Class action industry is making it harder to do business

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Many business leaders I talk to are experiencing a class action or know someone who is. Businesses are being targeted in a class action boom that is being driven by a flood of cash from unregulated overseas litigation funding firms.

One locally-based international company told me that when their board heard of the heightened risk here of class action law suits and insurance premiums going through the roof as a result, they asked why should they even bother operating in Australia? Their insurance costs driven by the spike in class actions in Australia had risen fourfold. Their story is not unique. These wasted millions could have been better spent on employment, investment and research and development.

More businesses are being dragged into court by litigation funders.

There are really two issues at play. In a soft economy, there are real risks in making it even harder to do business here. Then there are the often poor outcomes for claimants in class actions when a litigation funder is involved.

Defenders of the current lightly regulated class action system say that efforts to regulate class actions, in which current claims against businesses total over $10 billion, could lead to a denial of access to justice. However, implementing carefully considered changes to class action laws to achieve a fairer outcome for claimants and businesses, will not impede access to justice. The current laws are only operating in the interests of litigation funders and the law firms that they are partnering with.

The argument is not about restricting access to class actions, it is about the economic cost and especially the fact that it is consumers, employees and other plaintiffs in class actions who are often the biggest losers. An Australian Law Reform Commission report last year on class actions proceedings and third-party litigation funders reported that in cases involving litigation funders, the median return to plaintiffs was only 51 per cent of the amount awarded, while in cases not involving litigation funders, the median return to plaintiffs was 85 per cent.

Class actions have a genuine role to play in ensuring that where a large number of parties have suffered common harm or damage, they are properly compensated. However, the current poorly regulated system is allowing litigation funders to take a disproportionate share of the amount ultimately awarded or settled for. Overseas litigation funders, for example, are often claiming 300 per cent or more of their costs from settlement outcomes.

We are urging the federal government to implement legislative changes to ensure that returns to litigation funders are reasonable. The Courts are not well placed to unravel on a case by case basis the often highly complicated and opaque financial arrangements implemented by litigation funders to achieve highly lucrative returns from class actions. The consumers, employees and other plaintiffs, who are being urged by litigation funders and the law firms that they are partnering with, to sign lengthy and highly complex funding agreements in order to participate in class actions, would in many cases not fully understand the implications.

Litigation funders are in reality financial institutions but they do not face anything remotely like the regulations applying to businesses in the financial sector. In a clear example of this, a large US litigation funder, openly announces on its website: "*Qualifying for litigation funding is no different to applying for any other loan*". It goes on to promise law firms: "*a healthy introducer fee*" in return for "*introducing your client to a market leading third party funder*".

As this US funder effectively acknowledges, litigation funding arrangements are quite clearly financial products and these arrangements should be regulated like other financial products. We are calling on the federal government to bring them under the Australian Securities and Investments Commission (ASIC) regulatory regime. ASIC oversight would certainly bring numerous issues into question including the matter of "*healthy introducer fees*". The banking royal commission looked very closely at the issue of secret commissions.

A honeypot for litigation funders is the attraction of bringing class action claims under the *Fair Work Act*, where the risks are lower because orders to pay another party's legal costs are only made in limited circumstances and are relatively rare. Justice Lee of the Federal Court recently handed down a very wise and insightful decision in the *Turner v Tesa Mining* case. Justice Michael Lee decided that where a litigation funder is pursuing claims for financial reward they should not have access to the 'no costs' arrangements that apply to most parties under the *Fair Work Act*, and should provide security upfront for the costs that the respondent businesses will be required to expend in the proceedings. Not surprisingly, the litigation funder is pursuing an appeal against the decision because it threatens to close off this honeypot.

The recent High Court decision in the *BMW and Westpac* case is similarly very welcome because it has invalidated common fund orders in class action. The High Court effectively ruled that it was not the role of courts to guarantee a level of return on investment for litigation funders and to impose financial arrangements on class action members without their consent. The ruling will slow the litigation funders down a little but it will not fully address the many problems that have led to the current explosion in class action claims.

As if the problems relating to litigation funders are not enough, the Victorian government has introduced legislation into Parliament to allow law firms to reap much larger rewards from class actions. The Victorian Government's bill would allow plaintiff law firms to charge 'contingency fees' – fees charged as a percentage of the settlement amount – in class actions. Contingency fees are currently banned, and they should stay banned. The Bill is not in anyone's interests, other than plaintiff law firms.

It is welcome that the Attorney-General Christian Porter has expressed concern about the activities of litigation funders in Australian class actions which he has said "needs to be free from actors seeking solely to profit from the circumstances of others".

The issues need to be addressed urgently to ensure fairness for all parties and before major economic harm occurs.