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Victorian Law Reform Commission

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**ASA SUBMISSION: ACCESS TO JUSTICE—LITIGATION FUNDING AND GROUP PROCEEDINGS: CONSULTATION PAPER**

Dear Sir/Madam

The Australian Shareholders' Association (ASA) represents its members to promote and safeguard their interests in the Australian equity capital markets. The ASA is an independent not-for-profit organisation funded by and operating in the interests of its members, primarily individual and retail investors, self-managed superannuation fund (SMSF) trustees and investors generally seeking ASA's representation and support. ASA also represents those investors and shareholders who are not members, but follow the ASA through various means, as our relevance extends to the broader investor community.

The ASA has not commented on all sections of the consultation paper, *Access to Justice—Litigation Funding and Group Proceedings*. We have responded to one section only — the section on the ban on contingency fees for legal services, particularly as it relates to class actions.

The Productivity Commission's report *Access to Justice Arrangements*[1] notes that "a well-functioning civil justice system serves more than just private interests — it promotes social order, and communicates and reinforces civic values and norms. A well-functioning system also gives people the confidence to enter into business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia's economic performance."

[1] Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 5 September 2014

The ASA is in agreement with the Productivity Commission that a well-functioning civil justice requires access to avenues for dispute resolution which are affordable and lead to quick resolution (and are beyond the scope of alternative dispute resolution or other arbitration regimes); the provision of a range of legal services that are proportionate to the problems experienced, easy to access and treat people fairly; and affordable services to ensure that access to justice is not contingent on personal wealth.

The ASA has publicly (but not financially) supported Australian class actions where companies have failed in their corporate governance and shareholders have not received redress for the losses they have suffered. We see class actions as helping to provide for access to justice for shareholders who would not otherwise be able to access legal assistance to secure redress for corporate misconduct. Class actions can assist in creating a more 'level playing field' between plaintiffs and very large, well-resourced corporate defendants. The Australian Securities and Investments Commission (ASIC) is on the public record as noting that class actions are a complementary private enforcement activity to its own regulatory role.[2]

The ASA has received distributions in five settled class actions, which were ordered by the court and not sought by the ASA. The distributions have been applied to the education of investors, to assist them to make more informed financial decisions. Professor Vince Morabito references this in his fifth tranche of empirical data on class actions in Australia.[3] The ASA has not been directly involved in proceedings.

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[2] Greg Medcraft quoted at Australian Institute of Company Directors lunch, 25 June 2014 as reported in 'ASIC targets financial advisers', *AFR* and 'ASIC backs private litigation', *Money Management.* In the AFR: "Mr Medcraft said class actions backed by litigation funders was a welcome development that complemented what ASIC did and the regulator may in some cases directly support such actions" and in Money Management: "In terms of our own resources, personally being a free enterprise person, I'd rather people deal with the issues between themselves than actually involve ASIC. That's where I see class actions as a good development, because if the market decides there's something they want to take on, rather than coming back to the public purse, to me it's part of market efficiency. …The strategy is that if the private sector is willing to take on, for example a compensatory action, then our job is to try and use the resources we have the most effectively we can. If in fact private litigation can achieve an outcome that we might have done previously, then we should let the private litigation pursue that outcome, because we can use those resources to devote to another area.". Also, 'Regulators are ready for action', *AFR*, 31 March 2012 quotes Greg Medcraft, Chairman, ASIC at an AFR legal conference on 31 March 2012: "I think class actions are very good at equalling up the tables . . they democratise access to the law."

[3] Morabito, V, *An empirical study of Australia's class action regimes, Fifth report: The first twenty-five years of class actions in Australia*, July 2017. "the GIO shareholder class action was the country's first successful shareholder class action. It was also the first class action settlement where a contradictor was appointed to assist the Court.44 The GIO settlement was also, to my knowledge, the first class action settlement to authorise a cy-pres measure. It provided that some of the undistributed residue of the settlement fund could be paid to the Australian Shareholders' Association or the Australian Institute of Management (for the purposes of training its corporate officers and directors). I am only in the early stages of an empirical study of provisions in class action settlement distribution schemes, or orders made after the judicial approval of class action settlements, that deal with the "destination" of the residue of settlement funds. But I have already discovered that in at least 18% of all settled class actions, the relevant

At present, shareholder class actions are generally funded by a third party — litigation funders. The consultation paper notes that "The Commission was told during informal consultations that as few as one in 20 claims considered for funding may be selected. IMF (Australia) Ltd (now IMF Bentham Ltd), for example, has said that it funds claims that … are likely to resolve for an amount in excess of $5 million (for a single claim) and $30 million (for a class action)".[4]

As the body representing individual shareholders, the ASA is concerned that some meritorious class actions are not being undertaken by litigation funders, given the commercial decision that there is insufficient prospective return on investment. While we appreciate the demands of commercial decision-making, given that individual shareholders are unlikely to be able to take legal action in response to corporate misconduct, we are of the view that access to justice is constrained under the current regime.

Moreover, the amount being charged by litigation funders as their commission for funding claims has been, in some actions, quite high, as there are at least two separate entities (the funder and the lawyer), each of whom must make a profit. In a class action, this will see a client pay between 25 per cent and 40 per cent of the negotiated or court-ordered settlement proceeds in funding commission together with another percentage paid to legal fees.

We are therefore in agreement with the Productivity Commission's recommendation in its report *Access to Justice Arrangements* that the prohibition on contingency, or damages-based billing, be removed, subject to certain consumer protections such as comprehensive disclosure requirements and percentages being capped. Also, as recommended by the Productivity Commission, contingency or 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 ASA is of the view that the removal of the ban on contingency billing would:

- allow smaller scale class actions of merit to be tested in the legal system, which would increase access to justice
- improve the accountability of directors, executives and professional advisers to shareholders
- result in greater returns to group members, as the overall costs to the consumer are likely to be substantially less than the combined costs of a third-party funder and lawyer
- encourage more plaintiffs to mount a more financially marginal but otherwise worthy case.

The ASA's in-principle support for contingency billing is subject to the maintenance of Australia's loser pays costs rule and constraints on percentage recoveries. This is how contingency billing was

agreements or orders envisaged the payment of the residue of the settlement fund to persons or entities other than the defendants/respondents including (in addition to the two organisations mentioned above) …"

[4] IMF (Australia) Ltd, *Submission No 103 to Productivity Commission, Access to Justice Arrangements*, 18 November 2013, 5.

introduced in the UK and Canada, providing the example of how such constraints prevent an explosion of 'frivolous' claims.

Constraints on percentage recoveries provides certainty to group members about what will be distributed to them and aligns the interests of the lawyers and clients. For example, if the contingency fee was set at 25 per cent, group members would have certainty that 75 per cent of proceeds would be distributed to them. We note, for example, that the law firm Maurice Blackburn has established that "In a sample of 10 funded cases run by Maurice Blackburn, close to an additional $90 million would have been returned to group members if those cases were run on a flat, all-inclusive 25 per cent contingency fee basis".[5]

The Law Institute of Victoria, in its paper *Percentage-Based Contingency Fees: Position Paper*[6]*,* states that it views contingency billing as improving access to justice, noting that "Removing the prohibition on law practices charging contingency fees would facilitate access to justice by providing another method by which legal costs can be agreed upon, thus enabling some claims to be brought which would otherwise not be brought due to lack of funding".

The Law Institute of Victoria has long advocated for the introduction of contingency fees, noting that it will increase access to justice by people who do not qualify for legal aid and cannot afford to pay legal fees upfront. Its reasons for supporting the lifting of the ban on contingency billing are that it enables meritorious matters that are not able to be funded by the client alone to be funded; aligns costs to outcomes rather than hours spent working on the matter; clarifies legal costs for the client; and provides an incentive to law firms to resolve matters efficiently. Moreover, the Law Institute notes that contingency billing is already being used by litigation funders.

Concern has been expressed that contingency fees create conflicts of interest between the lawyer's fiduciary duty to the client and their financial interest in the outcome of a case. However, the ASA agrees with the Productivity Commission that it "is unconvinced that any perverse incentives inherent in damages-based billing are more pronounced than those embodied in conditional billing." Lawyers already have a financial interest in the outcome of the case under conditional billing. Conditional billing is charged on an hourly rate, which can provide an incentive to over-service. Contingency billing removes this incentive and creates an incentive to achieve the largest pay-out in the shortest possible time. Hourly rates become irrelevant as a contingency fee (or damages-based fee) sees the lawyer receive an agreed percentage of the amount recovered by the client.

**Conclusion**

The ASA is of the view that removing the existing prohibition on law firms charging contingency fees (except in areas where contingency fees would be inappropriate, including personal injury, criminal

[5] Maurice Blackburn, *Response to Productivity Commission Access to Justice Arrangements Issues Paper*
[6] Law Institute of Victoria, *Percentage-Based Contingency Fees: Position Paper*, Released 17 February 2016

and family law matters) would assist to mitigate the issues presented by the practice of litigation funding.

Our support for the removal of the prohibition on contingency billing is subject to:

- constraints on percentage recoveries — the contingency fee should be capped at 25 per cent
- the maintenance of Australia's loser pays costs rule, and
- it being used on its own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).

Please do not hesitate to contact us should you wish to discuss our submission.

Yours sincerely

Judith Fox
Chief Executive Officer
Australian Shareholders' Association