6 October 2017

Submitted via email

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

Dear Commissioners

Litigation Funding and Group Proceedings: Consultation Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Victorian Law Reform Commission's (the **Commission**) Consultation Paper, *Litigation Funding and Group Proceedings*.

This is an important and broad review that presents a real opportunity to enhance access to justice in Victoria. We welcome the focus of the Commission's inquiry, that is, to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens when using services of litigation funders or when participating in class actions.

In summary, this submission argues that:

- class actions play an important role in facilitating access to justice, and regulatory arrangements should facilitate such actions proceeding;
- the restriction on lawyers charging contingency fees should be removed;
- robust court oversight is important to protect litigants at certain process steps (for example, processes to 'close' the class) as well as settlement and distribution, but there should not be upfront barriers to initiating class actions such as class certification;
- litigation funding plays an important role in supporting class actions, but measures should be adopted to manage conflicts of interest and encourage funders to adopt common fund class action models; and
- the Commission should re-visit its previous consideration and support for a judicial power to allow a court to order *cy près* or public interest distributions of unclaimed damages in class actions. The Commission's recommendation was not adopted by the Victorian Government following the 2008 Civil Justice Review, however there are sound public policy reasons for such a power.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and

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policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Class actions provide access to justice

Class actions provide an important means for people to band together to pursue justice when companies engage in widespread violations of the law. For this reason, we strongly support a facilitative regime for class actions. Such a regime should avoid counterproductive barriers that stop people from being able to exercise their rights.

Class actions can be an efficient mechanism to enable redress for many people affected by the same wrongdoing, compared to those individuals seeking redress separately. It is, of course, highly unlikely that every affected individual would have the resources or capacity to seek individual redress. Given this, class actions can provide accountability for wrongdoing—they can ensure that the full scope of wrongdoing is assessed and remedied by a court. This benefits not only the class, but the fairness and efficiency of markets generally. Competitors of wrongdoers aren't disadvantaged for complying with the law.

Class actions are not the only mechanism to facilitate access to justice for a group of affected consumers, but they are an important one. Other available mechanisms in relation to consumer claims include public action by regulators and systemic conduct investigations by industry-based ombudsman schemes.

While Australian regulators are increasingly taking action to obtain compensation on behalf of groups of consumers, particularly the Australian Securities and Investments Commission (**ASIC**), this is by no means widespread among regulators. Many sector-specific regulators do not have powers to obtain compensation for affected consumers, but rather have powers to obtain administrative, civil and sometimes criminal sanctions against wrongdoers. Even where regulators do have powers to obtain compensation, for example state-based consumer affairs or fair-trading regulators, these powers are rarely exercised. This may be due to lack of resourcing for these regulators. Public regulators are limited by their resources and recognise that class actions complement the role of the regulator.[1]

Industry-ombudsman schemes also play a role in obtaining redress for groups of consumers where they investigate a systemic issue. However, these powers are not always sufficient to facilitate redress for corporate wrongdoing. There are a number of reasons for this. First, not all sectors of the Australian economy are covered by an industry-based ombudsman scheme. A key gap in the work of Consumer Action relates to disputes about motor vehicles. Cars are essential for many Victorians to fully participate in family life and employment, especially those living in rural and remote areas. Disputes with car retailers and manufacturers about defects can be very difficult for consumers to navigate through a tribunal or court, and usually require expert evidence. The availability of class actions is vital to allow consumers to obtain redress for manufacturing defects.

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[1] Michael Legg, 'ASIC's nod to class actions', *The Australian,* 12 April 2017, available at: http://www.theaustralian.com.au/business/opinion/asics-nod-to-class-actions-may-backfire/news-story/4b2ee2aa619539bea0cae5ee33eb5e42?nk=b2fc18a05bb5f56c95c8ee2d93985659-1506557590.

Second, industry ombudsman schemes can be limited by their jurisdiction—for example, the Financial Ombudsman Service (**FOS**) has limited jurisdiction over the level of fees or charges,[2] whereas there may be a legally arguable remedy available through the courts. Further, some products can be structured so that the relevant industry ombudsman service does not have jurisdiction.

For example, FOS is available to consumers in relation to disputes about some motor vehicle extended warranties but not others. Warranty providers such as National Warranty Company (**NWC**) and Australian Warranty Network (**AWN**) provide a number of different types of warranty products. The cost of these products range from approximately $1,000 to $2,800. The products themselves often provide very limited cover including financial caps, significant exclusions and onerous servicing requirements. When issues arise, consumers may generally lodge a complaint with FOS because the provision of these products generally fall into the category of 'Financial Service' within FOS's Terms of Reference.[3]

However, Consumer Action has recently noticed an increase in complaints about "dealer-issued" warranties provided by NWC, AWN and others. The documents for these products state that NWC and AWN "administer" the warranties only and that the "cover" is provided by the car dealer. FOS has taken the position that complaints about these "dealer-issued" warranties fall outside its jurisdiction because they do not relate to the provision of financial services by a FOS member, leaving people without access to external dispute resolution schemes.

ASIC has recently published a Consultation Paper about reform proposals to address the systemic issues observed in the sale of add-on insurance through car yards.[4] Unfortunately, the proposed reforms do not apply to the "dealer-issued" warranties described above. The availability of class actions is essential to ensure harmful conduct does not fall through regulatory cracks.

Third, industry ombudsman schemes generally require consumers to self-advocate. Many consumers affected by predatory conduct have difficulty advocating for themselves due to vulnerability and/or disadvantage, for example, low literacy levels, life stress, and no access to free legal advice. Class actions can play a role to ensure such people are afforded a remedy.

Contingency fees

Consumer Action is generally supportive of the removal of restrictions on lawyers charging contingency fees.

Lawyers can already enter conditional cost agreements, including uplift arrangements, where the charge is based on the amount of work done by lawyers. However, lawyers are prohibited

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[2] Financial Ombudsman Service, Terms of Reference, Clause 5.1(b).
[3] Financial Ombudsman Service, Terms of Reference, Clauses 4.2, 20.1.
[4] Australian Securities & Investments Commission, *Consultation Paper 294: The sale of add-on insurance and warranties through caryard* intermediaries, August 2017, available at: http://download.asic.gov.au/media/4422973/cp294-published-24-august-2017.pdf.

from entering into “no win, no fee” arrangements where legal fees are calculated as a percentage of the amount recovered in civil proceedings. This is inconsistent with the position of litigation funders, who are able to fund litigation in return for a share of the proceeds if the case is successful. This anomaly needs to be addressed—it may increase competition in this arena. We comment further on litigation funding below.

More broadly, this type of charging arrangement can facilitate access to justice, enabling meritorious matters to proceed. Free or low-cost legal assistance services, including those provided by community legal centres, provide assistance to support particularly vulnerable and disadvantaged groups. However, the available funding for free legal assistance is very limited. Further, some services have eligibility criteria while others focus on particular issues rather than responding to every instance of detriment. The Productivity Commission has acknowledged there is a “missing middle” in the availability of legal assistance, and has recommended that restrictions on lawyers charging contingency fee be removed, stating that this will “increase access to legal advice where lawyers take on claims they would not have accepted under other forms of billing.”[5]

Charging on a contingency fee basis may also align the interests of lawyers and their clients. Time-based billing, which remains widespread in legal services, facilitates an inherent conflict of interest. As stated by Richard Susskind in his book *The End of Lawyers*, “so long as the focal point of law firms’ profitability is premised on the number of hours spent advising clients, their motivation will always tend to be to spend more rather than less time on the work, where the clients will prefer precisely the contrary.”[6] This is not to say that lawyers are unethical or that professional standards are not sufficient, but recognises that financial incentives can powerfully influence business conduct. Lawyers are not immune from this. Contingency fee arrangements, by contrast, can provide incentives for the lawyer to resolve a matter as quickly as possible and obtain the best possible result for their client.

Should contingency fees be allowed, safeguards need to be adopted. In particular, the existing protection in the Legal Profession Uniform Law that legal costs must be fair and reasonable must remain paramount.[7] This rule should be enforced by the regulator to ensure that uplift fees aren’t unreasonable. It would be particularly helpful for the regulator to develop guidance about how this rule applies in practice.

We also support the imposition of a percentage cap on the amount of an award that can be retained by a lawyer. A cap would overcome the risk that vulnerable litigants may be overcharged. It is unlikely that cost disclosure will prevent exploitation, particularly as a percentage fee may not be interpreted or be easily understood—a percentage of an unknown award is unlikely to fully inform a litigant about the costs that will be incurred. Further, people may accept an unreasonably high percentage fee because they feel that it’s their only option, particularly people who may not have the means to pursue their claim alone. We do not have a fixed view on the appropriate level for such a cap, but submit that a significant proportion of compensation awards should be paid to claimants.

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[5] Productivity Commission, *Access to Justice Inquiry*, volume 2, page 625.
[6] Richard Susskind, *The End of Lawyers? Rethinking the nature of legal services*, Oxford University Press, 2010.
[7] Legal Profession Uniform Law, section 172.

Court oversight of class actions

Robust court oversight of class actions is necessary to ensure class members are not put at undue risk or bear disproportionate cost burdens. Unlike other litigants, class members are unlikely to be highly engaged in the litigation, and court oversight offers them some protection.

However, we do not support additional barriers to initiating class actions, such as class certification. It is not clear what problem class certification addresses, and an additional certification process is likely to add additional costs to the litigation.

Court oversight is more appropriate at the point of settlement and distribution of any award. As noted above, many class action members are unlikely to be highly engaged in the litigation and court oversight can ensure the interests of members are considered at this stage. This is particularly the case where the parties agree to "close the class" as a precursor to settlement negotiations.

Consumer Action has previously raised concerns about lawyers representing a class (and their funders) and businesses that are subject to a class action effectively excluding some parties from access to justice.[8] In the context of the NAB bank fees class action settlement, the parties agreed to a process of opening and closing the class to facilitate settlement. This meant that affected people were required to register with the funder of the class action in order to benefit from the settlement. Our concern was that many otherwise eligible claimants would miss out on participating in the settlement because they were unaware of the need, or were unable, to take steps to register. We were particularly concerned about lower income or otherwise disadvantaged people who were systematically charged penalty fees by banks. These people are unlikely to have responded to newspaper advertising alerting them to the class action and thus, through no fault of their own, missed out on the settlement.

The Consultation Paper proposes options to assist the Court in ensuring that the interests of unrepresented class members are protected. The first option involves the appointment of a third-party guardian or contradictor whose role it would be to assess the strengths and weaknesses of the settlement from the perspective of the unrepresented class members. This seems like a sensible approach, and such a party should also provide assistance and guidance with respect to any process to open or close the class.

We also support proposals to improve notification given to class members about progress and outcomes during proceedings. Research should be conducted about how best to communicate particularly with unrepresented class members that increases the likelihood that they will be informed about their options with respect to participating in an action. Insights could be gained from the field of behavioural economics to make it more likely for people to engage with relevant decisions.

[8] Consumer Action, *Media release—NAB locks out the most vulnerable from unfair bank fees refunds*, 11 April 2016, available at: http://consumeraction.org.au/nab-locks-vulnerable-unfair-bank-fees-refunds/.

Funded class actions

Litigation funding plays an important role to ensure that class actions proceed. While funders will of course make commercial decisions about which claims to support, funded class actions can nevertheless facilitate access to justice.

Consumer protection concerns do arise in relation to funded class actions, and processes should be adopted to ensure funders of litigation do not exploit the interests of their clients, given their financial interest in the litigation outcome. As noted by the Consultation Paper, there can be a conflict of interest between the funder and the client. There are, however, already conflicts in relation to existing conditional cost agreements. For example, it might be in a lawyer's interest to accept a "low-ball" settlement offer so they get their fee even where the client wants to reject the settlement and have the matter proceed to determination, where there remains a risk of losing (and where the lawyer might not be paid at all).

The Commission should consider how best these conflicts can be managed, rather than limit access to litigation funding (which can limit access to justice). With the advent of incorporated legal practices, due to the potential conflict of interest between the board's obligation to shareholders and the lawyers' obligation to clients, legislation allows for audits of such practices which consider (among other things) processes to ensure that lawyers act in the interests of their clients. Consideration might similarly be given to adopting additional legal profession rules to ensure that lawyers act in the interests of their clients where they fund litigation. Similarly, it would make sense for the Court to impose appropriate obligations on litigation funders to manage conflict of interests. We note that the Federal Court Practice Note already states that litigation funding agreements should include provisions for managing conflicts of interests, and these could be adopted for the Supreme Court.

Another challenge with funded class actions is a tendency for these to benefit only those that sign an agreement with the funder, rather than all affected people. This has the potential to exclude affected people from compensation, particularly where confidential settlements are reached with class members. Where disputes proceed to hearing, there is also the potential for non-funded class members or secondary classes to 'piggyback' off the work of litigation funded class members and obtain compensation without contributing to the cost of the litigation funding.

The Federal Court recently endorsed an innovative model in a case brought against QBE Insurance Group Ltd.[9] The Court ordered that if the class was successful in obtaining compensation from QBE, class members would each pay a share of legal costs and litigation funding commission from the common compensation fund. The Court held that all class members, whether or not they had signed up with the litigation funder, would pay a pro rata share of the commission charged by the litigation funder. However, the Court made clear that it would supervise the rate of the commission charged to make sure that it was appropriate

[9] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 338 ALR 188 per Murphy, Gleeson and Beach JJ.

given the "limited or non-existent" opportunity for individual members of the class to negotiate the rate of commission charges with the litigation funder.[10]

The QBE decision is an example of how innovative approaches to litigation funding can enable a greater number of affected members of the public to obtain compensation, while ensuring that the costs of litigation funding are fair in quantum and equitably distributed among class members. We encourage the Commission to consider mechanisms to incentivise these sorts of actions.

Compensation outcomes

As noted above, class actions can be important to ensure that the full scope of wrongdoing is assessed and remedied by a court. However, some of the class action processes can mean that affected people do not benefit from any remedy.

In these circumstances, the doctrine of *cy près* (a legal doctrine meaning 'as near as possible') should be employed to indirectly effect restitution to affected consumers who were not members of the class of litigants and who are unable to be directly contacted. In such cases, damages payable by a culpable trader can be held in trust and used to fund work which aims to benefit the class that has suffered, as a whole. This can be particularly beneficial where there are many consumers who have been illegally required to pay very small amounts—*cy près* can be adopted to prevent a wrongdoer profiting from errors or illegal conduct.

We have direct experience of this mechanism being used in Australia in a number of different ways.

In the late 1980s, the Consumer Credit Legal Service (**CCLS**) in Victoria objected to the licensing of a large finance company on the ground that the company was engaging in dishonest and unfair selling practices in relation to consumer credit insurance.[11] The circumstances of the case made it impossible to identify (for the purpose of compensation) every single consumer who may have been wronged by the finance company. The solution was to compensate consumers at large under the doctrine of *cy près*. The *cy près* solution resulted in the finance company paying $2.25 million into a fund to establish a centre that would advocate for, and work in the interests of, Victorian consumers. Accordingly, the Consumer Law Centre Victoria (**CLCV**) was established in 1992. The CLCV (which merged with CCLS to form Consumer Action in 2006) became a highly respected and influential voice in the consumer policy arena, both at a governmental level, and throughout the community generally.

Regulators have used similar mechanisms to make sure that businesses don't inappropriately profit from their conduct.

In 2014, Consumer Action received funds from insurers via the Office of the Fire Services Levy Monitor relating to the over-collection of the fire services levy from insurance customers. To

[10] Ibid, at [72].
[11] See http://consumeraction.org.au/resources/hfc-financial-services/.

date, Consumer Action has used to this funding to benefit insurance customers as a whole including the following:

- investigating the sale of add-on insurance and warranties;
- working with ASIC in law reform around add-on insurance and warranties;
- setting up the website DemandARefund.com to enable consumers to seek refunds for mis-sold add-on insurance and warranties (approximately $750,000 to date);
- representing and obtaining redress for consumers in relation to insurance claims and mis-sold insurance; and
- advocating for law reform including extending unfair contract terms prohibition to insurance.

In another example, ASIC accepted an Enforceable Undertaking from BMW Finance in December 2016 relating to responsible lending failures.[12] As part of this, BMW Finance paid $5 million to consumer advocacy and financial literacy initiatives. This ensured BMW Finance was held accountable even where affected customers could not be contacted and allowed the affected group as a whole to benefit.

These examples clearly demonstrate the benefits of being able to seek compensation for consumers under a *cy près* mechanism, especially where not all members of the class can be contacted.

The Commission has previously recognised the benefit of a judicial power to allow a court to order *cy près* or public interest distributions of unclaimed damages in class actions.[13] Despite this, the Victorian Government did not adopt the recommendation in its response to the Commission's previous Civil Justice Review. We urge the Commission to revisit this recommendation given the sound public policy reasons that support it.

Should you have further questions about this submission, please contact us on 03 9670 5088 or at gerard@consumeraction.org.au.

Yours sincerely
CONSUMER ACTION LAW CENTRE

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[12] ASIC, *Media release—ASIC action sees BMW Finance pay $77 million in Australia's largest consumer credit remediation program*, 6 December 2016, available at: http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-417mr-asic-action-sees-bmw-finance-pay-77-million-in-australias-largest-consumer-credit-remediation-program/.
[13] Victorian Law Reform Commission, *Civil Justice Review Final Report*, p 532, available at: http://lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf.