Online submission to the Victorian Law Reform Commission

ACCESS TO JUSTICE—LITIGATION FUNDING AND GROUP PROCEEDINGS

Number	27
Organisation	Ashurst Australia
Date	6 October 2017

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?
Response	We support the introduction of a class action certification requirement to address threshold issues including carriage, suitability of the representative and any need for additional representatives, and the capital adequacy of the funder, at an early stage. However, this is a reform which ought be introduced on a consistent basis throughout key class action jurisdictions in Australia. It is unlikely to be helpful or to promote efficiency or access to justice for only one of those jurisdictions to move to a certification regime. As an interim step, we propose that the Practice Note and/or Court Rules be amended to provide for discussion of these matters at an initial directions hearing/case management conference, with the opportunity for the Court to make directions requiring further consideration of those issues where warranted in the particular case.
Question 2	What changes, if any, need to be made to the regulation of proceedings in Victoria that are funded by litigation funders to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?
Response	In class actions, the existing regime for security for costs or equivalent measures already provides an important protection for representative plaintiffs and defendants against risks and costs. It is important that that not be eroded and that there is scrutiny of funding agreements at an early stage to ensure that they provide appropriate protection against costs risk (similar orders should

	also be made on any common fund application to ensure that the group members and defendant(s) are protected). Insofar as funding agreements give the funder control over the conduct of litigation, it should expressly be required to act in the interests of group members. Contradictors should generally be appointed in relation to the settlement of class actions, to protect against the risk that settlements disadvantage group members in the interests of the funder. The only exception should be where the amounts/costs would not warrant the appointment of a contradictor.
Question 3	Should different procedures apply to the supervision and management of class actions financed by litigation funders compared to those that are not?
Response	In principle, the regimes ought be the same. However, additional regulation is required in relation to funded class actions, in particular as regards disclosure of and scrutiny of funding arrangements and the protection of the interests of class members.
Question 4	How can the Supreme Court be better supported in its role in supervising and managing class actions?
Response	The Court should have a discretion to appoint contradictors and experts in appropriate cases to protect the interests of unrepresented class members, where the cost would be proportionate in the context of the case. The Practice Note should be reformed to deal in more detail with the threshold issues for consideration at an early stage (see question 1 above).
Question 5	Is there a need for guidelines for lawyers on their responsibilities to multiple class members in class actions? If so, what form should they take?
Response	Yes, the legal profession's regulator should adopt guidelines addressing the responsibilities of lawyers in class actions, after due consultation with relevant stakeholders.

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	Yes. This requirement should be covered in the Practice Notice and any failures ought be taken into account at the settlement approval stage or an application for the approval of costs and fees upon judgment. The information should be given in a manner consistent with other notices to class members during the proceeding (not simply by including terms in a Funding Agreement) and should be required to be done in plain language.
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	No, given that funded proceedings other than class actions are generally between sophisticated parties, with the benefit of legal advice.
Question 8	How could the form and content of notices and other communications with class members about progress, costs and possible outcomes be made clearer and more accessible?
Response	Notices should be written in plain language and omit jargon, references to legislative provisions and the court proceeding details. Notices should be given online and sent by electronic means in a variety of ways as chosen by the class member. Consideration should also be given to: a) requiring some "testing" with class members or focus groups of notices for significant matters, before they are endorsed by the Court; and b) requiring alternative means of communication (e.g. videos/podcasts/QAs in addition to notices).

Question 9	Is there a need for guidelines for lawyers on how and what they communicate with class members during a settlement distribution scheme? If so, what form should they take?
Response	This is a matter for determination in individual cases, depending on the nature, complexity and timeframes of the settlement. It is difficult to adopt a one size fits all approach. The Practice Note should require consideration of communications as part of the settlement process, and where appropriate directions should be made about the form and content of future communications and/or for the matter to return to Court from time to time for further consideration of progress and the need for communications.
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	Yes, by the Court Rules or a Practice Note. The requirement should be enforced by case management including being taken into account at the settlement approval stage or the approval of fees and costs upon judgment.
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	The Court should have the power to order this in its discretion. In many cases it may be unnecessary.
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	There should be proper disclosure regarding the capital adequacy of litigation funders and appropriate security for costs should generally be ordered. If a certification requirement is introduced, disclosure of matters going to capital adequacy could be made to the Court as part of that process. Alternatively, disclosure could be made as part of a lawyer's disclosure of litigation funding charges to the plaintiff, copies of

	which ought to be provided to the Court and the defendant's lawyers.
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	A certification requirement should be introduced, including the reforms in (a) and (c) above, although we recommend that any such change be introduced across key class actions jurisdictions (see question 1 above). While most proceedings commenced as class actions are properly constituted in terms of section 33C, a certification hearing would afford an important opportunity to address other preliminary issues. In addition, any certification/preliminary hearing should be required to consider (i) the representatives and funder for the class action; (ii) any issues with competing class actions; and (iii) whether additional representatives or exemplar group members are required in order for the common issues properly to be determined. We do not consider that the reforms proposed in (b) above and discussed in the paper would have substantial benefits. The existence of non-common issues or issues affecting only a sub-group should be taken into account by the Court as discretionary factors in deciding whether and how the class action should proceed, but introducing higher threshold requirements is likely only to increase satellite litigation and may decrease access to justice.

Question 14	Should the onus be placed on the representative plaintiff to prove they can adequately represent class members? If so, how should this be implemented?
Response	Plaintiffs should demonstrate that they adequately represent the class as a part of a certification requirement. If this requirement is not introduced, the Court should consider with the parties at an early stage whether there is any concern about whether the plaintiff can adequately represent class members and, if so, require evidence and submissions to satisfy it that this is the case. This should be addressed in the Practice Note. To support the early identification of issues in respect of which the plaintiff may not adequately represent class members, each party should be required to file a memorandum at an early stage indicating any "sub-groupings" of class members which they consider are likely to arise on the pleadings.
Question 15	Should a specific legislative power be drafted to set out how the Court should proceed where competing class actions arise? If not, is some other reform necessary in the way competing class actions are addressed?
Response	Yes. The current practice leads to inefficiency and a waste of resources. There should be clear legislative criteria for choosing between competing class actions. Those criteria should expressly state that the timing of filing is not a relevant factor except that if one action is commenced earlier and is in fact more advanced, it may be efficient for it to be the vehicle for determination of the issue.
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	The practice of the Federal Court to require disclosure of litigation funding arrangements at relevant stages of the proceeding should be adopted. Similarly, upon settlement, consideration should be given to funding commissions and, in that context, to the terms of the funding agreement.

Question 17	How could the interests of unrepresented class members be better protected during settlement approval?
Response	A third-party contradictor should generally be appointed to allow the Court properly to assess whether a settlement is in the interest of unrepresented class members. The only exception should be where the amounts/costs would not warrant the appointment of a contradictor.
Question 18	What improvements could be made to the way that legal costs are assessed in class actions?
Response	The approach taken in the Federal Court Practice Note to the assessment of legal costs strikes a good balance and ought expressly be adopted in the Supreme Court. In major cases, or where legal fees are a high proportion of the settlement amount, consideration should be given to having a further independent costs expert as a contradictor, reviewing and raising any issues about the work of the expert retained by the plaintiff's lawyers.
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	The level of funding fees should be regulated. It is difficult for the Court to benchmark funding rates internationally and assess what level of return is appropriate. If common fund class actions become more common, there will be less data available about what rates the market in Australia will bear in relation to class actions, which will make the Court's task even more difficult. Accordingly, we support the introduction of a statutory limit or guidance in the Practice Note based on a detailed review of international practice (noting, in this regard, that headline comparisons of funding commission rates need to be treated with some caution and the way in which those figures are derived requires careful analysis).

	Areas for possible regulation could include: (i) Cap on percentage of commission; (ii) Cap on dollar amount of commission; (iii) Consideration of the net percentage distribution to group members (taking into account both funding commission, legal costs and project management fees); and (iv) Requirement for an amicus / contradictor to assist the court in considering appropriateness of funding arrangements. Otherwise, we consider that the rate to be set in particular cases based on the net percentage distribution to group members (taking into account both funding commission, legal costs and project management fees) and any criteria or safeguards around common fund orders should be further developed by the Courts. In time, some further regulation may be necessary or appropriate.
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	This may be unnecessary if the overall level of fees is regulated (see 19 above). If this is not done, then it may be appropriate for funders to obtain independent expert reports benchmarking their proposed funding fee against Australian and international practice.
Question 21	At which stage of proceedings should the Court assess the funding fee? What, if any, conditions should apply to this?
Response	The funding fee should be assessed when a settlement is approved or upon judgment, although care should be taken to avoid any hindsight bias regarding the degree of risk taken on by the funder.
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	Legal costs and funding fees should generally not be confidential in a class action settlement approved by the Court.

Question 23	How could the management of settlement distribution schemes be improved to: a) ensure that individual compensation reflects the merits of individual claims b) ensure that it is completed in a manner that minimises costs and delays?
Response	The Court should make orders in approving the settlement requiring the distribution of funds to class members within a particular time period (based on an estimate, supported by evidence, provided by the plaintiff's lawyers). The plaintiff's lawyers should be required to apply to the Court for an extension of that period, where required, and explain the delay. The Court should have the power to reconsider the approval of the lawyers' costs and/or disallow the costs of settlement distribution in whole or part where a reasonable explanation for the delay is not given. An independent lawyer/class member advocate should be appointed in appropriate cases to ensure class members are not treated unfairly in the distribution of settlement proceeds.
Question 24	How could Court-approved notice for opt out and settlement be made clearer and more comprehensible for class members?
Response	Notices should be written in plain language and omit jargon. Notices should be given online and sent by electronic means in a variety of ways as chosen by the class member. Consideration should be required to be given to additional means of conveying the information in the notices (videos, podcasts, QAs). The Court should have the ability to require that notices for important steps be the subject of some independent review/testing with focus groups, where the nature of the claim warrants that cost.
Question 25	Are there other ways the process for settlement approval and distribution could be improved?
Response	The Court should impose sanctions, on the application of the legal profession's regulator, against persons responsible where there is undue delay in the distribution of settlement proceeds.

Question 26	Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?
Response	Lifting the ban on contingency fees is unlikely to significantly improve access to justice in Victoria. It is doubtful that the introduction of contingency fees would lead to any significant reduction in the level of fees charged by funders. Moreover, contingency fees have the potential to compromise the independence of lawyers, create a conflict between the interests of lawyers and their clients, may be negotiated in the context of a power imbalance between lawyers and clients, and may lead to an increase in unmeritorious litigation. The tri-partite structure of lawyer, client (or class) and funder avoids some of these issues and provides a check on others.
Question 27	If the ban on contingency fees were lifted, what measures should be put in place to ensure: a) a wide variety of cases are funded by contingency fee arrangements, not merely those that present the highest potential return b) clients face lower risks and cost burdens than they do now in proceedings funded by litigation funders c) clients' interests are not subordinated to commercial interests d) other issues raised by the involvement of litigation funders in proceedings are mitigated?
Response	If contingency fees are introduced, they should be capped according to the nature of the claim, prohibited in some types of claim and regulated having regard to the points noted above. Subject to that regulation and/or guidance, the Court should be required to approve the return at the end of the case and have a discretion to vary the return in appropriate circumstances.
Question 28	Are there any other ways to improve access to justice through funding arrangements?
Response	Access to justice can be improved by increasing legal aid funding. In addition, public legal services procurement conditions can be used to encourage pro bono legal services.