20 September 2017

The Hon. P D Cummins AM
Chair Victorian Law Reform Commission
GPO Box 4637
Melbourne
Victoria
3001

Dear Mr Cummins

Access to Justice - Litigation Funding and Group Proceedings

We welcome the opportunity to make a submission on the issues being considered by the Victorian Law Reform Commission in relation to litigation funding and group proceedings.

We recognise that this is not a straightforward issue and there are many strongly held views in relation to access to justice. The comments set out in this submission reflect the views of a range of our membership, who work across the business spectrum.

Overall commentary on matters raised in the consultation paper

We agree that the commercial litigation funding industry has substantially changed. While we support the role that third party litigation funders can play we are concerned that in the current unregulated environment, the rise of funders utilising litigation as an investment vehicle has been largely unchecked. This has introduced potential for misuse and unintended impacts on the productivity and cost of doing business. The continuing evolution of funding participants and models has the potential to extend the impact of such funding. We believe that regulation is required to protect the validity of the legal process and the legitimate interests of plaintiffs and defendants. The recommendations of the Victorian Law Reform Commission from 2008 and the Productivity Commission from 2014 remain valid, particularly in relation to licencing and capital adequacy.

We note that these issues have national implications and agree with the statement in the consultation paper that regulation is primarily a matter for the Commonwealth Government. The paper clearly demonstrates the rise of commercial litigation funders (to almost half of Commonwealth proceedings filed as quoted in the paper) and the investment nature of the business models of these funders.

The concern that additional regulation on litigation funders increases cost to consumers of pursing court proceedings needs to be considered in the context of the type of proceedings that litigation funders will accept and from who. As an investment model, funders seek low risk options where there are high profile, profitable or insured defendants. As evidenced in the consultation paper material, these business models are not seeking to benefit consumers. We also note that the rise of overseas-based litigation funders may impact the applicability of existing protections in Commonwealth or Victorian legislation and these should be further considered.

We note that much of the commentary in relation to this matter highlights that third party litigation funding can increase access to justice. However we believe this element needs to be considered in context. As noted in the consultation paper, there are only narrow circumstances where funders will become involved. In insolvency cases where there are limited funds available, third party litigation funding can be an effective option for an insolvency practitioner to utilise in preference to seeking funding through banks or creditors. Litigation funders have a valuable and relevant role in these circumstances. However actions involving individuals, vulnerable people, social purpose, or public interest are unlikely to be funded by third party litigation funders due to the less favourable risk vs investment return ratio. As noted in the consultation paper, the business model for third party litigation funders is commercial gain, not access to justice.

The concerns expressed in the paper about conflicts of interest, insufficient capital, out-of-jurisdiction entities being involved, and commercial incentives taking precedent over legal proceedings are all valid. It is also notable that there are no fiduciary responsibilities on litigation funders and they have no ethical obligations to safeguard the interests of claimants. There is continuing risk that the absence of a capital adequacy regime for funders can expose a representative claimant to large adverse costs.

Response to issues raised in the consultation paper

Chapter 4: Disclosure to clients

We support requiring disclosure of litigation funding basis, terms, charges and additional fees or arrangements to plaintiffs, including any indemnities given to the representative claimant by the funder. We would also highlight the need to set parameters around disclosure so that it provides relevant, comparable and understandable information. This is particularly important if there are actions involving unsophisticated parties who may otherwise be confused by the range and complexity of the funding arrangements.

Chapter 5: Disclosure to courts

We agree that litigation funding agreements should be disclosed to the Court in class actions and also where litigation funding is utilised in other proceedings. While we recognise that this could increase the role and workload of the courts, an understanding of the litigation funding is important to protect the legal process and to protect the legitimate interest of the defendant. This process may also promote competition in the funding market by disclosing the terms of respective funders.

We support this information being disclosed at an early stage so that any issues can be identified straight away rather than only coming to light at the stage of settlement approval. These terms are relevant to the interests of non-funded class members in an open class action as they may ultimately be required to contribute to a common fund which may be shaped by the funding terms.

We also support allowing the court have the ability to order security for costs as a protection against concerns over insufficient capital or about ability to enforce judgements out of jurisdiction. We note that if there was a robust capital adequacy regime for funders together with disclosure of funding terms at an early stage, it is likely that specific security would not be considered necessary in many proceedings. This could have the effect of moving associated costs away from individual parties to the funders.

Chapter 6: Starting a class action

We believe that improving the disclosure and court role as suggested above would assist the issues raised in this chapter. There was also support by some members for a more formal process, including certification, prior to starting a class action. This could cover matters such confirming the composition of the class in the proceedings, clarifying common questions that will be decided, whether the representative claimant is appropriate to represent the interests of class members, and whether there is an arguable causative link. Clarifying these matters at an early stage, and prior to formal commencement of proceedings, would streamline the legal process and prevent the need for the defendant to bring interlocutory applications.

Chapter 7: Settlement of a class action

We have concerns in relation to assessing reasonableness of funding fees and costs. Disclosure of funding terms allows all parties to be aware of the funding agreements – including costs and fees - at the start and throughout the litigation. Insight into the aggregate amount charged is a key element.

In relation to matters raised in the paper, we suggest that assessing the amount of fees against risk is unlikely to be productive as low risk is generally a criteria for funding. Also requiring additional evidence from defendants (at presumably the defendant's cost) does not seem an equitable option.

A number of our members supported a cap on the proportion of fees that a funder could take.

We are happy to expand or clarify these points and look forward to assisting with the reform as appropriate.

Kind regards

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