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Litigation funding is a lawyers' picnic that must end

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Shakespeare was right to have a dim view of lawyers. The passage of centuries has done little to dull the flaws of human beings, let alone lawyers.

While the Bard wanted them all killed when he wrote Henry VI more than 400 years ago, the least we can do in 2020 is make sure that greed doesn't get in the way of lawyers acting in the best interests of plaintiffs.

On that score, if tearing down statues is a sign of people forgetting history, it's even dumber to ditch tried and tested old principles, replacing them with shiny new rules entirely untethered from human nature.

Take the legal torts of maintenance and champerty. Most people won't have heard about these old common-law principles but will instantly recognise why they came about. In simple terms, maintenance means financing someone else's lawsuit, and champerty is maintenance plus making a profit, or taking a cut of the settlement or award arising from another person's legal claim.

The common law developed these legal wrongs following the reigns of Henry VI and Richard III when greedy barons and lords jammed the courts, profiteering by encouraging quarrels and supporting litigation in cases where they had no legal standing.

Fast forward to the 21st century: Seduced by the prospect of providing greater access to justice for plaintiffs, and hoping that human nature had changed, various law reform commissions in recent years have recommended getting rid of these old torts. They no longer exist in NSW, Victoria, South Australia and the ACT.

And in a 2006 decision called Fostiff, the High Court buried the last vestiges of the ancient tort of champerty, finding there was no public policy argument against litigation funders.

Addressing a bunch of judges in 2008, Patrick Keane, then a Queensland appeal court judge, and now a High Court justice, had something to say about the High Court's folly: "I suppose we should be celebrating the good news that the pessimistic view of human nature which, for several hundred years, has informed the common law's disapproval of champerty is no longer correct. Lawyers used to be greedy, but now we're better.

"And to the extent that we lawyers might still be susceptible to distraction from our duty by our own pecuniary interests, it is comforting to be reminded that the courts can prevent abuse of their processes."

It was tongue-in-cheek. Yet, single-handedly, the High Court unleashed litigation funding in Australia, creating a voracious new asset class seeking returns that one judge last year described as "stratospheric, in the tens of thousands of per cent".

To distract us from their plunders, the clever modern barons try to avoid accusations of trafficking in litigation today by hanging out their shingle with the words "access to justice" plastered over it.

But as Australia's largest litigation funder, Omni Bridgeway, has bragged to investors, it accepts only 4 per cent of cases that come its way.

That's not access to justice for plaintiffs; it's access to riches for those who take a fat slice of winning cases that would have made it to court anyway.

So eye-watering are the rates of return enjoyed by litigation funders, foreign investors are flocking to Australia for riches they can extract from plaintiff settlements, proving that human nature in the 21st-century Australia is not so different from 15th-century England.

It was bad enough when judicial naivety empowered litigation funders to extract ridiculous returns from plaintiff settlements. By introducing contingency fee schemes, the Victorian Labor government has given the same largesse to law firms, including the country's biggest class action firm, Maurice Blackburn, a generous donor to the Victorian Labor Party.

Here again access to justice has been used as a flimsy cover for lawyers to access more riches. The Andrews government has imposed no legislative cap on what lawyers can extract from

settlements, tossing out suggested amendments to impose a 35 per cent cap on contingency fees.

There is no requirement that the contingency fee scheme be disclosed to class members, and no right to oppose it. Nor is there any obligation on lawyers to take anything but the juiciest of legal cases, which would have made it to court anyway. In Victoria, class action lawyers have effectively become the mirror image of litigation funders.

The rush by the Andrews government to make Victoria an outlier on contingency fees is a powerful impetus for federal intervention to fix what has gone wrong with class actions in Australia over more than two decades.

There are two ways this can happen.

The quick fix is for the Australian Securities & Investments Commission to use its new product intervention powers to control litigation funding and law firms charging contingency fees. Both are managed investment schemes. ASIC could ban contingency fee schemes as rotten financial products for consumers: by untethering the lawyers' interests from their clients, these schemes create irreconcilable conflicts. How's that for a dodgy product targeting vulnerable consumers?

At the very least, just as ASIC used product intervention powers to stop payday lender Cigno from charging exorbitant rates of returns from vulnerable borrowers, ASIC could step in to protect consumers from schemes that allow voracious litigation funders and law firms making scandalously high returns at the expense of plaintiffs.

We will soon learn how serious ASIC is about protecting consumers from shoddy financial products offered by litigation funders and lawyers charging contingency fees.

Using its new powers, ASIC could also put an end to litigation funders hiding details about the funding process from class members by using an ambit claim of commercial-in-confidence. How can consumers "compare the pair" when litigation funders demand excessive levels of secrecy, and the courts grant it to them?

The longer-term fix falls to the Morrison government. It was a sensible first step for the Treasurer to demand that litigation funders be regulated as managed investment schemes. Josh Frydenberg fixed an egregious error by Labor's Chris Bowen.

The Morrison government should now embark on far more serious reform by using its powers in the Constitution to outlaw contingency fees and provide that all class actions against corporations

be commenced in the Federal Court and subject to Federal Court rules. Why? First, federal laws could set down a clear and sensible process for class actions in Australia, replacing the hodgepodge of court decisions that have failed to.

Second, this will provide a nationally consistent regime for regulating class actions brought against companies. This is why the framers gave the federal government a corporations power in section 51 (xx) of the Constitution: to ensure that corporations are treated equally.

Third, it will put an end to forum shopping, where lawyers get a bigger slice of plaintiff settlements in states that have thrown away the tort of champerty.

Fourth, it will help fix a serious insurance crisis in Australia. The blow out of average premiums by between 200 per cent and 400 per cent for directors and officers insurance means boards spend more time worrying about class actions bankrolled by foraging litigation funders, and now contingency fee charging lawyers in Victoria, than growing their core business.

Finally, as the Andrews government revealed last week, state governments frankly can't be trusted on this issue.

Labor looking after its donors in the legal profession is no substitute for the Morrison government looking out for plaintiffs.

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