Submission to the Victorian Law Reform Commission Consultation Paper – July 2017

ACCESS TO JUSTICE – LITIGATION FUNDING AND GROUP PROCEEDINGS

Introduction

The Victorian Legal Services Board and Commissioner (VLSB+C) are the independent statutory authorities responsible for the regulation of the legal profession in Victoria under the *Legal Profession Uniform Law Application Act 2014* (the Application Act) and the *Legal Profession Uniform Law* (Uniform Law). The two authorities have distinct regulatory powers but function as one body, the VLSB+C.

The VLSB+C are grateful to the Victorian Law Reform Commission (VLRC) for the opportunity to contribute to this important reference concerning access to justice in the context of class actions and litigation funding. Our approach in making this submission is to provide relevant information about our role and perspective as a legal regulator more generally, and then more specifically, to address the topics canvassed within in the VLRC's consultation paper, only where we consider it appropriate and useful. To that end, we have not addressed a number of the more specific consultation questions as we are not armed with the insight and depth of knowledge gained through practical experience in bringing or defending class action proceedings through the courts.

The VLSB+C's statutory role in protecting consumers by maintaining and enforcing high ethical standards and the competency, honesty and diligence of the legal profession in Victoria is the key driver behind our perspective. We are obligated to ensure the exposure of consumers of legal services both now and into the future, to 'unfair risks and disproportionate costs burdens' are mitigated, and that any lawyers or law firms acting in such a manner are appropriately regulated. We are conscious of our role as one that crucially supports the courts in the proper, efficient and effective administration of justice.

Throughout our submission we have followed the terminology and definitions used by the VLRC unless otherwise stated. We also acknowledge and support the VLRC's approach to its terms of the reference as set out in chapter 1 of the consultation paper, particularly the approach to the term 'access to justice' as being about both accessibility and outcome. We acknowledge the reference intends to be proactive and preventative in its focus and will include discussion on issues whether they be real, perceived or are potential and rising issues for the future.

Chapter 3: Current regulation of litigation funders and lawyers

As noted above, the Application Act and Uniform Law establish the legislative framework for the regulation of the legal profession. The Uniform Law includes a framework of supporting rules including, relevantly for this reference, Uniform Conduct Rules (Conduct Rules) for both solicitors and barristers which govern professional conduct and ethical responsibilities.[1] The Conduct Rules set the core principles of ethical and professional conduct and specifically include rules that establish the fundamental duties of legal practitioners, including their paramount duty to the court and the administration of justice, as well as duties to (amongst other things) act in the best interests of the their client and avoid any compromise to their integrity and professional independence.[2] There are also specific duties placed on legal practitioners in relation to potential conflicts of interest that may arise.[3]

[1] There are separate sets of Conduct Rules applicable to solicitors and barristers respectively, the *Legal Profession Uniform Conduct (Solicitors) Rules* 2015 and the *Legal Profession Uniform Conduct (Barristers) Rules* 2015. Unless otherwise stated a reference to the Conduct Rules will be a reference to the Solicitors Rules.
[2] Rule 3 establishes the paramount duty to the court and the administration of justice. Rule 4 sets out other fundamental ethical duties and rule 5 covers dishonest and disreputable conduct.

Board ABN 82 518 945 610 Commissioner ABN 66 489 344 310

Rules of professional and ethical conduct across Australia have historically been developed by the professional bodies for lawyers and reflect lawyers' fiduciary obligations. Over time, professional conduct rules in Victoria and other jurisdictions have been adopted as subordinate legislation and have progressed significantly from merely providing guidance for lawyers. The Law Council of Australia (LCA) and Australian Bar Association retain responsibility for the initial development of the Conduct Rules under the Uniform Law for solicitors and barristers respectively in consultation with the Legal Services Council.[4] The Conduct Rules are accompanied by helpful 'commentary' that includes illustrative examples from case law and explains terms and phrases used. The LCA is currently undertaking a full review of Conduct Rules for Solicitors with public consultation expected to take place in late in 2017.

The Conduct Rules are legislative instruments, any contravention of which is capable of amounting to professional misconduct or unsatisfactory professional conduct and subject to investigation by the VLSB+C. Ultimately, the result of such action may be an adverse order by the VLSB+C, or the Victorian Civil and Administrative Tribunal (VCAT) for more serious contraventions, of varying severity against the lawyer, including potentially the loss of the right to practise.

The Uniform Law does not encroach in any way on the Supreme Court of Victoria's inherent jurisdiction over the professional conduct of its officers. A lawyer's duty to the Court is and remains paramount to all other duties. This duty is merely echoed in the Conduct Rules. It is also important to note that although the VLSB+C's powers under the Uniform Law are extensive and broad, direct regulation of the conduct, fees or actions of litigation funders is not contemplated within the scope of the Uniform Law. Furthermore, as the VLRC has noted in its Consultation Paper, the collaboration of all uniform jurisdictions is required to progress amendments to the Uniform Framework, meaning that there must be a clear and demonstrated need for regulatory intervention.

Of special relevance to this reference is our experience in administering particular aspects of regulation, namely:

- lawyers' ethical obligations pertaining to conflicts of interest, delay and communication;
- lawyers' obligations to deliver legal services in a competent and diligent manner;
- lawyers' obligations to disclose legal costs to their clients;
- agreements between lawyers and their clients about legal costs; and
- the prohibition on charging legal costs on a contingency fee basis; that is, costs charged as a percentage of a clients' award on success of their legal action.

These issues largely arise in the context of complaints by consumers of legal services but can arise in other contexts such as media reporting, auditing, referrals from other agencies and activity within the Courts.

VLSB+C complaints data for the 10 year period from 2005 to 2015 reveals that complaints about legal costs represent 36.1 per cent (9,169) of all complaints with those about conflict of interest representing only 3.6 per cent (921). In our experience, and borne out by our data, consumers of legal services complain about their lawyers' legal costs largely because of poor initial or ongoing communication and disclosure. The second largest issue featured in complaints data is the 'competence and diligence' of the lawyer. Another feature of our data is that smaller practice types like sole practitioners are the subject of complaints to the Commissioner in significant disproportion to their numbers.

[3] See rules 10-12 of the Conduct Rules. The Rules pertaining to conflicts of interest are discussed in greater detail later in this submission.
[4] Chapter 9 of the Uniform Law contains all provisions pertaining to the development and powers of regulation and rule making. Specifically section 427 describes the process for making Conduct Rules.

Although our data does not specifically capture whether a complaint made was within the context of a class action proceeding, we are confident such complaints to date have been rare and isolated. Although our data does not evidence a significant or systemic issue for consumers of class action legal services, the VLSB+C has conducted three significant investigations into a lawyer or law firm's conduct in this context with one matter resulting in a successful prosecution before VCAT.[5] These investigations all resulted from a referral directly from either the Supreme or Federal Courts and not from an individual class member.

Chapter 3: Conflicts of Interest

A major focus of this chapter is the potential issues posed by various conflicts of interest for lawyers (and for litigation funders) that may cause disproportionate costs burdens to the class members. The VLRC has noted the potential for conflicts of interest to arise for lawyers in class actions where the lawyer has a contractual relationship with a litigation funder, including the potential for conflicting interests between clients, and the potential for conflicts to arise between the clients' interests and the lawyer's own personal interests. Questions are also raised in the paper about the level of responsibility lawyers may have to class members who are not their clients and the potential for conflict between contractual obligations they may have to litigation funders as opposed to their clients.

While class action arrangements are inherently complex and difficult, in our experience, the vast majority of lawyers comply with their ethical obligations and act with honesty, competence and diligence. While we note the concerns raised in the Consultation Paper, we have no evidence of systemic problems arising from non-compliance with ethical obligations, including conflicts of interest, where lawyers are participating in class actions, including where litigation funders are involved. Of some concern to us is the rise of entrepreneurialism and commercialisation of class action litigation and the strain this places on a lawyer's duty to prioritise the interests of their clients above their own. We have however, only seen direct evidence of this tension manifesting in the class action sphere on one occasion (discussed below). Nevertheless, our wider experience informs us that a small minority of lawyers will succumb to the temptation to subvert their clients' best interests to their own, particularly where clients may be vulnerable, unsophisticated or disadvantaged. As the regulator we want to ensure those temptations are minimised to the greatest possible extent.

The Consultation Paper discusses evidence of a trend towards smaller and newer plaintiff law firms with limited experience entering the class action litigation arena. Our experience is that statistically smaller, less resourced firm types, in general, present a greater regulatory risk to consumers. This is partly due to larger firms in general having greater resources and more developed administrative and business structures in place. Additionally, the organised firms appear to be better prepared for handling complaints themselves in ways that satisfy their clients. The VLSB+C actively encourage law practices to refine and focus their practices to within their areas of expertise and competence. Class action litigation with or without the involvement of a litigation funder is more complex even just by sheer scale and logistics and requires some scope to manage that within the law practice.

The VLSB+C led prosecution of Daniel Oldham in *Oldham v Law Institute of Victoria Limited* (Legal Practice) [2012] VCAT 571 (30 May 2012) (Oldham) is illustrative of these dangers and brought into focus both the complexity of the potential conflicts between class members and the spectre of the lawyer's own personal interest in the perceived financial advantages of pursuing the action. Mr Oldham, a partner in a small suburban law practice, issued and maintained two separate class action proceedings under Part 4A of the Supreme Court Act in relation to bushfires, without prior experience in such matters. The second proceeding was issued with undue haste in order to be first to issue, which was intended to place his firm at a comparative advantage to competitors. Mr Oldham did not undertake sufficient research or ensure he had appropriate assistance from Counsel; he did not properly supervise junior staff and remained ignorant of the obligations placed upon lead plaintiffs. He did not obtain their instructions to be nominated and did not advise them of their specific risks; namely, cost orders against them. In making findings of professional misconduct, Judge Bowman noted:

[5] *Oldham v Law Institute of Victoria Limited (Legal Practice)[*2012] VCAT 571 (30 May 2012) ("Oldham")

> *"Whilst there may have been no dishonesty in the present case, grave mistakes were made.by a practitioner operating outside his area of expertise without undertaking or organising adequate research"*

Dishonesty was not a factor and Mr Oldham was extremely remorseful and cooperative. There were also other factors in his favour that worked in mitigation. Despite this, VCAT restricted Mr Oldham to practising only in his area of expertise for two years. VCAT also noted the case of *Scott* in a class action proceeding in Queensland where again there was no suggestion of dishonesty; rather, the lawyer lacked insight into how his own lack of experience and the limited resources of his firm would adversely impact on the action.[6]

Specifically, the VLRC has sought comment on whether there is a need for the legal profession to draft guidelines addressing the responsibilities of lawyers in class actions. While it may be beneficial for particular professional associations to draft guidance materials for the benefit of their members, we do not believe there is a need for any additional regulatory intervention such as prescriptive rules governing class actions.

A solicitor's duty to avoid conflicts of interest between current clients is set out in rule 11 of the Conduct Rules and rule 12 deals with solicitors acting in situations of personal interest conflict. These particular rules are additional to a solicitor's paramount duty to the court and administration of justice, and the fundamental duties set out in rule 4, to act with honesty, competence and diligence, in the best interests of clients and to avoid any compromise to their integrity and independence. The combination of these rules provides an ethical pathway for lawyers to ensure they are mindful of their responsibilities and obligations, including lawyers engaging in class actions.

We do note that while the Conduct Rules can be applied to both guide lawyers in managing their position within the tripartite relationship[7] that occurs when a litigation funder is involved in legal proceedings, and assist regulators to identify potential concerns, neither the rules nor the accompanying commentary specifically prescribe best practice or appropriate processes for class actions. Therefore, consideration could be given to supplementing the commentary in the Conduct Rules (in particular commentary pertaining to rules 11 and 12) to specifically mention potential conflicts of interest in class actions. For example, commentary could be developed to provide guidance on how requirements for informed consent under rule 11.3 may be satisfied in a class action.

Similarly, rule 12.4.3 which deals with financial interests and benefits that may flow from referrals to third parties may benefit from some commentary outlining how this rule relates specifically to the situation of a litigation funder. One matter referred to the VLSB+C did involve the partners of a class action law practice having an interest in a discretionary trust managed by the litigation funder. The law firm in question sought to inform us as to how the funding arrangement delivered the necessary protections to class members. The particular funding arrangement purported to require clients to agree to waive the application of the conduct rules pertaining to conflicts, a position we strongly contended.

In making this suggestion we note that although the Conduct Rules are currently being reviewed, these rules are intended to guide solicitors in a broader sense and do not generally provide process direction or specific rules for particular areas of practice. Additionally, as noted by the VLRC, the Conduct Rules have wide applicability across Australia and any changes (including to the commentary) do require collaboration across multiple jurisdictions, and from both professional associations and independent regulators.

Given the specialist nature of class action proceedings and the unique position of litigation funders within those proceedings, we would like to suggest that the legal profession consider the merits of developing a specialist

[6] *Legal Services Commissioner v Scott* [2009] LPT 7

[7] The tripartite relationship is described in the VLRC Consultation Paper as being the relationship between litigation funders, lawyers and plaintiffs. The litigation funder and lawyers are contractually obligated to each other as well as individually to the plaintiff. See section 1.40 of the Consultation Paper.

accreditation course in class action litigation. Specialist accreditation provides a clear way for consumers to readily identify expert lawyers in a particular field. Development of a course could involve input from both the Federal and Supreme Courts as well as from academics. This approach may assist in quality assurance and expertise development and raising awareness amongst those newer, inexperienced lawyers entering the field that class actions have unique complexities and responsibilities.

Chapter 4: Disclosure to Plaintiffs – Legal Costs and Funding Fees

The discussion in this chapter focuses on the disclosure of information to plaintiffs throughout a class action proceeding about legal costs and the funding charges of litigation funders, referred to as 'funding fees' in the Consultation Paper. The VLRC has succinctly set out the obligations already placed on lawyers to disclose information about their legal costs under Part 4.3 of the Uniform Law. There were some changes brought by the Uniform Law that are worth highlighting in the context of this reference; specifically the additional requirement on lawyers to not only disclose but to satisfy themselves that the client (or potential client) has understood that disclosure,[8] thus a more proactive approach by lawyers is required. Legal costs must also be 'proportionate' in both how they are incurred as well as in amount[9] and there is a specific statutory offence for charging unreasonable costs and for acting in a manner designed to increase costs.[10]

The VLSB+C have made some 40 determinations concerning disputes about costs pursuant to the provisions of Part 4.3 since the commencement of the Uniform Law in July 2015.[11] The majority involved some communication breakdown leading to costs estimates being exceeded or misunderstood. For disclosure to be of any value it must be communicated clearly, simply and regularly. Our regulatory experience in managing lawyers' disclosure obligations generally tells us that it is fundamentally important to consumers to be armed with sufficient information about their options, the likelihood of those options yielding a result satisfactory to them and how much each option is going to cost.[12] Inadequate and inaccurate disclosure has the effect of eroding a consumer's perception as to whether they have truly accessed justice.

Lawyers and disclosure of funding fees

The VLRC has identified that lawyers are not expressly required to inform class members about litigation funding charges, either initially or on an ongoing basis. There is no information as to whether, or to what extent, such disclosure occurs in practice, despite not being mandated.

Litigation funders are required to advise funded members under contract law of their fee. However, our concern would be to eliminate any potential class member confusion about the cumulative impacts on awards of damages when legal costs and funding fees are deducted as separate items. We are concerned this confusion may be leading to some of the views that costs burdens are disproportionate. Our experience with larger plaintiff firms is that ongoing disclosure is a prudent, if not vital strategy for managing plaintiffs' expectations and their own professional reputations, regardless of whether it is expressly required. Complaints about legal costs in general made up 35 percent of complaints in 2016-17 with specific complaints about defective costs disclosures representing four percentage points of that total. However, complaints specifically relating to a conditional fee agreement being 'misleading or unclear' are not common with less than 50 complaints of this nature recorded since May 2012.[13]

[8] Section 174(3)
[9] Section 172(1)
[10] See Sections 173 and 207
[11] All VLSB+C determinations under section 290 and 299 of the Uniform Law are published with appropriate redactions on our website at www.lsbc.vic.gov.au.
[12] During December 2016, the Legal Services Council commissioned an Australia-wide survey of consumers (and potential consumers) of legal services to provide authoritative evidence to assess the needs and wants of Australian consumers of legal services concerning costs disclosure. See http://www.legalservicescouncil.org.au/Documents/consultation/LSC_Consumer_Survey_Report.pdf for access to the report
[13] Source: Internal VLSB+C data. A sub-category of the issue 'costs / bills' are conditional fee agreements.

The obligations under Part 3.4 of the Uniform Law do not specifically require the fees of litigation funders to be disclosed as these fees are not within the definition of legal costs. Further, the obligation only extends to clients. Although "client" is broadly defined, this definition may not capture all class members.[14] Amendments to the disclosure provisions of the Uniform Law to clarify disclosure of deductions other than legal costs but dependent upon or related to the outcome of the legal matter may be a potential option. However, the broader application beyond class actions would need consideration (e.g. Tax deductions from settlement monies. This occurred in the Black Saturday bushfire case. Other non-disbursement liabilities may also be captured). There would need to be clear evidence of harm occurring before any amendments would be entertained.

We note the reform suggestion that an express requirement upon lawyers could be incorporated into the Supreme Court Practice Note in similar terms to what currently appears in the Federal Court Practice Note as the VLRC has set out at paragraph 4.22 of the Consultation Paper. Such a requirement would mitigate the potential for class members to be misled or misunderstand that the costs of the action may be cumulative and represents a more specifically targeted solution than seeking amendments to the disclosure obligations under the Uniform Law. Many plaintiff lawyers are already used to advising of other deductions from settlement monies, like Medicare and Centrelink repayments. The lawyers are in possession of the information and can reasonably be expected to be in a position to explain and disclose this information to class members, particularly its relationship to legal costs. Lawyers need to consider their duty to act in the best interest of their clients in the context of disclosure about features of the litigation funding agreement, the fee in its various scenarios and other matters such as opt out provisions for the litigation funder. The litigation funding fees are intricately related to the conduct of the litigation in class actions so the burden imposed by a Practice Note requirement does not appear significant.

Communications with class members

The VLSB+C does not have detailed or extensive knowledge of the content of opt out notices and communications from lawyers to class members on settlement distribution schemes, however we do have some experience in translation of "lawyer speak" to consumers. Poor communication alone made up four per cent of complaints made in 2016-17 with a further four per cent of complaints specifically about disclosure failures.

The VLRC seeks ideas on how communication can be clearer and more accessible. It is important to know one's audience and adjust communications to that audience. Although standard forms can be useful in ensuring all the necessary topics and criteria are included, care needs to be taken to ensure the specific facts of each matter are addressed, especially as it is clear that in class actions there is huge variation across cases. We agree there may be merit in relevant professional associations compiling a library of past approved notices that could be available to litigants with a short description of the contextual facts of the case. A Plain English consultant may also be usefully engaged.

Other methods of communication to assist in both clarity and accessibility of communication may be usefully employed such as by pictures and flowcharts and in question and answer (Q & A) format. Although intensive, it may be useful for plaintiff lawyers to test a small sample of different class members to gauge understanding. More broadly, the suggestion that a survey of past case class members as to their overall satisfaction with communication may be very useful. If not already occurring, Q & A live forums for class members with lawyers using remote link-in facilities may also assist.

With respect specifically to communications about settlement distribution schemes it appears the most frequently voiced concerns by class members is one of delay, whether perceived or real. Complaints about delay amounted to four per cent of complaints made to us in 2016-17. The VLSB+C have conducted an investigation into a class action distribution scheme at the request of a Court. We found that particular scheme was being administered in a timely manner and communication with class members about timing was acceptable. What may assist is to ensure full disclosure about timing and potential complexities forms part of initial disclosure.

[14] Section 3 of the Uniform Law sets out the definitions of terms used

Chapter 5 to 7: Court supervision of class actions proceedings

Class action proceedings are clearly very complex and vary so widely that the flexibility and innovation currently being shown by the court may be the most efficient way to manage them. It is not within our expertise to comment on how the court manages or should manage the parties to litigation and its own processes. We are confident the court is adept at discerning the most efficient way to prioritise the interests of class members. From our experience the court will deal directly with or refer to us for investigation, any matters where entrepreneurialism has overridden the interests of those members. The court will also take action or refer to the regulator, cases where inexperience, ignorance or dishonesty leads to incompetence in the initiation and management of class actions. Formalisation and legislative reform should be a last resort option. Without systemic, evidence-based failure unnecessary institutional interference can effectively stifle innovation and flexibility.

Chapter 8: Contingency fees

The VLSB+C continues to hold the view that the ban on contingency fees for lawyers should be maintained across all areas of legal practice.[15] There is nothing unique about the access to justice purpose of the class action regime that has prompted the VLSB+C to review this position.

The ban as set out in the Uniform Law[16] is clear and well understood by the vast majority of the legal profession. Our experience in handling complaints is that very few lawyers attempt to subvert the ban and those who do, only do so in the context of other business, ethical and personal failures. They may be motivated to some extent by desperation and greed. Most matters we have investigated have been in the area of wills and estates litigation and are coupled with improper executor's commission being taken from persons who are often vulnerable and grieving.

There are occasional examples of attempts to charge contingency fees in personal injury matters such as in *Barrett*.[17] Here, the lawyer was found guilty of professional misconduct for charging his client a contingency fee of ten per cent of the damages awarded. This was in addition to an upfront retainer fee and ten per cent of the costs awarded by the Court. There is also the notable case of *Bektas* who was found guilty of multiple charges involving grossly excessive costs in personal injury matters, including improper amounts for "conditional" uplift fees.[18]

The two recent Supreme Court matters noted by the VLRC at paragraphs 8.43 and 8.44 of the Consultation Paper only further underline the VLSB+C's views as to the dangers inherent in allowing contingency fees, including the potential for significant damage to the reputation of fairness and service of the legal profession. A feature of these cases again is inexperience and a lack of competence leading to a subversion of the client's interests to the lawyers' commercial and personal interests.

In the context of this reference, the VLRC has been asked to address whether lifting the ban in the sphere of class actions would 'mitigate' the issues presented by the involvement of litigation funders and increase access to justice. The VLSB+C does not accept that the issues of limited case selection, high costs or conflicts of interest between the commercial imperatives and the client would be mitigated to any significant degree worthy of lifting the ban. In our submission the evidence is insufficient.

Limited case selection

[15] Michael McGarvie, Victorian Legal Services Commission, Opinion: Contingency Fees Will Fail Us (Media Release 3 March 2016
[16] Section 183
[17] *Legal Services Commissioner v Barrett (Legal Practice)* [2012] VCAT 1800 (23 November 2012)
[18] *Legal Services Commissioner v Bektas* (Legal Practice) [2013] VCAT 2142 (16 December 2013)

Although we accept there is an unmet demand for access to civil justice in a general sense,[19] in the context of class actions there is insufficient evidence presented as to how permitting contingency fees would increase access to justice. For example: what types of cases would proceed if contingency fees were permissible that would not be viable using a conditional fee agreement? This point is well made by the VLRC at paragraph 8.11 of the Consultation Paper in the discussion about business-to-business litigation services. For example, it is not clear how contingency fee arrangements would increase the economic viability of particular cases, thereby improving access to justice for small to medium sized businesses.

Additionally, the contingency fee model is quite impractical for any legal work done for a client that does not involve the recovery of money from the other party. This is because without a flow of funds going to the successful plaintiff at the end of the case, there is no percentage that can be readily retrieved. As already noted in this submission we have very few complaints about conditional fee agreements in general and are of the view they operate well and provide substantial access to justice for many consumers of legal services in a manner that is proportionate and reasonable. The VLRC also notes law firms in the class action arena have already brought many successful social justice-focused class actions on a conditional fee and to their credit, on a pro bono basis.

The argument advanced by Maurice Blackburn that allowing contingency fees in cases of high return would enable profits to be diverted to cases of lower monetary value but with high 'social justice' value is questionable in our view. In saying this we are not questioning that Maurice Blackburn and similar firms are indeed motivated by socially just outcomes. There is however, already concern in the marketplace (including from experienced law firms) about inexperienced law firms without the necessary resources entering the class action sphere. Introducing a social justice component raises questions about how it would be measured and evaluated. What discouragement or sanctions would flow for firms that chose not to invest in social justice?

Further, what power is there to regulate this in a situation where things go less well within a big firm? There is a danger less of the fees earned will find their way to social justice causes. Furthermore, who decides what cases are more deserving than others and how will disclosure be made to the class members of the high value cases about the contributors from their damages awards? They may well complain of bearing a disproportionate cost burden. Perhaps a better solution is to ask the litigation funders to pay an 'access to justice' fee into court to allow them to leverage off the benefits an 'access to justice' label gives to them. The fee could be used to fund a pool for those class actions deemed not sufficiently profitable but otherwise have enough merit to be supported.

Costs

The majority of the VLRC reference is focussed on ways to prevent disproportionate costs burdens being placed on class members with the funding fee consistently highlighted as the single biggest cost and a clear cause of angst and media attention. We do not believe enabling lawyers to charge contingency fees will rectify this position. In particular, we question how the interests of non-client members of the class would be protected under contingency fee arrangements.

The Consultation Paper notes that, unlike law firms, litigation funders provide an indemnity for any security for costs orders or adverse cost orders; a risk that is reflected in the funding fees they charge. Law firms have argued that current conditional costs arrangements do not allow them to compete in this area and constrain lawyers' rewards regardless of the level of risk they undertake. There has been no argument advanced or evidence provided as to why a conditional fee agreement that complies with the existing legislation does not adequately compensate a lawyer for taking the risk of failure and no costs recovery. For example, can after-the-event insurance be accessed to bridge this gap?

Conflicts of Interest

[19] See for example: Productivity Commission, Access to Justice Arrangements, Inquiry Report No. 72, Chapters 1, 19. Further see for example Access to Justice Review, Volume 1,Report and Recommendations, Department of Justice & Regulation 2016

In the class action context, allowing lawyers to charge contingency fees does not remove the conflict of interest inherent in accessing a separate litigation funder, it only shifts the conflict directly onto the shoulders of the lawyer, a burden that in our view will be too much to bear for some. In this context, we note with interest the reference to the VLRC does not include personal injury, family or criminal law matters as these are considered 'inappropriate'. For the litigation funder, access to justice is no more than a useful by-product, whereas for lawyers (on both sides) as officers of the court, to whom they owe their primary duty, facilitating access to justice is integral.

As we have stressed in this submission the Legal Profession Uniform Law, including the Conduct Rules, guide lawyers along a clear ethical high road. Allowing contingency fees even in this limited sphere opens the door to the low road.

Michael McGarvie
Board CEO & Commissioner

Date 20 September 2017