



Plain English Summary

The scope of this review

Going to court is expensive and risky. People who want to enforce their rights in court may face expensive legal bills. If they lose, they are likely to have to pay some of the other side's legal costs as well as their own. However, if they win, some of their legal costs will usually be paid by the other side. Depending on the outcome of the case, they could receive some money in compensation, which might help them pay the rest of their legal bills.

The financial risks can be daunting if a person takes legal action against someone who has more resources than they do, such as a big company or a government agency. Costs and risks of this type can prevent people from getting access to justice.

The Victorian Law Reform Commission is looking into two ways that the costs and risks for someone who brings legal action can be reduced:

- By using the services of a litigation funder
- By participating in a group proceeding (commonly known as a class action).

What are litigation funders?

Litigation funders put up the money to pay for legal action. They are not law firms, but financial companies that invest in legal action. They cover the upfront legal costs of the person who brings legal action (the plaintiff). If the plaintiff wins, the litigation funder receives a share of the compensation paid to the plaintiff. If the plaintiff loses, the plaintiff does not have to pay the litigation funder, and the litigation funder pays the other side's legal costs as ordered by the Court. This reduces the risks and costs faced by the plaintiff, in return for a share of the compensation if the case is successful.

Litigation funders support only a small number of cases that they think are likely to win and result in substantial compensation being paid to the plaintiff. These cases are typically commercial litigation, insolvency, intellectual property and estate law matters and some class actions. The class actions are mostly on behalf of investors and shareholders.

What are class actions (group proceedings)?

When a person has been affected by a major disaster, or by the actions of a large corporation or government department, they are unlikely to be alone. Other people may have been affected as well. Separately, it would cost too much for each person to take legal action because the amount they would get in compensation wouldn't cover their legal costs. A class action is a way for people who have similar claims against the same person or organisation (the defendant) to take legal action. Class actions have existed in Victoria since 2000.

For example, many Victorians remember the Kilmore East—Kingslake bushfire which, on 7 February 2009, burnt more than 125,000 hectares of land. It caused 119 deaths, destroyed 1,242 homes and damaged a further 1,084 homes. A class action that encompassed more than 10,000 individual claims was conducted and resulted in compensation of more than \$494 million.

In a class action, one plaintiff represents the class and is responsible for the legal costs. If the plaintiff wins, all members of the class may get a share of any compensation, after legal and other costs are paid. If the plaintiff loses, the other class members are bound by that result but are not required to contribute to the costs unless they have entered a formal agreement to do so.

Class actions are very costly and usually require some kind of financial assistance. The assistance is typically a funding agreement with a litigation funder, or a costs agreement with a lawyer who charges on a 'no win, no fee' basis. Otherwise, class actions have been conducted with the assistance of community organisations, individual members of the community, government legal assistance, and lawyers who provide their services for free.

Under a 'no win, no fee' costs agreement, the plaintiff doesn't have to pay their lawyer unless they win the case. If they win, the legal fees are based on the amount of work done and may include a bonus, or 'uplift' fee, and there will be additional related costs ('disbursements') such as court fees, barrister fees, and witness expenses. If they lose, the plaintiff may have to pay the disbursements and some of the defendant's legal costs. This is how the Kilmore East—Kingslake Black Saturday Bushfire Class Action was conducted.

The issues

The Attorney-General has asked the Victorian Law Reform Commission to review some aspects of the law and court procedures concerning cases financed by litigation funders and class actions. Some of the key questions are:

- What changes, if any, should be made to the class actions system to make it fairer and less risky for people involved in legal action?
- What changes, if any, should be made to litigation funding, and should there be more supervision and regulation to make it fairer and less risky for people involved in legal action?
- Would it help people get access to justice if lawyers could charge contingency fees?
- Are there other ways to improve access to justice by reducing the costs and unfair risks to people involved in legal action?

These issues are summarised below and discussed in detail in the Access to Justice—Litigation Funding and Group Proceedings consultation paper. The Commission has been asked to report back to the Attorney-General by 31 March 2018.

Disclosure to clients

In a court case, the way that lawyers and litigation funders tell clients about their fees, the progress of the case, and the expected result is not always clear. It is important that lawyers and litigation funders explain these things clearly so that clients can make informed decisions about whether going to court, or being part of a class action, is the best choice for them. The Commission has been asked to report on possible changes to the requirements to disclose information to clients.

Disclosure to courts

A judge might not always know if a party in a case is having its costs covered by a litigation funder, or whether the litigation funder has enough money to cover their client's costs and the costs of the other party if they lose. If the contract signed between the litigation funder and their client is provided to the court, it might help the judge to make sure that parties are not exposed to unfair risks or costs because of this agreement. The Commission has been asked to report on possible changes to the requirements to disclose information to the court.

Starting a class action

In Victoria, the legal steps to start a class action are straightforward. This helps provide access to justice but it also means that class actions can be started when there might be a better way to deal with the problem. This can impose unnecessary costs and delays on the courts and the defendant. The Commission has been asked to report on whether there should be a new process to sort out whether the case should go ahead as a class action, before the class action begins.

Settlement of a class action

Where the parties in a class action agree to settle a case (rather than have the court decide the outcome), the judge must approve the settlement to make sure that it is fair and reasonable. The Commission is looking at the matters that a judge should consider, such as whether all the class members are getting a fair and reasonable result. The judge will also make sure the legal fees and the fees charged by litigation funders are reasonable. The way that the compensation is distributed, and the time that this takes, is also important. The Commission has been asked to report on the court's role in approving settlements and supervising the administration of the compensation.

Lifting the ban on contingency fees

Lawyers in Australia are only allowed to charge clients based on the amount of work they do. They are not allowed to charge a client a percentage of the compensation paid to the client from a case (a contingency fee). Litigation funders are able to charge contingency fees. Lawyers can charge contingency fees in some other countries, such as the United States, England and Wales, and Canada.

The Commission has been asked to report on whether lifting the ban on lawyers charging contingency fees would help to address problems with litigation funding. The consultation paper contains questions about whether allowing lawyers to charge contingency fees would help more cases to be funded, reduce the risks and costs for clients, and uphold the interests of clients.

Make a submission

The Commission invites you to send us a submission about the issues above by 22 September 2017. Preferably, the submission should be in writing and should respond to some or all of the questions in the consultation paper. (See this information about [how to make a submission](#) and our policy about publishing the submissions we receive.)

To make a submission, please send us your responses via email in a Word document or pdf, or complete the [online submission form](#).