Online submission to the Victorian Law Reform Commission

ACCESS TO JUSTICE—LITIGATION FUNDING AND GROUP PROCEEDINGS

Number	17
Organisation	Adley Burstyner
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Question 1	What changes, if any, need to be made to the class actions regime in Victoria to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?
	1. Make success fees recoverable, where reasonable proper and necessary to enable proceedings, and where rate reasonable by objective measures. But not if a reasonable alternative was available to all plaintiffs and group members, for example they are all litigants of means. In the case of class actions, there should be a rebuttable presumption that funding is necessary (and therefore recoverable). 2. Provide access to insurance coverage of defendant. Adley Burstyner's written submission expands on this topic. [See Submission 18]
Question 6	In funded class actions, should lawyers be expressly required to inform class members, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?
Response	No change necessary because current law adequately imposes thorough obligations on lawyers to keep informed persons responsible for legal costs. That is already comprehensive and it covers the field.

Question 7	In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?
Response	Current law imposes sufficient obligations on lawyers to keep informed persons responsible for legal costs. That is already comprehensive and adequate, and it covers the field.
Question 10	In funded class actions, should the plaintiff be required to disclose the funding agreement to the Court and/or other parties? If so, how should this requirement be conveyed and enforced?
Response	No. In short, it should not be the role of defendants to champion the interests of the parties they have aggrieved. That is non-sensical, a clear conflict of interest, and delivers the defendants a means for derailing proceedings. It is also inconsistent with the unsatisfactory limitations plaintiff access to the defendants' ability to satisfy a judgment, in particular insurance policies (which is a legitimate interest, unlike a defendant knowing how a plaintiff will fund its claim). Justice and practical reasons dictate that defendants' insurance information should be available to a plaintiff so it can make rational decision making as to court proceedings. Rational decisions in that regard are in the interests of fairness and the judicial system. Adley Burstyner's written submission expands on this topic. [See Submission 18]
Question 11	In funded proceedings other than class actions, should the plaintiff disclose the funding agreement to the Court and/or other parties? If so, should this be at the Court's discretion or required in all proceedings?
Response	As above.

Question 12	In the absence of Commonwealth regulation relating to capital adequacy, how could the Court ensure a litigation funder can meet its financial obligations underthe funding agreement?
Response	1. Security for costs provisions. 2. Who is the concern for: a) A defendant: There is no compelling grounds for why a defendant in a funded case should have superior ability than a defendant in a conventional proceeding. b) A plaintiff: Lawyers acting on behalf of a plaintiff owe duties to her or him. The class action lawyer could either advise in relation to such exposure, or refer the party to an independent lawyer for advice. If there are poor outcomes in this regard, dictating a need for clarification, it could be clarified by a change to the Uniform Law.
Question 13	Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate? a) introduction of a pre-commencement hearing to certify that certain preliminary criteria are met b) legislative amendment of existing threshold requirements under section 33C of the *Supreme Court Act 1986* (Vic) c) placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met d) other reforms.
Response	No. The arguments for this are unsatisfactory, and there is limited or inadequate evidence about poor outcomes or genuine problems. The mooted reforms will be an obstacle to the access to justice features of a class action, and drive up costs. In jurisdictions where there is certification, there is protracted litigation over different requirements. Adley Burstyner's written submission expands on this topic. [See Submission 18] The complaint stated in paragraph 6.61, as to the risk of proceedings with little cohesion or commonality, has not been borne out over the history to date. And courts have the power to remedy any such deficiency should it ever come up, with the defendants having clear rights to agitate any perceived vice in this regard. And even if that reaction becomes necessary in the

	future, as it hasn't even materially happened yet, over 25 years, it can't be seen as a major recurring problem which justifies changing the way every class action progresses, In addition, Section 33C should be amended to reflect the approach mentioned in in paragraph 6.50 of the discussion paper, that it be unnecessary for each class member to have a claim against each defendant. Certainty on this issue is required, and the key criterion of same, similar or related circumstance is adequate without the limitation from *Philip Morris (Australia) v Nixon* with can reduce the efficiency and pragmatism for which the class action regime exists.
Question 16	Does the involvement of litigation funders in class actions require certain matters (and if so, which) to be addressed at the commencement of, or during, proceedings?
Response	No. Unless there is a specific problem in a specific case, the matter is private within the plaintiff camp and it remains irrational that a defendant participates in the analysis of the funding of a plaintiff. Adley Burstyner's written submission expands on this topic. [See Submission 18]
Question 17	How could the interests of unrepresented class members be better protected during settlement approval?
Response	At present all group members have an opportunity to object during settlement. Their objections are relayed to the Court, or they appear in person at a hearing. Thereafter should the Judge consider there to be a need, then she or he can appoint a contradictor. The Court should also be open to requests that a group member's lawyer be appointed contradictor. A lawyer consulted by a potentially disgruntled group member may then feel free to approach the court requesting such role, putting the submission forward appropriately and removing the burden of group members expecting the administrative resources of the Court to assist them.
Question 18	What improvements could be made to the way that legal costs are assessed in class actions?
Response	Recovery of success fees. Adley Burstyner's written submission expands on this topic. [See Submission 18]

Question 19	Should the following matters be set out either in legislation or Court guidelines? a) criteria to guide the Court when assessing the reasonableness of a funding fee b) criteria for the use of caps, limits, sliding scales or other methods when assessing funding fees c) criteria or 'safeguards' for the use of common fund orders by the Court.
Response	No. Whether guidelines should have been given when class action regime commenced might have been an interesting debate, but it is moot because whilst the Court was then left to its own devices, principles have now been developed, and are in good stead. The Court is doing its work in this area very well already, and has principles and flexibility for this area which can never be a one size fits all topic.
Question 20	Is there a need for an independent expert to assist the Court in assessing funding fees? If so, how should the expert undertake this assessment?
Response	No. The skillset varies too much from the Court's typical role, in particular assessing legal costs. Whereas legal costs are by and large set by reference to quantifiable work, success fees are measured by investment, risk and comparison with other investment strategies. If a need for contemplation of succeed fees arises, then that is a matter for expert evidence. The quantum at stake is sufficiently significant to justify the Court time. The success fees should be paid by an unsuccessful defendant. Adley Burstyner's written submission expands on this topic. [See Submission 18]
Question 22	In class actions, should lawyers and litigation funders be able to request that the total amounts they receive in settlement be kept confidential?
Response	No.

End of submission