
28 May 2014

Access to Justice
Productivity Commission
GPO Box 1428
Canberra City ACT 2601
By email: access.justice@pc.gov.au

Dear Sir/Madam,

Re: Productivity Commission Draft Report on Access to Justice Arrangements

The Liability Reform Steering Group (LRSG) welcomes the opportunity to contribute to the consultation process in relation to the Productivity Commission's April 2014 Draft Report on Access to Justice Arrangements (the Draft Report).

The LRSG represents a range of professional associations and professional firms on professional liability issues. The LRSG currently includes representatives of the Australian Institute of Architects, Consult Australia, CPA Australia, Engineers Australia, the Institute of Chartered Accountants Australia, the Law Institute of Victoria, the Law Council of Australia, Professions Australia and representatives from numerous large professional services firms.

The LRSG was first convened in 2002 to share information on the deteriorating state of the professional indemnity (PI) insurance market and the detrimental consequences of this for professionals and consumers, and to advocate for legislative reform measures to alleviate market failure in PI insurance. Subsequently, Australian governments passed a package of reforms including proportionate liability and professional standards legislation to address market failure in PI insurance.

Since 2002 the LRSG has continued to monitor the progress of reform on these matters and emerging issues. The increasing incidence of private funding for litigation is one such issue. As such, we limit our comments on the Draft Report to Chapter 18 only, and specifically to the Commission's Recommendation 18.2, which states:

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

The LRSG supports this recommendation.

As acknowledged in the Draft Report, there are arguments both in support and in opposition to third party litigation funding. Those in support note that it can assist access to justice and deliver better outcomes for some plaintiffs. Those opposed note that it can lead to the advancement of unmeritorious actions, add to cost and delays in the legal system, lead to significant conflicts of interest, potentially disempower some potential or actual plaintiffs, divert director and management attention and effort within business to defensive rather than productive effort, potentially encourage an overly risk-averse business and professional service culture, and potentially increase the cost of business and professional indemnity insurance premiums (and in a hard insurance market, make insurance¹ increasingly difficult to obtain for some businesses).

In the absence of categorical answers on these matters, the LRSG supports as a first step the introduction of a comprehensive licensing regime for private litigation funders, backed by appropriate capital adequacy requirements and accompanying public reporting and disclosure mechanisms on appropriate and agreed metrics. A licensing and reporting regime under ASIC will help provide the information needed to evaluate the economic costs and benefits of third party litigation funders and the contribution that they may (or may not) make to our community.

We would welcome the opportunity to contribute further to public consultation on these matters through Treasury and ASIC as recommended by the Commission and in anticipation that the Draft Report's Recommendation 18.2 is accepted.

On behalf of the LRSG, I appreciate the opportunity to comment on the Draft Report. If you require any further information, please do not hesitate to contact me

Yours sincerely,

Chris Hall
Chairman, Liability Reform Steering Group

¹ There are many points additional points of difference in the comparison cited in the Draft Report at p.534 between the service litigation funders provide to plaintiffs compared to that provided by insurers for defendants. Most significantly, whilst insurance is purchased by a potential defendant for its own protection (and/or legal requirement), the benefit of that insurance cover is also shared by the class of potential plaintiffs, as the existence of insurance assists actual recovery of damages by consumers and other potential plaintiffs. There is no similar direct or incidental benefit that third party litigation funders provide to the class of potential defendants.