

MEDIA RELEASE

4 December 2024

Litigation funders claim business self-interest behind push to stymie class actions

A campaign to tighten regulation of class actions by groups linked to corporate Australia is designed to water down Australia's class action regime and tip the scales further in favour of business, according to the body representing leading funders of consumer and shareholder class actions.

In a discussion paper released today the Association of Litigation Funders Australia (AALF) argues that the Courts should remain the primary regulator of class actions and their associated costs as the best model to ensure access to justice.

The paper rebuts myths surrounding class actions and explains why the current balanced regulatory model is the best way to ensure the viability of class actions with appropriate protection for class members and as a deterrent against corporate and government wrongdoing.

AALF's intervention comes amid concerns the federal Coalition will seek to reintroduce business-friendly, Covid-era restrictions on class actions – since reversed - if it is returned to government next year.

CEO of AALF, Pip Murphy, said it was clear business interests were laying the groundwork for tougher restrictions on class actions if the Coalition is returned to Government.

"Australia's class action regime is renowned worldwide as being accessible, efficient and fair. Yet over the past months we have seen groups aligned to corporate Australia and the conservative side of politics arguing to stymie it," Ms Murphy said.

"It's a campaign based on myths and commercial self-interest, designed to protect companies and governments from the consequences of breaking the law," she said.

"The main argument, that class actions should be more closely regulated and fees capped, is not supported by the data and would limit compensation to individuals following corporate wrongdoing. Currently, fees to lawyers and funders following any class action award must be approved by the Courts and their first concern is the interests of claimants."

Litigation funders play a crucial role in enabling class actions brought by large groups of individuals who would not be able to afford to launch a claim on their own. Funders assume significant financial risk in supporting claims, not only covering the legal costs involved but also the risk of paying the defendants' legal costs if the claim fails.

In return for assuming this risk, they charge a percentage of the amount awarded if the claim is successful or settled.

The conservative-aligned Samuel Griffiths Society and Menzies Research Centre (MRC) have in recent months published sweeping proposals to limit class actions, including that they be treated as Managed Investment Schemes (MIS) for regulatory purposes.

AALF argues the MIS model is misplaced and merely designed to limit third-party funding of claims, with one Federal Court judge already describing regulation by MIS as “placing a square peg in a round hole”. It says ASIC, the ACCC and the Courts’ broad powers to oversee class actions and fees remain the best model of regulation, a position broadly consistent with the conclusions of the Australian Law Reform Commission’s 2019 inquiry into class actions and litigation funding.

According to AALF, possible reforms to the class action regime could include:

- To prevent unfair tactical manoeuvring in response to a claim, requiring defendants to disclose their insurance in the same way claimants and funders usually have to post security to cover adverse cost orders. This will ensure that the courts have oversight of insurers’ involvement in the civil justice system, just like they have over funders.
- Australia following the UK and introducing Costs Management Orders to remove the incentive for deep-pocketed defendants to drag out proceedings. Higher post-judgment interest rates would encourage prompt payment of awards following judgment and discourage spurious and lengthy appeals.
- As with legal costs, passing the cost of litigation funding on to the defendant of the claim if a claim is successful, to maximise returns to individual claimants.

Research by Monash University shows that in 22 years of the class action regime operating in Australia more than \$7.94 billion has been paid to plaintiffs. In almost all cases these successful claimants were individual consumers, shareholders or small businesses.

According to AALF, the MRC proposal to cap third-party funders’ fees would mean many class actions would never commence, leaving consumers, shareholders and small businesses with no means of redress. A cap would create an incentive for defendants to drag out proceedings to make the claim uncommercial for funders. It also ignores data showing increased competition has reduced average funders’ fees.

AALF Chair and co-founder of leading litigation funder CASL, John Walker, added: “The problem here is corporate misconduct not class actions. Any moves to restrict or restrain class actions will only weaken access to justice. Consumers subject to wrongdoing – for example, being charged fees for no service or worthless insurance – should not be denied access to justice because the value of their individual claim is small. Giving defendants and their insurers more control over class actions is akin to the fox regulating the henhouse.”

ENDS

Media contact: Nick Owens, Sefiani Communications Group, 0421 977 062, nowens@sefiani.com.au

About ALFA

The Association of Litigation Funders of Australia (AALF) is a professional body established in April 2018 to enhance the Australian litigation funding market by providing training, education and information about the litigation funding industry, engaging with Government and policymakers to help shape the legal and regulatory framework for litigation funding in Australia and promoting best practice and ethical conduct among litigation funders. AALF Funder Members comprise: Aequitas Litigation Funding, Litigation Lending, Fortress Investment Group (Legal Assets), Balance Legal Capital, Ironbark Funding, CASL, Court House Capital and Hartwell Funds.