THE VICTORIAN BAR INCORPORATED

SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION

ACCESS TO JUSTICE – LITIGATION FUNDING AND GROUP PROCEEDINGS

INTRODUCTION

1. The Victorian Bar ***(the Bar)*** welcomes the opportunity to provide a submission to the Victorian Law Reform Commission ***(VLRC)*** in respect of the VLRC's Consultation Paper '*Access to Justice – Litigation Funding and Group Proceedings'* dated July 2017.
2. The Attorney-General's Terms of Reference ask the VLRC to report on a number of issues concerning access to justice by litigants who are seeking to enforce their rights using the services of litigation funders and/or through group proceedings to ensure that such litigants are not exposed to unfair risks or disproportionate cost burdens.

SUMMARY OF KEY SUBMISSIONS

3. For the reasons set out below, it is submitted that:
   3.1 whether disclosure of a funding agreement is required is a matter entirely for the court in the jurisdiction in which a proceeding is brought;
   3.2 a certification requirement should not be introduced for the commencement of class actions in Victoria; and
   3.3 lifting the ban on contingency fees will not of itself mitigate the issues presented by the practice of litigation funding. The Bar has previously provided a submission to a Law Council of Australia Percentage Based Contingency Fees (PBCF) Working Group in which it opposed the lifting of the ban on legal practitioners being allowed to enter into PBCF Agreements. That submission is annexed.

RESPONSES TO THE CONSULTATION PAPER QUESTIONS

4. The Bar's submission responds to the questions put in Chapters 5, 6 and 8.

CHAPTER 5: DISCLOSURE TO THE COURT

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?

5. The Bar notes the Consultation Paper's observation[1] that the relevant Practice Notes of the Supreme Court of Victoria and the Federal Court of Australia differ as to a plaintiff being required to disclose a litigation funding agreement to the Court and/or other parties. As noted, the recently revised Practice Note of the Supreme Court of Victoria is silent as to the disclosure obligations of a plaintiff in funded class actions. Instead, disclosure of funding agreements is dealt with on a case-by-case basis to allow for more flexibility. By contrast, the Federal Court of Australia's Practice Note is clear on the issue – a plaintiff must disclose a funding agreement to the

[1] Victorian Law Reform Commission, Consultation Paper: *Access to Justice – Litigation Funding and Group Proceedings*, July 2017 [5.23]-[5.28] ('*Consultation Paper*').

Court and other parties in all funded class actions commencing in the Federal Court subject to any objection to disclosure being made.[2]

6. It is the view of the Bar that whether a plaintiff is required to disclose a litigation funding agreement to the Court and/or other parties is entirely a matter for the court in the jurisdiction in which the proceedings are brought. Whilst not advocating for one approach over the other, the Bar is content to retain the status quo in Victoria (i.e. a case-by-case approach). The maintenance of judicial oversight in managing disclosure is supported.

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?

7. The disclosure of a funding agreement in funded proceedings other than class actions should be at the court's discretion, particularly so in circumstances whereby it will often be the case that no third party is affected by the terms of agreement other than the plaintiff who appears before the court.[3]

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 under the funding agreement?

8. The security for costs regime in Victoria already provides an effective and satisfactory mechanism to protect defendants from a litigation funder's inability to meet its financial obligations under a funding agreement. Rule 62 of the *Supreme Court (General Civil Procedure) Rules 2015* provides the Court with the power to make an order for security for costs upon application by a defendant. This power is routinely exercised, where appropriate.
9. There is no need for reform in this area in Victoria.

CHAPTER 6: CERTIFICATION OF CLASS ACTIONS

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

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[2] Federal Court of Australia, *Class Actions Practice Note (GPN-CA) – General Practice Note*, 25 October 2016, 5 [6.1-6.7].

[3] Consultation Paper [5.41].

10. The Bar is opposed to increasing the existing threshold criteria for commencing a class action or otherwise amending the existing threshold requirements.
11. There is very little evidence to support the proposition that the existing threshold criteria for commencing a class action should be increased or amended. Until a body of clear and persuasive evidence is produced to show that the existing regime introduces unnecessary inefficiencies, delays and costs that are borne by defendants and the courts, the Bar is of the view that reform is not desirable. On this point, and as noted by others, the study conducted by Vince Morabito and Jane Caruana[4] on the operation of the certification device in the class action regime in the Federal Court concluded that in Federal Court class actions filed between March 1992 and March 2009, there was "no evidence of claimants taking advantage of the absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly or efficiently through the class action device".
12. To the contrary, it is quite feasible that the introduction of a certification device will create inefficiencies, delays and costs as the process would necessarily entail contested certification hearings and an increased number of interlocutory applications flowing from the decision of the Court. A "trial before a trial" type of scenario may eventuate. This has the potential to prevent or have a limiting effect on access to justice.
13. Further, the "decertification provisions" set out in the *Supreme Court Act 1986* (Vic) at sections 33L, 33M and 33N empower the Court to order that a proceeding no longer continue as a class action. The decertification provisions available to the Court in managing class actions have, for the most part, operated effectively and have ensured that unnecessary costs have not been incurred by a defendant to a class action proceeding. The decertification provisions also promote flexibility. The provisions enable the Court to respond to the changing circumstances of a proceeding, and this in turn, protects the interests of defendants.

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?

14. The Bar does not agree that the onus should be placed on the representative plaintiff to prove they can adequately represent class members.
15. The power vested in the Court under section 33T of the *Supreme Court Act 1986* (Vic) to order that an inadequate representative plaintiff be replaced, whilst admittedly limited in that it requires application being made on behalf of class members, provides the Court with a mechanism by which it can order that an inadequate representative plaintiff be replaced.
16. Section 33ZF also provides the Court, of its own motion or upon application by a party, with the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding. This could feasibly include ordering that a representative plaintiff be replaced if inadequate.
17. In the interests of encouraging and maintaining judicial oversight, one possible amendment that may be considered is amending section 33T to provide the Court with explicit power, of its own motion, to order that

[4] See Consultation Paper [6.73].

an inadequate representative plaintiff be replaced. As noted,[5] this would be consistent with the power conferred on the Court in New South Wales.[6]

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?

18. The mechanisms currently available to the Court in addressing competing class actions, such as stay, joinder or consolidation, provides the Court with sufficient flexibility of response in dealing with the many different sets of circumstances that are presented to it. There is no need for a specific legislative power to be drafted to set out how the Court should proceed where competing class actions arise.

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?

19. The Bar does not wish to express an opinion on this question, other than to state that it is for the Court to determine the matters that need to be addressed at the commencement of, or during, proceedings.

CHAPTER 8: CONTINGENCY FEES

Question 26: Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?

20. In short, no.
21. Presently, the practice of litigation funding limits access to justice for plaintiffs with smaller claims. This is compounded if a smaller claim is also complex or difficult. In this sense, lifting the ban on contingency fees would not mitigate the access to justice issues currently inherent in the practice of litigation funding. Whether or not lawyers charged contingency fees would still largely be a commercial decision. People with smaller claims are likely to continue to miss out.
22. There is no evidence that there is significant unmet legal need in Australia that would be alleviated through lifting the current prohibition against contingency fees. Unmet legal need in Australia is greatest in crime, family law and migration, areas of law which would be excluded from contingency fee agreements in any event. The wide availability in Victoria of no win/no fee representation provides a reasonably accessible means of providing access to justice to prospective plaintiffs who would not otherwise be able to afford legal representation, particularly in common law and other class action matters.
23. Lifting the ban on contingency fees would not of itself mitigate the issues presented by the practice of litigation funding. There are issues that arise in respect of litigation funding that would also arise in respect of contingency fees, including:

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[5] Ibid [6.79].

[6] *Civil Procedure Act 2005* (NSW) s 166(1)(d).

- that there may be upward pressure on the settlement amounts required to resolve disputes to accommodate the 'cost' by reason of the funding agreement or contingency fee;
- lawyers acting are placed at a higher risk of being compromised ethically in breach of their obligation to act in the best interests of the client, in particular a lawyer acting may have a direct financial interest in the outcome of the proceeding which may result in conflict arising against the clients' best interests.

24. The independence and detached objectivity of the Bar, and the barrister, plays a vital role in enabling the barrister to serve the ends of justice in an adversarial system—that is, by fearlessly pursuing the client's interest to the exclusion of any other within the boundaries circumscribed by the duty owed to the court, professional ethics and the law.

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?

25. Class action litigation funding indemnifies plaintiffs against adverse costs. If the ban on contingency fee agreements was lifted, amendment to existing regulations should occur to ensure that security for costs and adverse costs orders may be directly enforced against the plaintiff's lawyers. This would provide clients with the protection the current framework affords.

26. Placing a cap on the percentage able to be charged under a contingency fee agreement would provide some protection against excessive costs or financial windfalls being received by lawyers acting under a contingency fee arrangement. This would not necessarily provide clients with lower cost risks or cost burdens per se, particularly in respect of retail clients.

27. Costs disclosure and agreement documents should make clear what the percentage of the contingency fee to be claimed in the event of a successful outcome will be, how it will be calculated, any additional costs or disbursements and liability in respect of any adverse costs order.

Question 28: Are there any other ways to improve access to justice through funding arrangements?

28. Consideration could be given to the establishment of a special public fund,[7] which may assist in further improving access to justice if structured to deliver a mechanism that would provide financial support for meritorious civil claims that without funding would otherwise not be initiated. This would allow for the payment of costs awarded against representative parties. A similar public fund has been established in

[7] As recommended by the Australian Law Reform Commission and the Victorian Law Reform Commission and referred to in the Consultation Paper at [8.51].

Ontario, Canada[8] called the "Class Proceedings Fund". In that jurisdiction, the Class Proceedings Committee, which has responsibility for overseeing the administration of the fund, decides whether a person who is a plaintiff to a class action is to receive financial support in respect of disbursements related to the proceeding. In deciding, the Class Proceedings Committee may have regard to the following factors:[9]

(a) the merits of the plaintiff's case;

(b) whether the plaintiff has made reasonable efforts to raise funds from other sources;

(c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded;

(d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and

(e) any other matter that the Committee considers relevant.

29. Defendants can also apply to the Class Proceedings Fund in respect of a costs award made in their favour against a plaintiff who has received financial support from the Class Proceedings Fund.[10]
30. In the event that such a scheme was to be considered, the Bar would participate in any further review or enquiry.

[8] The class proceeding fund was established in 1992 following amendment to the *Law Society Act*.

[9] *Law Society Act*, R.S.O. 1990, c. L.8, s59.3(4).

[10] Ibid s59.4(1).