VICTORIAN LAW REFORM COMMISSION

LITIGATION FUNDING AND GROUP PROCEEDINGS

SUBMISSION BY THE SUPREME COURT OF VICTORIA

October 2017

OVERVIEW

This submission

The Supreme Court of Victoria makes the following submission to the Commission's review of Litigation Funding and Group Proceedings. These are based on its experience in the management of class actions and the Court's commitment to facilitate access to justice through the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The topics raised by the consultation paper released by the Commission concern a number of issues which properly fall within the realms of policy determination by Government. The Court will not address these matters.

Management of class actions in the Supreme Court

The Supreme Court of Victoria is the only Victorian Court in which class actions can be filed. The Court now has nearly two decades of experience managing class actions. The framework under which this operates includes:

- Part 4A of the *Supreme Court Act 1986* (SCA)
- *Civil Procedure Act 2010* (CPA)
- *Supreme Court (General Civil Procedure) Rules 2015* (the Rules), in particular Order 18A
- Practice Note SC Gen 10 - Conduct of Group Proceedings
- The Court's overall case management structure, including the management of cases within specialist lists in the Commercial Court and Common Law Division.

Differential case management is at the heart of the Court's approach to fulfilling the overarching purpose of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute. Whilst class actions share

a common procedural form, the nature of those proceedings is hugely diverse. Each case requires individual management adapted to its peculiar features, such as proceedings involving:

- A large class where the identity of each individual is at the time of commencement unknown or a small class of clearly identifiable individuals
- A single defendant or multiple defendants
- A complicated factual basis or relatively straight forward proceeding
- A class of individuals with litigation and commercial experience seeking redress in relation to commercial dealings or a class of individuals with personal injuries who have never previously engaged with the court system
- A litigation funder or where the plaintiff's lawyers are acting on a contingency basis

Class actions do not lend themselves to a single prescriptive approach. The Court has deliberately maintained significant flexibility in its class action practice.

Supporting best practice

The Court has put in place systems which enhance the efficient management of class actions, as part of the ongoing transformation of judicial and registry support, to a more closely integrated model. The Class Actions and Major Torts Co-ordinator and the Commercial Court Class Actions Coordinator serve as contact points for the public and the profession. They also support the judicial management of class actions in each Division, by working directly with members of the Court. These resources allow for the best use to be made of judicial time in the management of proceedings, and also assist in saving time for practitioners and facilitating registry processes.

These positions are not exclusively devoted to class action proceedings and encompass other duties. When there are a number of class actions before the Court at one time resources are stretched and the Court is unable to provide the same level of support. In periods of intensive activity in large class actions (during trial or significant interlocutory applications) the Court has sought to find ways to devote additional resources to support the efficient conduct of those matters. This has often involved dedicating research staff and/or additional associates or paralegals to particular cases. This has been a highly effective means of allowing rulings to be delivered quickly and thereby ensuring the continuing progress of the case. However, it results in a reduction of the availability of research staff and associate assistance in other areas.

Adequately resourcing the Court to enable the recruitment of additional legally qualified staff, to support the judiciary and to provide better service to

parties and the profession, is a worthwhile investment. It would reduce the overall cost of class action litigation and improve access to justice.

The Commission has identified that effective communication to class members is critical to the protection of their interests and their ability to make informed choices. Opt-out notices and notices of settlement approval hearings are widely circulated and appear on the Court website. However, additional resources within the Court could be used to develop tools to improve communication in the context of class actions. For example this could extend to:

- developing more accessible explanations of the class action process for potential group members in user friendly formats, utilising modern technology;
- developing templates for use during the opt out process that could then be adapted by practitioners for individual cases; and
- enhancing digital communication in the context of class actions.

CERTIFICATION

The Commission's consultation paper[1] asks whether a certification requirement should be introduced into Part 4A of the SCA for all class actions specifically or for those supported by litigation funders.

Chapter 6 poses the following questions:

13. Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate?
    (a) introduction of a pre-commencement hearing to certify that certain preliminary criteria are met
    (b) legislative amendment of existing threshold requirements under section 33C of the *Supreme Court Act 1986* (Vic)
    (c) placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met
    (d) other reforms.
14. Should the onus be placed on the representative plaintiff to prove they can adequately represent class members? If so, how should this be implemented?

The Court is of the view that the existing threshold criteria should not be altered. In summary, the introduction of a certification regime would

[1] *Access to Justice – Litigation Funding and Group Proceedings* consultation paper VLRC, July 2017.

produce no tangible benefits. It would add an additional compulsory step in every class action increasing the cost to all litigants and would inevitably place added demands on the Court, requiring it to seek additional resources. It would potentially delay the progress of proceedings adversely affecting many Victorians who have suffered injury, property damage or financial loss as a result of alleged breach of duty (statutory or common law). The current system is capable of preventing unmeritorious claims, and contains adequate protections for both group members and defendants. It also aligns directly with three cognate Australian jurisdictions.

Current system promotes access to justice

There is no evidence (empirical or otherwise) that the current provisions of Part 4A of the SCA either operate unfairly or are open to abuse by plaintiffs in group proceedings in this Court. This year Professor Vince Morabito wrote in *25 years of class actions in Australia*:

> Jane Caruana and I conducted an evaluation of this decertification model with respect to every federal class action filed in the first 17 years of the operation of the Part IVA regime.[2] The data we collected revealed significant differences between the perceived operation of this regime and its actual operation. In fact we found no evidence of claimants taking advantage of this absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly and/or efficiently through the class action regime.[3]

This conclusion is reflective of the experience of judges, both in the Commercial Court and the Common Law Division. Certainly none of the judges who have regularly handled class actions believe there is any need for amending the criteria contained in ss 33C, 33D or 33H of the Act which regulate the issue of class action proceedings.

The question of certification was considered by the Law Reform Commission when the *Federal Court of Australia Act 1976* (Cth) (FCA) was amended by the insertion of Part 4A of the Act in 1992. The formulation of the class action regime was carefully considered by an eminent body of jurists and it was determined, after (it would appear) considerable thought, not to follow the United States Federal Rule 23 certification process. Rather, it introduced a variant which, in effect, placed the onus on a defendant to decertify by application asserting non-compliance with s 33C or s33H of the Act or

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2 Vince Morabito and Jane Caruana, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal Comparative Law* 579, 614.

3 Vince Morabito 'The First 25 Years: Has the Class Action Regime hit the mark on access to Justice' in Damian Grave and Helen Mould (eds) (2017) *25 Years of Class Actions in Australia, 1992-2017, 54.*

alternatively, by application under s 33N to declass the proceeding.[4] This is consistent with the underlying theme (and the underpinning) of Part IVA of the FCA, namely, to improve access to justice for those who cannot afford to bring a claim on their own account. That rationale holds good today for Part 4A of the SCA.

Adequate protections in the current system

The lack of certification in relation to Part 4A proceedings (in this Court and its analogues in New South Wales and Queensland jurisdictions) is a distinctive feature of the Australian regimes – in contrast to the United States[5] and Canada. However there are devices within and outside Part 4A open to defendants and Courts faced with an unmeritorious, non-compliant or unsuitable class actions.

- Within the scheme itself, s 33N provides defendants with the means by which to endeavour to 'declass' a class action.[6] In addition, there are the commencement requirements of s 33C and that of s 33H which stipulates that the endorsement to the writ commencing the proceeding contain details identifying the group members to whom the proceeding relates, a specification of the nature of the claims made and the relief claimed, and an outline of the common questions of law or fact of the claims of the group members. Section 33T allows for the substitution of a representative plaintiff.
- Parties can invoke traditional remedies to terminate a proceeding. Applications can, and have, been made on the basis of abuse of process under the Rules.[7]
- There is also the capacity to make an application on the basis of contravention of the obligations under s 18 of the CPA if it is considered that there is no proper basis for the proceeding. The CPA imposes obligations on practitioners and litigation funders to further the aims of that Act including minimising delay, narrowing the issues in dispute and taking steps to facilitate the resolution/determination of proceedings and not raising claims without proper basis or those that are frivolous, vexatious or an abuse of process.[8]
- In addition, under the CPA , the Court has power to make any orders or appropriate directions pursuant to the overarching purpose in the pre-trial stage of a case.[9] This is also reflected in s 33ZF of the SCA

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4 See for example *A.S v Minister for Immigration & Ors* [2017] VSC 137 and the decision below.

5 E.g. *United States Federal Rules of Civil Procedure* 23.

6 See for example applications in *Wong & Anor v Silkfield Pty Ltd* [1998] FCA 27; *Giles v Commonwealth of Australia [2014] NSWSC 83; AS v The Commonwealth* [2017] VSC 137, *Bright v Femcare Limited* [2002] ALR 574.

7 E.g. *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187.

8 CPA, ss 18, 19, 23 and 25.

9 CPA s 48.

empowering the Court to the make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.

- The role of judicial case management is important in ensuring that claims are managed and monitored closely – that is the practice in the Supreme Court. The contours of class actions are intended to be identified as early as possible. Indeed, case preparation steps have informally created a system of "quasi-certification"[10] by virtue of the Supreme Court's group proceeding Practice Note.[11] It provides for the fixing of a first case management conference within 6 weeks of the date the writ was filed to identify as soon as practicable questions relating to common issues in an informal exchange between the managing judge and legal representatives.[12] At the initial case management conference, the parties are expected to outline any facts in dispute, whether expert evidence is required at trial, if the matter is referrable to alternative dispute resolution[13] and any other potential interlocutory questions.[14] This process is preferable to a certification process as it is a process which encourages cooperation rather than creating an adversarial contest. It addresses the issues at an early point of time which need to be addressed rather than requiring a determination of what in many cases will be a non-issue.

Taken as a whole, these remedies and practices provide sufficient armoury for the Court and defendants if there is any concern about the legitimacy of a class action or the adequacy of its form, without the need for any additional process.

The Court is not convinced that introduction of certification (whether as a rule or statutory provision) would carry any real benefit to class action management in this State.

Empirical data gathered by Morabito and Caruana indicates that Australia's 'decertification' model does not unfairly impact defendants.

The Court endorses the conclusions of Justice Bernard Murphy and Professor Morabito:[15]

> The Part IVA regime and its State counterparts have provided a flexible and adaptable procedure for dealing with mass civil claims which has provided practical access to justice for an enormous number of claimants of many kinds or types, and allowed them to bring cases based in diverse causes of action

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10 Michael Legg, 'Class Actions, Litigation Funding and Access to Justice' (Speech delivered at the Australian Centre for Justice Innovation, Monash University Law School, Melbourne, 7 September 2017), 3.

11 Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions)* ('Practice Note').

12 Practice Note [5.3], [5.5] and [5.6].

13 Practice Note [5.7].

14 Practice Note [5.8].

15 The Hon Justice Bernard Murphy and Vince Morabito 'The First 25 Years: Has the Class Action Regime hit the mark on access to Justice' in Damian Grave and Helen Mould (eds) (2017) *25 Years of Class Actions in Australia, 1992-2017*

> arising out of a huge range of circumstances. In most cases the claimants would have been unable to bring their claims before the courts if the class action mechanism was not available to them, and many of them have enjoyed significant success in doing so. Notwithstanding the financial and technical barriers to the use of the class action procedure, we would describe the access to justice provided through the regime as broad-based and substantial. In our view there can be no doubt the regime has significantly enhanced access to justice.

All indications are that this aspect of the regime is operating well and in a sustainable fashion.

Problems with certification

Certification procedures, such as those in the United States, are significant, protracted and often, despite protests to the contrary, invoke a consideration of a plethora of earlier decisions in determining whether to grant or deny certification. It is, in effect, a large case within an even larger case. There are delays and often appeals concerning certification or denials of certification.

The ALRC Report[16] in rejecting certification as part of the Australian class action system, noted that certification proceedings had often been:

> more complex and taken more time than the hearing of the substantive issues…these expenses are wasteful and would discourage use of the procedure.

Importantly, the ALRC Report concluded that certification hearings do not always achieve the objective of protecting class members; other mechanisms being better suited.[17]

Duplicated class actions

As the Australian class actions system does not certify a group proceeding as a first step, it is possible for multiple group proceedings to be commenced if the pre-conditions contained in ss 33C and 33H of the Act are satisfied. However, there are a number of mechanisms that can be employed to address that situation.[18] Certification does not necessarily offer a solution.

Although duplication is possible at a State level, this has not to date occurred in this Court.

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16 Law Reform Commission (as it then was), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) ('the ALRC Report'), 63.

17 Ibid 63-64

18 See for example the options explored in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, see also Michael Legg, 'Class Actions, Litigation Funding and Access to Justice' (Speech delivered at the Australian Centre for Justice Innovation, Monash University Law School, Melbourne, 7 September 2017), 6.

Divergence from the cognate approach to class actions in Australia

The introduction of a certification regime would potentially dislocate the cognate nature of the class action regimes in this country. Sensibly, State legislation mirrors (almost entirely) the federal model, allowing learnings in the federal sphere to be translated to the State sphere and vice versa. There is a constant cross-pollination of decisions and principles derived from those decisions. To, in effect, 'go it alone' and introduce a certification regime in this State that is not present in other jurisdictions has the potential to undo the harmony that currently exists between the jurisdictions. This may also encourage other jurisdictions to depart in different ways from the established model. This potential divergence is inconsistent with current legislative best practice to achieve Australian uniformity where practicable.

Any divergence with the current nation-wide system may also have the unintended and undesirable consequence of encouraging forum shopping. A certification regime would create a risk of a significant shift in class action proceedings to other jurisdictions; this would diminish the expertise available in Victoria in these matters.

If implemented Victorians who have suffered physical or psychiatric injury, property damage or financial loss (and cannot afford the costs of prosecuting their own claims) would face additional expense either in the costs of the certification process in the Supreme Court, or the additional costs associated with litigating in another forum. More importantly such a step has the potential to impair the access to justice for Victorians in their own court.

SETTLEMENT

Chapter 7 of the Commission's Consultation Paper poses, inter alia, the following questions:-

17. How could the interests of unrepresented class members be better protected during settlement approval?

18. What improvements could be made to the way that legal costs are assessed in class actions?

…

23. How could the management of settlement distribution schemes be improved to:

    (a) ensure that individual compensation reflects the merits of individual claims?

    (b) ensure that it is completed in a manner that minimises costs and delays?

…

25. Are there any other ways the process for settlement approval and distribution could be improved?

The Supreme Court Process on settlement approval and management

The process for applications for approval of settlement (and distribution of settlement funds) under s 33V and the subsequent supervision of the administration of settlement schemes in the Court is one that has evolved over time. It has grown in sophistication due to the need to adapt to complex scenarios.

A potential settlement is usually accompanied by a large amount of material relevant to liability and quantum with a proposal for distribution of the common fund. Notice is given to group members in a variety of ways (such as on a website, and provision of letters, emails and newspaper notices).

The principles that govern the exercise of the Court's power to approve a proposed settlement are well established and were set out in the recent ruling of Emerton J in *Williams v Ausnet Electricity Services Pty Ltd*[19]:

> The Court must consider whether the proposed settlement:
>
> (a) is fair and reasonable as between the parties having regard to the claims of the group members; and
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> (b) is in the interests of group members as a whole and not just in the interests of the plaintiff and the defendants.
>
> Whether a proposed settlement is fair and reasonable depends, among other things, on whether the Settlement Sum is fair and reasonable, and on whether the distribution of the Settlement Sum among group members pursuant to the Scheme is fair and reasonable.
>
> The Court must be independently satisfied of the fairness and reasonableness of the proposed settlement. It will not be sufficient to simply assess whether the opinions expressed by the plaintiff's legal advisers appear, on their face, to be reasonable.
>
> The almost complete absence of substantive objections to the settlement cannot relieve the Court of its obligations. Nevertheless, the assessment which the Court is able to make can ultimately be no more than one which confirms whether or not the proposed settlement is within the range of fair and reasonable outcomes. Importantly, in making such an assessment, the relative prospects of success can only be broadly gauged.

[19] [2017] VSC 474, [31].

In considering whether the proposed settlement of a class action falls within the range of fair and reasonable outcomes, the Court will consider the following:

(a) the complexity and duration of the litigation;

(b) the reaction of the group to the settlement;

(c) the stage of the proceeding at which the settlement is proposed;

(d) the relative risks of establishing liability;

(e) the relative risks of establishing loss and damage;

(f) the risks of continuing a group proceeding;

(g) the ability of the defendants to withstand a greater judgment and the range of reasonable outcomes governing the settlement in light of the best feasible recovery;

(h) the range of reasonableness governing the settlement in light of all the attendant risks of litigation on the one hand, and the advantages of a settlement on the other; and

(i) the terms of any advice received from counsel and/or from any independent expert in relation to the issues that arise in the proceeding.

The use of a contradictor in the approval of settlement process is increasingly common. In some cases an opinion is provided by the lawyers for a Defendant to the Court to inform the process in addition to the usual opinion of counsel required of the plaintiff to justify the settlement.

Under the provisions of both the CPA and Part 4A, the Court has employed different mechanisms to ensure the lawyers charges for proposed legal costs to be recovered as part of the settlement and any ongoing costs associated with the administration of the settlement scheme are reasonable. Court appointed experts acting as special referees are one option that is utilised. Another is the referral of an issue to a Costs Judge or a Judicial Registrar of the Costs Court. There is scope to expand the Practice Note to incorporate reference to these options.

The Court has established mechanisms for the supervision of settlement distribution schemes. It should be noted that settlement distribution schemes vary considerably in their size and complexity. Those arising from cases in the Common Law Division can involve a complex case-by-case assessment of the loss suffered by an individual which may require a significant body of material to be considered. On the other hand, some Commercial Court settlement schemes can be very straightforward, utilising a formula or a

matrix, based on easily established facts. There is a considerable range in between.

Where a scheme requires ongoing supervision the administrator of the scheme is required to provide a report to the Court at least every six months. For large schemes requiring more intensive supervision, regular directions hearings are scheduled to allow any group member to appear and raise issues concerning the administration.[20] The Court publishes regular rulings and notifies group members about the progress of the administration. The Court requires a formal report by the administrator to be filed at the conclusion of the process.

Opt out and settlement notices

The current process of court approval of notices to group members seems to work well. Admittedly some notices – particularly of complicated settlements – can be lengthy and at times contain too much 'legalese'. However the Court has a role under ss 33X and 33V to supervise the settlement and to endeavour to ensure that the notices convey to the group members the relevant matters – be it relating to settlement or opt out. It is not perceived that there is any need to either legislate or introduce a rule relevant to this issue.

Approval of compromise

The Court does not see any need to alter the current practice. As Emerton J noted in *Williams*, the criteria for approval are well established and do not require a formulaic recitation.

The Court has found the contradictor process helpful in a number of cases. It sees value in including guidance about the use of contradictors in the practice note. This should however remain a flexible process. The use of a contradictor involves expense which can diminish the fund condition. In some cases the role of the contradictor may be best confined to specific issues that arise at the settlement (and not every aspect of it). For example, a contradictor may be asked to perform that role solely in relation to the detail of the settlement distribution scheme rather than the merits of the overall settlement. A contradictor may well be helpful on the issue of costs, of both the proceeding and the settlement.

Costs – the proceeding and administration of the SDS

Consideration of legal costs upon settlement can have two components: the recovery of legal costs incurred by the representative plaintiff and the prospective costs associated with the administration of the settlement distribution scheme. These issues require separate and close scrutiny. The

[20] See for example Mathews v SPI rulings no. 40-46.

question as to whether the costs claimed by the representative plaintiff's lawyers may be excessive is an issue. An example of the Court seeking assistance in respect of such a claim is *Williams*[21] in which the supervising judge referred the costs claim of the plaintiff's lawyers to the Costs Judge for consideration, ultimately resulting in a reduction in the claim made by the lawyers.

Then there are the particular administrative aspects of the settlement distribution schemes which need not attract fees based on the work of skilled solicitors – for example, much of the routine of a settlement administration can be carried out by paralegals. There is scope to contain costs in this regard and the Court needs to ensure it is in a position to oversee minimising the costs of settlement administration while ensuring the process will run efficiently and in a timely fashion in providing redress to group members.

The Court has a number of tools available to it to allow this to occur, including those noted above. Again inclusion of these within the Practice Note would be a flexible means of enabling the use of the mechanism best suited to the individual case. The use of members of the Costs Court is an attractive option, but it also poses some resource issues.

Administration of the scheme

Some settlement schemes, require complex individual assessments. It may be desirable to have a mechanism by which some disputed assessments can be reviewed by the Court. This would be confined to exceptional circumstances and only available if a dispute remained following the internal review process of the initial assessment (usually provided for in a Settlement Distribution Scheme). This would provide a final safeguard and contribute to the overall quality of the distribution scheme process, even if utilised only rarely.

The best means of implementing such a process is through its inclusion in the settlement scheme proposed for approval. Once a scheme is approved, the options for any further modification are limited. The Court would contemplate including this issue within the Practice Note.

[21] [2017] VSC 528, [2017] VSC 474.