ROD BARTON MP
Member for Eastern Metropolitan Region
Parliament of Victoria | Legislative Council

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
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Canberra ACT 2600

By email:

To the Parliamentary Joint Committee on Corporations and Financial Services,

Thank you for the opportunity to provide input to the Committee's inquiry into litigation funding and the regulation of the class action industry.

My contribution stems from my background as a hire car driver with 30 years in the business and my term as recent past president of Transport Alliance Australia (TAA, 2014-2018), then known as Commercial Passenger Vehicle Association of Australia (CPVAA).

I write to you now as an elected member of the Legislative Council in the Parliament of Victoria and Leader of the Transport Matters Party.

My position is somewhat unique in that I am one of relatively few people who has been through the process of bringing a class action for a group of people who have been wronged. I have led the charge on behalf of my constituents to seek a way to pursue justice for my taxi and hire car industry colleagues that have had their livelihoods trashed unfairly by big business.

The Transport Matters Party evolved out of what I increasingly saw throughout my time in that industry as a need to ensure that individuals and small business owners don't get trampled on by powerful entities out to damage their livelihoods and wellbeing.

Transport Matters was born out of a belief that everybody – regardless of your wealth or position of power – should have proper representation of their rights and their issues in society, including in politics.

Along with around 7,000 other affected people, I am a participant in a class action to pursue the type of justice that I think we deserve for what we have suffered as a result of the misconduct of a corporate interest.

Specifically, the class action claim developed and brought forward by my colleagues and I is against Uber for lost income and loss in licence values for participants in the taxi and hire car / limousine /

charter vehicle industries during the period in which Uber and their driver partners traded without the proper regulatory approvals, permissions and licencing.

The idea, which now forms the basis of the class action, was formed a long time before there was even any prospect of a claim getting filed and getting to court. The reality for individuals who pursue this type of justice is a long, hard journey just to get to the starting line.

If you are fortunate enough to find good, helpful advice, as I was, there are many thresholds and hurdles that even a potentially strong class action must overcome before even the best firms can get a case off the ground. This is partly because the cases are large, expensive, hard to run and hard to win – and if you lose (unlike in the USA), we here in Australia have a 'loser pays' model where those that bring a class action are on the hook not only for the millions of dollars of their own costs that they have to plough into a case just to keep up with well-resourced defendants, but they are also on the hook for the costs of the opposing side. Furthermore, it is the lead plaintiff who must bear that burden alone.

Due to cases being so expensive to run, and so laden with risk, many only get off the ground with the financial support of a litigation funder. These litigation funders enable cases to see the light of day, but it comes at a price. For indemnifying the lead plaintiff and paying all or most of the case costs along the way, these funders understandably expect a return on their money in the event of a successful outcome down the track.

That commission is typically around 30% or more of what is often a settlement amount in successful cases. In addition to this commission, the lawyers who actually run the case have to get paid for their work. Together, the two compulsory fees often sum to around 50% of the total resolution. That is 50% of any settlement goes straight out the door before any money can be given back to the people who need it most, the individuals that have suffered.

While the proportion of the overall settlement that is ultimately received in compensation is not ideal, this outcome is a lot better than what happens in many other cases that have merit but may not stack up as being financially viable – they don't ever get a chance to see the light of day. Those people who feel they have been wronged and wish to pursue justice are left with no real avenue to mount their case – the financial burden and risk is simply prohibitive.

A Bill currently sitting before the Victorian parliament is an important piece of legislation (Justice Legislation Miscellaneous Amendments Bill 2019) that proposes to change all of that by removing the ban on contingency fee billing in class action lawsuits. This would ensure more people can access the courts by making the pursuit of legal rights more affordable. It does so by introducing the option for lawyers in class actions to simplify how clients are charged and bill on a contingency fee basis. This would ensure that when people access legal help and are successfully compensated, more of their recovery than ever before will go back in their own pockets.

This Bill has been developed in recognition of the many independent and expert opinions already formed by multiple reviews into this area of law – all drawing the same conclusion that this is a sensible and prudent reform and one that should be enacted.

Removing the ban on contingency fee billing has been strongly endorsed and recommended by no less than three independent peak bodies that have considered this matter since 2014.

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First, the Productivity Commission, which in its 2014 Access to Justice Arrangements report looked into the economics of how justice could be better served via class actions, made a clear statement on lifting the ban on contingency fee billing in Australia.

In Chapter 18 of that report, the recommendation was this:

> *The Australian, State and Territory Governments should remove restrictions on damages-based billing (contingency fees).*

The Productivity Commission had examined the evidence and found that a contingency fee model would lower the costs to consumers, increase returns and ultimately facilitate better access to justice.

Then came the review undertaken by the Victorian Law Reform Commission. Tabled in parliament in June 2018, the Access to Justice: Litigation Funding and Group Proceedings Report recommended changes to increase access to justice for class action litigants.

This, the report said, could be achieved by regulating litigation funding at a national level, lifting the ban on contingency fees and increasing the Victorian Supreme Court's role in managing class actions.

At point 33 of the Executive Summary, the report notes that:

> *As a matter of principle, the Commission considers that lawyers should be able to charge contingency fees, as it provides another avenue of funding for clients who may be otherwise unable to pursue proceedings due to the cost.*

Most recently was a Federal review into the same issues around class actions, how they work and how they can work better. The Australian Law Reform Commission (ALRC), headed by Justice Sarah Derrington who was appointed by George Brandis, also found that on the evidence, contingency fee billing would improve conditions for class action clients compared to the current situation.

In Chapter 7 of the ALRC report, Solicitors' Fees and Conflicts of Interest, recommendation 17 clearly says:

> *Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.*

Cost should be no barrier to people of all means being able to access justice. Justice and the law should not just be for the wealthy and the powerful, justice is for all. The proposed changes to the way in which class action lawsuits may be funded and billed will go a long way to unlocking access to justice for more Victorians. It will be better for the people trying to protect their rights, and it will do more to address the behaviour of bad businesses and organisations.

Even for those class action cases that do proceed with a litigation funder, it is clear why three respected independent reviews have found that there must be a better way. The current Bill before the Victorian state government seeks to address this by opening access to the courts by making it more beneficial to those seeking justice via a class action

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In the class action I am part of I can say with absolute certainty that the group members in that matter, whilst hugely appreciative that a class action specialist law firm and a litigation funder believed enough in us, our struggle and the strength of the case to pull everything together that is needed to pursue it, it would have been a whole lot simpler and would be a whole lot cheaper for us if legislation was in place to allow a simple contingency fee split between lawyer and client as opposed to the complicated arrangements we've had to use just to get the case off the ground.

Many of my constituents and many members of this action have limited language skills and limited education. Imagine the difficulty they've had in wading through dense funding agreements with endless clauses and complicated funding arrangements that shift depending on a wide range of factors.

Instead, we could have had a simple split that everyone understood where the lawyers that run the case are entitled to say, 20 or 25% for their work, and we know we are getting 75 or 80% of whatever the return may be upon success. That is clearly a simpler equation for people and it would leave us much better off financially.

The proposed changes to Victorian legislation also ensures the interests of group members of the class action and the interests of the lawyers are more aligned than ever. It would create an environment whereby the lawyers are incentivised to achieve better results faster rather than potentially just billing more. It would expose lawyers running class actions to greater financial risks and only enhances the mitigating effects of questionable case selection and prosecution. It would also promote a more efficient resolution that could see more money back to those that have suffered faster.

Aside from the very clear benefits that this simple legislative change will enable, delivering on the recommendations made by the VLRC to the Government, the Bill ensures there are very important safeguards at play to provide the Courts with appropriate controls and oversight of class actions and the contingency fee arrangements, so as to avoid some of the supposed consequences those opposed to it are fearful of.

Safeguard 1: Contingency fees will only be permitted in class actions
This is not a widespread introduction of contingency fees but specifically limited to the area of legal practice where they will provide the most benefit and be subject to the most control.

Safeguard 2: Contingency fees will only be permitted if approved by the Supreme Court Under the Bill the Supreme Court has the ultimate powers to decide if there should be a contingency fee and to set it at an appropriate level.
The Supreme Court already has extensive power over the conduct of class actions and exercises it regularly and appropriately – having that powerful check and balance is crucial.

Safeguard 3: Contingency fees will only be permitted where the lawyer has agreed to pay the defendants' costs if the class action losses.
A plaintiff lawyer's interest in careful merit investigation and case selection is even stronger in the context of contingency fee arrangements because the lawyer would not only be unremunerated for their work if the case fails, but also face the prospect of paying an adverse costs order, a risk that runs into the millions of dollars.

Opposition to these legislative changes also centres around the notion that they may clog the resources of the courts. However, one of the primary reasons we have a properly functioning class

action mechanism is because it helps resolve large disputes in a more efficient manner. Can you imagine what a drain on the courts it would be if there were 7,000 individual claims to manage instead of one class action?

As things stand, there are only a handful of class actions run in Victoria in any given year, and even if this were to rise as a result of more people being able to have worthy cases heard, the numbers of cases are still extremely low. The legislative change is a response to the independent research showing that if anything, the Victorian regime is under-utilised at the moment, meaning too many people are locked out of the justice system when they need it.

Another common argument put by those opposed to the legislative change is that class actions will hurt investment and business. The class action regime has been around for 28 years and in that time, the only businesses to suffer from it are those that have broken the law and inflicted mass harm on people by selling dodgy products, providing deceptive investment advice or those complicit in negligent behaviour leading to devastating floods and fires, among other things.

The Bill will be bad for businesses that rip off consumers and businesses that sell faulty products that maim, injure or worse. Conversely, it will actually be good for all those businesses who do the right thing, who want to treat their customers and suppliers fairly and who take their safety obligations seriously. By helping hold wrongdoers to account the Bill will help good businesses.

On this point about the impact of class actions on businesses, the facts show that less than half of one per cent of ASX-listed companies have faced shareholder class actions in any given year.

The alternative is to allow unscrupulous corporate conduct to flourish unchecked. There are now countless examples from the Financial Services Royal Commission which show just how dangerous this would be.

This is also the view of one of the world's leading authorities in this area, eminent US judge Jed Rakoff. While he was in Australia talking about corporate conduct issues in 2015, he spoke to Fairfax Media and said "*Class actions and suits brought by regulators help the economy because the public's trust in the honesty and fairness of financial markets is one of the 'greatest assets' a nation can have*".

Class actions are a very important way for people to access the justice system. If the class actions system did not exist, I would not have been able to pursue my rights over the damage that was done to me.

It is important that any changes to Australia's class actions system are for the benefit of the victims of poor corporate behaviour, not for the benefit of those that caused the damage.

Yours sincerely,

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