

# VLRC REVIEW INTO LITIGATION FUNDING AND GROUP PROCEEDINGS

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Legal Briefings - By **Ante Golem**, **Sue Nicholas** and **Edward Sinclair**

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On 17 July 2017, the Victorian Law Reform Commission (**VLRC**) released a consultation paper as the next step in its review of the potential risks and cost burdens for litigants when using the services of litigation funders and/or participating in group proceedings.<sup>1</sup>

It is expected that the VLRC's report will, amongst other things, help to inform the debate in this country around the role of litigation funding, including the regulation of litigation funders.

The terms of reference for the review include:

- the need for increased supervisory powers of the Victorian Court or regulatory bodies in group proceedings funded by litigation funders;
- whether removing the existing prohibition on law firms charging contingency fees (other than in family, criminal and personal injury matters) would assist to mitigate issues presented by litigation funding; and
- the need for further regulation of proceedings that involve a number of litigants being represented by an intermediary, including certification before such proceedings are continued, or specified criteria for the Court's approval of a settlement.

## KEY ISSUES

**Potential conflicts of interest:** There is the potential risk that the commercial interest of the litigation funder or the lawyers will be given priority over the plaintiff's interests. Reform options proposed include the drafting of guidelines addressing the responsibilities of lawyers in class actions and practice requirements for litigation funders in relation to conflicts of interests.

**Disclosure to the plaintiff:** The lack of transparency about the relationship between the litigation funder and the lawyer has led to calls for stronger disclosure requirements, including the requirement for lawyers to better inform plaintiffs regarding litigation funding charges, progress and outcomes during a proceeding and any settlement distribution scheme.

**Interests of unrepresented class members:** Class members in an open class action are bound by the outcome of proceedings unless they choose to opt out. There is a risk that unrepresented class members will be bound by a decision where their interests were not properly represented by the representative plaintiff's lawyers. Reform options include the appointment of a third-party guardian or contradictor and increased involvement of defendants in the settlement hearing to assist the Court with assessing the strengths and weaknesses of any proposed settlement.

Other points for consideration raised include:

- whether any litigation funding agreement should be disclosed to the Court to assist with protecting the interests of all parties and case management generally;
- proposed certification of a class action, confirming that required criteria have been met and it is appropriate for the case to proceed; and
- notwithstanding a potential conflict of interest between a lawyer's duty to the client and financial interest, whether the introduction of contingency fees would broaden the types of claim that would be funded, thereby enabling greater access to justice.

The deadline for submissions is 22 September 2017. The VLRC's final report is due by 30 March 2018.

## ENDNOTES

1. [Victorian Law Reform Commission, \*Access to Justice - Litigation Funding and Group Proceedings\*, Consultation Paper \(July 2017\).](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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