



**Submission to the Australian Law Reform Commission
Inquiry into Class Action Proceedings and Third-Party Litigation
Funders
July 2018**

Introduction

1. Maddens Lawyers (**Maddens**) is South-West Victoria's largest law firm. Maddens' head office is located in Warrnambool. Visiting offices are located across South West Victoria (Colac and Terang) and in Melbourne.
2. Maddens practices across a range of disciplines including class actions, commercial law, property law, personal injury, employment and family law. Maddens' class action department consists of two principals and employs a further six solicitors as well as six support staff.
3. Maddens' exposure to major tort practice commenced in 1983 with the Ash Wednesday Bushfires. Our firm issued in excess of 400 individual writs in the Victorian Supreme Court on behalf of victims of the Ash Wednesday fires and recovered approximately \$40million of compensation.
4. Following the introduction of the Class Action regime in Australia, Maddens has acted on behalf of plaintiffs in respect of 8 class action proceedings that have been completed, including four of the 2009 Black Saturday Bushfires and the 2013 Springwood bushfire. We currently act on behalf of plaintiffs in respect of 10 class action proceedings that are actively being progressed in the Supreme Court of Victoria and the Supreme Court of NSW.
5. All bar one of the class action proceedings advanced by Maddens have involved gross damages claims of less than \$100million.

6. Each of the 8 concluded class actions, along with the 10 proceedings presently on foot have been advanced by Maddens on a 'no win, no fee' basis and in the absence of litigation funding.
7. Maddens is one of the most experienced class action firms in Australia and is proud to have facilitated access to justice on behalf of thousands of people. Inclusive of the Ash Wednesday Bushfires, Maddens have obtained in excess of \$100 million of compensation on behalf of approximately 2,000 victims of major torts.

Summary

8. Maddens' submission to the ALRC focuses upon the following Terms of Reference: -
 - a) The increased prevalence of class action proceedings in Courts throughout Australia, and the important role they play in securing access to justice; and
 - b) The importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards.
9. Maddens has considered the Discussion Paper released by the ALRC in June 2018 and is conscious of the increasing debate associated with competing class actions. We note that the increased incidence of competing class actions has been identified at paragraph 1.83 of the Discussion Paper as an emerging issue.
10. In the course of considering the challenges associated with competing class actions, it is important to examine factors likely to drive this anticipated trend. The emergence of extensive contractual clauses in policies of insurance with respect to insurers' rights of subrogation and recovery proceedings against third parties has (and is likely to continue to) result in an increase in competing class actions and/or an increase in multiple class actions arising as a result of identical or related events.
11. Further, contractual clauses in some policies of insurance directly impact upon the manner in which compensation from a third party wrongdoer will be distributed. It follows that these clauses will also impact upon the net recovery of plaintiffs and group members

The Doctrine of Subrogation

12. The doctrine of subrogation is an equitable principle. The doctrine applies to indemnity policies of insurance. The general rules of the doctrine are as follows: -

- a) the insurer acquires an equity of subrogation at the time the contract of insurance is entered into;¹
- b) the equity crystallises into a right of subrogation when indemnity is provided in respect of a loss covered by the policy of insurance;
- c) the rationale for the doctrine is to prevent double recovery;²
- d) in circumstances where the loss suffered by the insured is greater than the indemnity received under the policy of insurance, the insured has the right to bring a recovery action against a third party without interference from the insurer;³
- e) the insured must act equitably in respect of the insurer's equity and therefore will ordinarily be required to claim, and fairly prosecute, both insured and uninsured components of loss against a third party wrongdoer;
- f) where the insured acts equitably, the doctrine has no work to do unless and until the insured acts inequitably or obtains double recovery; and
- g) double recovery does not occur until the insured has taken full indemnification for his losses, plus indemnification for the costs associated with the recovery action. Only then, does the insurer's equitable right of subrogation support a charge on the balance of the sum. Accordingly, the insured holds the position of *dominus litis*.

13. The doctrine is not equivalent to a complete assignment of rights in the insurer's favour.

14. Any of the above general rules can be modified by agreement, including as part of the contractual terms of the policy of insurance entered into by the insured.

Dominus Litis

15. With respect to point 12(g), it is acknowledged that there is no clear Australian authority on the insured's position as *dominus litis* under the doctrine of subrogation.

16. The introduction of s.67 of the *Insurance Contracts Act 1984 (the Act)* which came into effect on 28 December 2013, goes some way to clarifying the position.

17. s. 67(3) of the Act provides that in instances where an amount is recovered by an insured then the insured is entitled to priority recovery of the full extent of their uninsured losses, plus their legal fees, prior to accounting to their insurer for any excess. Equally, s.67(2) of the Act provides that in instances where an amount is recovered by an insurer, in

¹ *Napier v Hunter* [1993] AC 713 at 737-8; *Insurance Commission of Western Australia v Kightly* [2005] WASCA 154 at [48]

² *AFG Insurances Ltd v Mayor, Councilors and Citizens of City of Brighton* (1972) 126 CLR 655 at 663.

³ *The Owners Strata Plan 66601 v Majestic Constructions Pty Ltd & Ors* [2008] NSWSC 735 at [18]

exercising its right of subrogation, then the insurer holds the position of *dominus litis* and is entitled to priority recovery with respect to the amount paid by the insurer, plus the insurer's legal costs incurred in connection with the recovery, prior to accounting to the insured for any excess.

18. The position under the Act can be modified by the specific terms of any applicable policy of insurance.

Modifications to the Doctrine of Subrogation and Dominus Litis.

19. Insurer's contractual terms with respect to subrogated rights are becoming increasingly onerous.

20. Take, for example, the following policy terms extracted from one prominent insurer's Product Disclosure Statement (PDS): -

Recovery Actions

*You agree that the following provisions, which appear under the headings **Recovery action by us** and **Recovery action by you** apply where we cover you under the policy for some or all of that loss or damage you suffer in connection with an incident.*

Recovery action by us

You agree we may, if we choose to, take steps to recover from someone else we consider responsible for the incident:

- *some or all of the loss or damage we cover; and/or*
- *some or all of the loss or damage which we do not cover, whether or not it is covered by another insurer or you do not have cover for it.*

You agree we may take such recovery action:

- *without your consent;*
- *using your name; and*
- *whether or not you have been, or have a right to be, fully compensated for all of your loss or damage by us or anybody else.*

Examples of recovery action we may take include:

- *conducting legal proceedings using your name, including as an applicant or plaintiff in representative or group proceedings (commonly known as class actions);*

- *conducting legal proceedings on your behalf as a member of representative or group proceedings;*
- *taking over the conduct of legal proceedings started by you or on your behalf, including as an applicant or plaintiff in representative or group proceedings;*
- *exercising any statutory or contractual rights, including rights to opt-out, that you have in or in connection with representative proceedings; and/or*
- *entering into contracts in your name in relation to litigation funding or legal representation, including where entry into those agreements causes you to become a group member of representative or group proceedings.*

We have in our discretion the right to decide upon the conduct and any settlement of any recovery action we take.

You agree we may exercise all the rights you have in connection with the loss or damage you have suffered in connection with the incident.

If we take recovery action in respect of some or all of the loss or damage which we do not cover, we may in our discretion, and to the extent permitted by law, require you to contribute to the costs we incur.

Of any amount recovered in recovery action we take, you agree we first keep the amount we have paid, or must pay, you under the policy plus interest recovered on that amount and any administrative, recovery agent, funding and legal costs we have incurred in taking the recovery action. We then pay you the amount of loss or damage you have suffered in connection with the incident for which you do not have any cover with us plus any interest recovered on that amount and costs you may have been required by us to contribute. Finally, we keep any remaining balance.

You must give us all the information and co-operation that we require to take the recovery action.

You must not do anything which prejudices us in taking any recovery action. For example, you must not:

- *assign your rights to anyone else; or*

- *opt-out of any representative or group proceedings taken by us.*

Recovery action by you

You may only take recovery action with our prior written consent and on conditions which we in our discretion impose.

You must have proper regard for our interests in respect of loss or damage that we cover.

You must seek to recover the loss or damage we cover in addition to any other loss or damage you have suffered in connection with the incident.

Of any amount recovered in recovery action you take, you may first keep the amount of loss or damage you have suffered in connection with the incident and for which you do not have any cover with us plus any interest recovered on that amount and any administrative and legal costs you have incurred in taking the recovery action. You then pay us the amount we have paid, or must pay, you under the policy plus interest recovered on that amount.

Finally, you keep or pay any remaining balance in accordance with any other obligations you have.

You agree we may:

- *take over the conduct of legal proceedings started by you or on your behalf, including where you are an applicant or plaintiff, or a group member, in representative or group proceedings; and*
- *require you to cease recovery action that you have commenced.*

21. The policy terms outlined above extend well beyond the equitable doctrine of subrogation and its founding principles.
22. Subrogated insurers are proactively investigating third party recovery options following major tort events, including in circumstances where: -
 - a) alternative class action proceedings are on foot; and
 - b) insureds have commenced progressing a claim for compensation in their capacity as a participating group member.

23. By way of overview, the breadth of the policy terms being incorporated into insurers' Product Disclosure Statements with respect to subrogation rights and recovery proceedings against third parties gives rise to the following considerations: -

a) Public Policy

- i. A move away from one of the driving principles behind the class action regime, being the facilitation of access to the Courts (and a choice of legal representation) for impacted individuals in circumstances where it otherwise may not have been economically viable.
- ii. A lack of knowledge by insureds when purchasing an insurance product as to the extent of the contractual obligations owed to the insurer and the impact of those obligations upon their ordinary legal rights.
- iii. The potential for such extensive contractual obligations to result in perverse scenarios, for instance: -
 - Individuals with minimal insured loss and significant uninsured loss losing control over the conduct of a recovery proceeding. We consider this to be a particular concern in instances where individuals have lost significant assets e.g. residential properties or farming loss; and
 - Individuals with multiple insurers each seeking to exercise contractual rights under the respective policies of insurance; and
- iv. Onerous contractual obligations contained at the end of lengthy PDS documents which are not specifically brought to the attention of insureds when taking out the policy.

b) Potential Conflicts of Interest

- i. Accepting instructions from both an insurer and insureds to progress a claim for compensation against a third party wrongdoer raises a potential conflict, particularly having regard to s.67 of the Act. This potential conflict is heightened in instances where a settlement is achieved and a limited pool of compensation is available for distribution.

c) Choice of Legal Representation

- i. Maddens recognises the importance of individuals having access to justice and legal redress. Undoubtedly, the introduction of the class action regime has facilitated and promoted access to the Courts.
- ii. A choice of experienced, appropriate and affordable legal representation is also of critical importance to individuals seeking legal redress.

- iii. Contractual clauses seeking to restrict an individual's (i) ability to pursue legal redress avenues and (ii) choice legal representation should be closely regulated.
- iv. These issues are heightened in circumstances where individuals have suffered personal losses for which they are either uninsured or substantially uninsured. Such circumstances occur in respect of the vast majority of members of class actions arising out of major torts and bushfire claims in particular. The pursuit of such claims should be controlled by the individuals impacted and by the legal representatives engaged by them to achieve that outcome.
- v. In circumstances where participating group members in a class action are compelled by insurers to hand over all of their legal rights to recovery of loss and damage there is an emerging sense of confusion and outrage by insureds that are being compelled to do so. It is submitted that an individuals' ability to engage representation of their selection and to control the pursuit of their losses ought to be preserved and protected.

d) Communications with Group Members

- i. The complexity and size of class action proceedings gives rise to particular challenges when communicating with group members. Timely and accurate communications with group members, including with respect to their legal rights and obligations, legal costs and their anticipated net recovery is of critical importance.
- ii. Whilst certain communications with group members are required to be Court approved (for instance opt-out procedures and notices of proposed settlements) Maddens submit that the Court's supervisory role should extend to overseeing and regulating communications with group members with respect to the following: -
 - the extent of their contractual obligations under any applicable policy of insurance;
 - the basis upon which legal costs are intended to be calculated and charged; and
 - the manner in which any compensation funds are intended to be apportioned between insured and uninsured loss

- iii. Such oversight is of increased importance in circumstances where there are competing class actions so as to ensure that impacted individuals make informed choices and are able to compare 'apples with apples'.

e) Competing Class Actions

- i. An extensive range of submissions have been made with respect to the issues associated with competing class actions. We do not seek to canvass or reiterate these issues in this submission save to say that it is Maddens' experience that competing class actions have a negative impact on the just, quick and cheap resolution of disputes.
- ii. Competing class actions also give rise to particular difficulties in circumstances where the relief being sought in each of the proceedings varies.
- iii. It is submitted that further consideration should also be given the settlement approval process for competing class actions, particularly where one proceeding has resolved in principle and other remains on foot.

f) Distribution of Settlements and Damages Awards

- i. Contractual modifications to the doctrine of subrogation and s.67 of the Act is likely to have a direct impact upon individual group member's net recovery and the way in which compensation funds are apportioned between insured and uninsured loss.
- ii. The issues identified at items (a) – (e) above compound the issues associated with the distribution of settlements and damages awards.
- iii. The manner in which settlement funds are distributed is of particular importance in circumstances where a settlement is reached and there is a limited pool of compensation available for distribution.

Maddens would welcome the opportunity to expand upon any of the matters outlined above as part of the ALRC's upcoming consultation process.

Maddens Lawyers

30 July 2018