Victorian Law Reform Commission
Level 3, 333 Queen Street
MELBOURNE VIC 3000

Dear Sir/Madam,

Access to Justice – Litigation Funding and Group Proceedings
Submission in response to Consultation Paper

As the Presiding Commissioner for the Productivity Commission's Inquiry into Access to Justice Arrangements in 2013-14, I have had the benefit of previously studying the issue of access to justice and of contributing to identifying how equity and access can be improved.

The Report produced by the Commission was described by the Law Council of Australia as "the most comprehensive review of access to justice arrangements in Australia ever attempted". The Commission thoroughly examined the real costs of legal representation and trends over time, factors that contribute to the cost of legal representation, the proportionality of the costs of accessing justice services and the alternative mechanisms to improve equity and access. It is a testament to our system that procedural and other issues that may improve access to justice repeatedly undergo review so that we may avoid counterproductive barriers preventing Australians from exercising their rights, and allow them to do so in the most time and cost effective manner.

The Consultation Paper covers a range of topics of particular importance and concern, including a number the Commission addressed in its Report. The Report explores access to justice at great length, recommending various reforms to enhance it as well as identifying potential barriers which could inhibit it. The Commission expressed the view that "a just outcome is likely to be associated with fair and transparent processes — confidence in the integrity of the process instils confidence in the outcome reached." The Report concludes that the transparency and integrity of our system is placed at risk by costs and delays associated with accessing the system, the complexity of the system and the law which underpins it, and an absence of mechanisms to enforce rights in certain circumstances.

My submission is that the integrity of the justice system could be jeopardised by two key considerations in the Consultation Paper: the introduction of a certification regime for class actions and the failure to lift the ban on contingency fees, subsequently inhibiting efficiency, effectiveness and the likelihood of access to justice for thousands of Australians with meritorious claims. I should add these views are my own and should not be attributed to the Productivity Commission or any other organisation I am associated with.

Certification of class actions

The Consultation Paper considers whether the introduction of a certification regime would benefit the conduct of class actions, with particular reference to the question of whether it would ensure efficiency and the minimisation of cost.

There is no evidence I have seen to support a contention that introducing an early certification process would in any way benefit the current regime in terms of the aforementioned aspirations of efficiency in time and expense. In fact, it seems such a process could only lead to an exacerbation of such concerns.

This is in large part due to the fact that Courts already have the power to achieve the same ends that a certification process proposes to address, through the existing ability defendants and Courts have to respectively pursue and order strike out and decertification motions in circumstances for example where it is has been deemed that a class action would not be the most efficient means of resolving the dispute at hand or where the pleadings are deficient. The Commission received no evidence that the Courts were tardy in this regard.

Significant delays, unnecessary costs and inefficiencies

As it stands in our existing system, even under the very best of circumstances, claimants already face lengthy processes with drawn out timetables. This would be exacerbated by the requirement to assess the intricacies of a potential case by way of a pre-certification hearing. I would also note that increasing pre-trial complexity and activity runs counter to the broad thrust of judicial reform across all jurisdictions that has occurred in recent years that is documented throughout the Report and in particular in Chapter 11.

In order to review effectively the merits of a case in a pre-certification hearing, plaintiffs and defendants must adequately prepare by allocating sufficient time for discovery and gathering evidence. The direct result of this time-consuming procedure is substantial additional cost to the client, creating a financial barrier to access to justice at the very outset.

The requirement to hold pre-certification hearings generates further inefficiencies by duplicating the debate of the merits of a proceeding; raising them at certification and potentially re-litigating them at trial. A certification regime would only inhibit access to justice by adding further complexity, delay and cost to our existing system, which currently adequately safeguards the interests of all parties.

I submit that a certification regime would directly contradict the outcomes it seeks to accomplish, making justice less accessible and more costly, by imposing additional time and financial barriers, contrary to its intended purpose.

Contingency fees

The Commission's terms of reference directed it to consider a wide range of mechanisms by which the financial costs of litigation, that are recognised to present barriers to access to justice, can be reduced.

The Commission also reviewed at length consumer protection arrangements for legal services and made a range of recommendations in this regard, many of which have not been adopted by various jurisdictions. It is fair to say that the Commission was of the view that such reforms, coupled with appropriate supervision of individual cases by the Courts, led it to a position that people seeking access to justice should not be denied the use of a funding

mechanism on the basis of concerns about the professional or ethical conduct of lawyers. Indeed, I did find it strange at varying times during the Inquiry that professional bodies would argue that there was no need to improve the professional and ethical supervision of solicitors and then on the other deny litigants access to certain funding mechanisms because of concerns about lawyer conduct. I would also note that the bulk of objections to allowing improved access to justice by liberalising billing and funding practices came from lawyers and other bodies, such as the Australian Institute of Company Directors, typically associated with defendants in these proceedings.

The Commission's broad conclusions were that there should be no prohibitions on the fee structures that lawyers may use to charge their clients provided that those structures are fully explained and understood by clients – the Commission was provided with evidence that in a small but material number of cases this was not the case. In relation to contingency fees, the Commission recommended

(a) The prohibition on damages-based billing [contingency fees] for criminal and family matters, in line with restrictions for conditional billing, should remain;

(b) Comprehensive disclosure requirements — including the percentage of damages, and where liability will fall for disbursements and adverse costs orders — being made explicit in the billing contract at the outset of the agreement;

(c) Percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients; and

(d) Damages-based fees should be used on their own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).

The Consultation Paper considers whether lifting the ban on contingency fees may mitigate the issues presented by the practice of litigation funding, with particular reference to the claim that the availability of such a regime would promote unmeritorious and frivolous litigation, and create a conflict of interest between the lawyers' duty to their client and their financial interest in the outcome of the case.

Meritorious claims

I disagree that the availability of contingency fees would discouraged lawyers to fully consider whether a case is meritorious before proceeding is misguided. Regardless of billing arrangements, cases run on a 'no win no fee' basis leave lawyers at risk of not recovering their fees in the event that the case is lost, therefore already providing financial incentive to proceed only with claims that have reasonable prospects of success. This argument also seems to ignore the real and active role that judicial officers play in this regard, the likelihood that "docket" based case management is likely in itself to reduce the number of cases lacking merit that are brought to trial, and the general duties lawyers owe to the Courts.

Further, the Commission concluded that adverse costs orders are an inherent disincentive to pursuing high risk claims with a low likelihood of success, as claimants would face the threat of paying the other side's legal fees and the lawyers would face the prospect of bearing the cost of the litigation. This is particularly the case in the presence and possibly increased use of indemnity cost orders and if higher levels of recovery of court costs were to be implemented as the Commission recommended. Contrary arguments are likely based on particular cases in the United States, who do not have the same adverse costs laws in place that we enforce here in Australia.

It has been demonstrated through the introduction of contingency fees in Ontario, Canada and the United Kingdom that adverse costs orders act as a sufficient deterrent to pursuing frivolous claims, and maintain the integrity of litigation. This is consistent with the view the Commission formed of the empirical evidence available to it at the time. If contingency fees be introduced in Australia in the same way, restrictions could be imposed on the nature of claims for which contingency fee arrangements may be applied, such as those recommended by the Commission that I have mentioned above.

Alignment of interests

Potential conflicts of interest between lawyers and their clients are not unique to a contingency fee regime. Lawyers clearly have financial interest in the outcome of their cases and clients are at risk of being charged excessive fees irrespective of the billing structure.

Contrary to speculation that contingency fees could generate conflicts of interests between lawyers and their clients, it can be argued that contingency fee arrangements would have the opposite effect and in fact align their interests in respect of achieving the highest value recovery. It could be said that lawyers who are paid by the hour may be motivated by pursuing lengthy litigation and unnecessary pre-trial activity, benefiting from maximising the number of hours worked irrespective of the outcome of the litigation. On the other hand, under a contingency fee arrangement, time billed becomes largely irrelevant and the lawyers and clients mutually focus on resolving the dispute without inefficiencies and delays. This may also have the knock on effect of reducing the demand on the resources of the court system.

Improved competition

There is very little difference in the financial incentives faced by lawyers billing on a contingency basis and litigation funders. As such lifting the ban on contingency fees would generate additional competition for the currently small number litigation funders and ultimately force down their percentage fees, to the ultimate benefit of legal clients.

With appropriate protections for consumers in place as discussed above and more broadly by improving protections for legal services consumers, the introduction of a sliding scale contingency fee billing model would enable lawyers to lower total costs for claimants and increase rates of recovery, thereby improving access to justice and increasing returns for legal consumers.

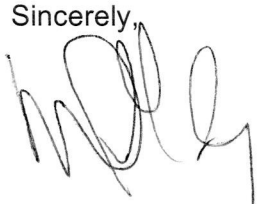
In addition to generating greater returns for claimants, the availability of contingency fees would encourage greater transparency between lawyers and their clients. Uncertainty surrounding the potential total of costs at the end of a matter is eliminated, as contingency fees are results-based, and clients are assured at the outset of a case that their costs will be proportional to the recovery. This compares with cases operating on a conditional fee basis where clients may be left without sufficient funds from their recovery to cover the lawyer's full fee. I understand the Law Institute of Victoria has long held the view that contingency fees should be a method of billing available to law practices and clients on the basis that it provides clarity to clients about the legal costs they will be liable to pay – I share this view.

The evidence that was available to the Commission made clear that access to financing by third party litigation funders was not available to small and isolated litigants due to the economies of scale inherent in the businesses of litigation funders. As a result, many small, meritorious claims, deemed financially unviable by litigation funders, may not be tested in the legal system as lawyers are in many cases unable to proceed with complex litigation on a conditional fee basis under the current regime without third party support. It seems likely that a significant proportion of such matters would proceed if contingency fees were allowed,

especially if legal practices were able to specialise and build up a "client portfolio" that diversified the firm's risk exposure without needing recourse to the capital required by third party funders.

Please do not hesitate to contact me if I can further assist with the Commission's important work.

Sincerely,



Dr Warren Mundy FRAeS FAICD
Former Productivity Commissioner