arguing otherwise.

But the kind of self-interested, hyperbolic arguments being thrown around by those whose real aim is making the start of any class action immeasurably more difficult, particularly those on behalf of wronged shareholders, do not stand up to scrutiny.

Unchallenged, they risk driving a response from government that will harm the people they purport to protect — ordinary Australians seeking access to justice.

Contrary to critics, there has been no "explosion" in class actions, there is no widespread practice of returning "mum and dad" class action members less than 50 per cent of settlements, and the returns of litigation funders are commensurate with the significant risks they take on behalf of claimants.

There is also no credible independent evidence that class actions are having an adverse impact on the Australian economy, financial markets or the prospects for Australian companies.

On the contrary, it is acknowledged that class actions, by complementing action by regulators to enforce Australia's continuous disclosure regime, contribute to the integrity of the nation's financial markets, making them an attractive source of capital for Australian and international companies.

In its submission to the Australian Law Reform Commission review into litigation funding and class actions, handed to the government in December 2018, the Australian Securities & Investments Commission said the continuous disclosure obligations "are critical to protecting shareholders, promoting market integrity and maintaining the good reputation of Australia's financial markets".

ASIC's position on shareholder class actions was unambiguous: "The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages ... Shareholder class actions provide a number of benefits to consumers and financial markets and play an important role in improving shareholder access to justice."

There has been an increase in the cost of directors and officers liability insurance, which has placed a burden on some particularly smaller companies, and the number of class actions is a factor. However, the ALRC accepted Norton Rose Fulbright's argument that there was "presently no evidence to suggest that insurance is unaffordable or that there is a material underinsurance risk requiring policy intervention", and that recent increases in premiums for D&O cover was "an overdue and necessary reaction to the realities of the Australian market".

There is no doubt that the number of class actions begun in Australia has been growing. There are several factors behind this increase, including the growth and sophistication of the Australian economy and financial markets, and some well-publicised issues in corporate Australia, such as the banks' treatment of their customers, as exposed by the Hayne royal commission, and the systematic underpayment of employees by some of our biggest companies.

Another undeniable factor is the courts' endorsement of common fund orders after 2016, which meant it was no longer necessary for litigation funders to obtain the express agreement of each claimant before they were bound to litigation funding terms. This is a valid concern.

We believe the High Court's ruling last year that the courts do not have the power to make CFOs (at least at the early stages of the proceedings) and the federal government's proposed litigation funding licensing regime — which we support — are likely to result in the end of these so-called open class actions. We would welcome a return to the closed class action model that existed until 2016 and ensured only class actions genuinely supported by claimants proceeded.

Despite all these factors, however, claims of an explosion in class actions are overstated. There were 59 class actions started in 2018-19, just three more than 2017-18 and 15 more than 2014-15.

This is in the context of more than 2000 ASX-listed companies. And these figures represent all types of class actions including those on behalf of shareholders, consumers, employees and victims of events such as the mismanagement of Brisbane's Wivenhoe Dam in the 2011 Queensland floods — first exposed by this newspaper — which is funded by Omni Bridgeway.

Of the 14 current class actions Omni Bridgeway is funding, only five are on behalf of shareholders and we have not funded a new Australian shareholder class action in more than 12 months. We have publicly supported a six-month moratorium on new class actions associated with COVID-19-related disclosures to allow companies and their boards time to manage their response to the pandemic.

Litigation funders can make generous returns on successful cases — but those returns must be balanced against the very expensive losses in other parts of their portfolios ($30m in the case of the Omni Bridgeway-funded action on behalf of bank customers over various bank fees) and the outsized risks that come with taking on very powerful, well-funded defendants over long periods.

Across all Omni Bridgeway-funded class actions since we listed on the ASX in 2001, we have recovered $1.6bn of which $1bn, or 63 per cent, went to group members. Of the balance, a proportion covers the legal and other costs of running the matter and about 25 per cent went to Omni Bridgeway as its commission. These numbers are broadly consistent across the industry.

There are outliers in which claimants have received less than 50 per cent due to the particular circumstances of those cases. In those cases, we believe the burden should fall on the litigation funder, which is why we support legislation to set a minimum return to claimants of 50 per cent.

The argument that claimants get greater returns from unfunded class actions than they do from funded class actions is a statement of the obvious. Funders recover their costs and fees from any recoveries, reducing returns for claimants. The real question is how many claimants in those funded class actions would have received nothing because they were unable to take action as individuals.

Opponents of litigation funding find themselves pursuing somewhat contradictory aims: to curtail the number of class actions ordinary Australians can take by cutting off a critical source of funding; yet to ensure those ordinary Australians who participate in a funded class action receive a bigger slice of any settlements or court-ordered damages.

The truth is that without litigation funders, many Australians let down by government, institutions or companies would have no avenue for redress. And a bigger slice of nothing is still nothing.

Andrew Saker is the chief executive of litigation funder Omni Bridgeway.