AUSTRALIAN LAW REFORM COMMISSION

INQUIRY INTO CLASS ACTION PROCEEDINGS AND THIRD-PARTY LITIGATION FUNDERS

SUBMISSION BY THE SUPREME COURT OF VICTORIA

July 2018

OVERVIEW

This submission

The Supreme Court of Victoria makes the following submission to the Australian Law Reform Commission's (ALRC) Inquiry into Class Action Proceedings and Third Party Litigation Funders. It is based on the Court's experience in the management of class actions and commitment to facilitating access to justice through the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The topics raised by the discussion 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.

The Court is currently in the process of considering a number of recommendations from the Victorian Law Reform Commission (VLRC) regarding practice and procedure in class actions[1]. The Court in its submission to the VLRC indicated that it was open to options such as expanding the content of its practice note, particularly to encompass practices which have become increasingly common in the management of class action proceedings. The VLRC's report contains a number of recommendations of that type, recognising that this can be a useful mechanism to provide guidance while maintaining flexibility.

Some recommendations of the VLRC are directed at legislative change. In those areas, related changes to court practice and procedure will await the outcome of government and parliamentary processes.

The outcome of the ALRC's inquiry may also be relevant to the Court's consideration of practice changes in light of the close connection that exists between State and Federal practice.

The experience of the Court has been that there are significant benefits from mirror legislative provisions governing class action proceedings at the State and Federal level. Those benefits include

[1] Victorian Law Report Commission, *Access to Justice- Litigation Funding and Group Proceedings* Report 37 (2018).

- a shared jurisprudence;
- shared learnings in practice;
- ease in transferring proceedings where appropriate;
- efficiency for lawyers practising across jurisdictions; and
- avoidance of forum shopping.

It is noted that the VLRC's first recommendation was that its subsequent recommendations be implemented with the aim of advancing the nationally consistent regulation and conduct of class actions.

While this inquiry concerns Commonwealth legislation and the operation of that legislation in the Federal Court of Australia, the Commission's recommendations have the potential to have a wider impact. They may result in a departure from the mirror legislation approach by the Commonwealth, or be adopted in Victoria and other jurisdictions to maintain the mirror legislative approach.

The Supreme Court makes this submission both to share its experience of a cognate regime, and having regard to the potential implications of the inquiry for the Victorian regime.

COMMISSION RATES AND LEGAL FEES

The Court does not take a position regarding contingency fees, or the regulation of litigation funders' fees. Both the VLRC in its recommendations[2] and the ALRC in its discussion paper have proposed an increased role for the Court in approving fee arrangements at an earlier stage of proceedings. Insofar as the ALRC proposals cast upon the court a particular role, the following matters are raised for consideration.

The first is the significant difference between a court conducting an evaluation of legal fees or litigation funding charges for the purpose of determining whether to approve a settlement, and conducting an evaluation of proposed fees and charges at the commencement of proceedings.

While there are some unknowns at the settlement stage, an evaluation is generally made on the basis of a number of known factors and a body of information including the legal work that has been done, the settlement amount that is proposed, and an evaluation of risk informed by available evidence. That information is not generally available at the commencement of proceedings. As a protective measure, the effectiveness of court approval at commencement may be overestimated. That is not to say it should not be

[2] See for example Victorian Law Reform Commission, *Access to Justice- Litigation Funding and Group Proceedings Report 37* (2018) Recommendation 8 and Recommendation 24.

considered by the Commission, it is just to recognise that decisions at that point in time are working from a lower evidence base than settlement approvals.

It is also worth considering how those approvals would then sit with settlement approval processes. Do they stand as determinations not to be reopened, if not, on what basis are they open to being revisited or challenged?

The second matter is the practical aspect of how the approval at commencement is conducted.

Currently, class actions are managed by a single judge through to trial, unless a settlement is reached. An application for approval of settlement is generally conducted by another judge so that, if the matter is not approved, the managing judge can resume the conduct of the proceeding without having to disqualify themselves based on the information received during the settlement application.

If decisions are to be made at the beginning of proceedings that are related to the risks involved in the proceeding, they may similarly need to be dealt with by a judge other than the managing/trial judge. This complicates the case management exercise and requires some duplication of judicial effort in familiarisation with the facts of the case.

Another practical aspect is the disclosure of information. Certain information in settlement approval proceedings is not made public in order to maintain client legal privilege, and to allow the matter to proceed if necessary. It is otherwise generally an open procedure, and needs to be so in order for group members to be able to object. The disclosure of risk assessments at the settlement stage is less sensitive because the settlement in principle has been reached. At settlement stage, class action group members will be known or largely known, making private notifications and provision of information a possibility.

At the commencement of proceedings, group members may be largely unknown, and disclosure of risk assessments could be highly prejudicial to the plaintiff's interests. In that context, conducting the kind of assessment procedure suggested raises more difficult issues for the court in ensuring a fair and transparent process which does not prejudice the interests of parties.

COMPETING CLASS ACTIONS

Competing class actions generally

There is currently no legal impediment to competing class actions being brought in Australia, whether that be in the same court or multiple jurisdictions.

It is important to recognise that while a situation of competing class actions requires resolution, it is an issue which arises relatively infrequently. In a recent study Professor Morabito found that of 563 class actions commenced since 1992

there had been 28 instances of 'overlapping' or competing class actions.[3]

Federal Court rulings such as Justice Lee's decision in the *GetSwift*[4] case, in which two proceedings were stayed and a third allowed to proceed, and Justice Beach's decision in *Bellamy's*[5], in which one class was closed, demonstrate that courts currently have ample power to creatively manage competing class actions.

The VLRC recommended that

> the Supreme Court consider amending its practice note on class actions to include guidance for the Court and parties on managing competing class actions. The guidance should reflect current practice, as it has developed over time, and allow for the Court to respond flexibly to the circumstances of each case.[6]

The ALRC discussion paper envisages that a process to avoid multiple class actions would be undertaken in every class action proceeding, except those where the court determined it should not occur. All potential claimants would be notified and invited to commence a competing class action. If none is commenced within the allotted time, potential claimants would lose the capacity to commence another class action. There would then be a selection hearing if multiple actions were commenced. In either event a process of approval of the fee and cost proposals from lawyers/litigation funders would take place.

Having this procedure as the default option runs the risk of becoming a *defacto* certification model. The Court, in its submission to the VLRC noted the numerous difficulties associated with certification, and the VLRC specifically recommended that it not be adopted on the basis that 'it would not improve access to justice; rather it would inhibit it by exacerbating pre-trial complexities and increasing costs and delays'[7].

The discussion paper raises the problem of the 'race to court' and notes that there should be no 'first mover advantage'. As a matter of practice, a default process of the nature envisaged will almost inevitably foster a tendency to file early or to put together an alternative proceeding in haste. It also creates the prospect of a court leaving open a significant period of time for other proceedings to be brought, which then delays the progress of the case.

Competing class actions in different courts

In relation to competing class actions in different courts, Professor Morabito

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[3] Professor Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Competing class actions and comparative perspectives on the volume of class action litigation in Australia' (11 July 2018) 13.
[4] *Perera v GetSwift Limited* [2018] FCA 732.
[5] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's* [2017] FCA 947.
[6] Above n1, 84 (Recommendation 11).
[7] Ibid, 79 (Recommendation 9).

found only 11 instances have arisen in 18 years.[8]

To address this particular issue the VLRC recommended the establishment of a multi-jurisdictional cross-vesting panel, composed of a senior judge from each jurisdiction with a class action regime.[9]

This concept emerged from a consensus amongst stakeholders consulted by the VLRC that current cross-vesting procedures were not adequate to allow for efficient cooperation between jurisdictions where duplicative class actions were filed.[10] Although courts can 'push' class actions to a different jurisdiction (i.e. from the Supreme Court to the Federal Court) there is no mechanism to allow for the courts to cooperate together to assess whether cross-vesting is desirable in a given case.

In his recently published paper considering competing class actions and the empirical volume of class action litigation in Australia, Professor Morabito has expressed a view that the cross-vesting panel proposed by the VLRC is preferable to the ALRC's suggestion of conferring exclusive jurisdiction for civil class action claims on the Federal Court.[11]

While there are areas of exclusive jurisdiction vested in the Federal Court, the advantages of the 'autochthonous expedient' more commonly result in shared jurisdiction. It would be particularly unusual, if not entirely novel, to create exclusive jurisdiction for a particular form of proceeding in relation to one or two pieces of legislation in which jurisdiction is otherwise shared between State and Federal Courts.

It appears from the paper that the possibility of exclusive jurisdiction is posed because of a concern that forum shopping could circumvent the proposed measures to avoid multiple class actions. This concern assumes that the proposals regarding competing class actions, even if adopted nationally, can only operate in relation to multiple proceedings in a single jurisdiction, and cannot take account of proceedings in other courts.

Exclusive jurisdiction would avoid competing class actions in different courts, but only in that limited class of case. It cannot operate as a comprehensive solution for all types of cases that may be brought in the Federal Court.

This highlights two things:

- the value of a mechanism which could facilitate a coordinated approach across jurisdictions; and
- the limited utility of an approach that focuses only on one jurisdiction.

[8] Above n 3, 15.
[9] Above n1, 86 (Recommendation 12).
[10] Ibid, 85.
[11] Above n 3, 22.

Approval of settlement processes

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 ruling of Emerton J in *Williams v Ausnet Electricity Services Pty Ltd*[12]:

> 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
>
> (b) is in the interests of group members as a whole and not just in the interests of the plaintiff and the defendants.
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> 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.
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> 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:
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> (a) the complexity and duration of the litigation;
>
> (b) the reaction of the group to the settlement;

[12] [2017] VSC 474, [31].

(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. The Court has found the contradictor process helpful in a number of cases. 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.

The VLRC has recommended that the Court's practice note incorporate reference to the option of using a contradictor.[13] It recommended that it be referred to as an option because it is recognised that ultimately the process must adapt to the proceeding and that particular caution must be exercised in imposing steps that will add to costs.

The Court's view is that this should remain a flexible process. For example, in some cases the role of a contradictor may be confined to specific issues. 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 or special referee may be used to assist on the issue of costs of the proceeding or for the settlement distribution scheme or both.

[13] Above n 1, 102 (Recommendation 16).

Approval of settlement distribution schemes

The prospective costs associated with the administration of the settlement distribution scheme require separate and close scrutiny.

The Court can take account of the fact that many aspects of the settlement distribution schemes 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. The Court can balance the need to ensure the costs of settlement administration are minimised while ensuring the process will run efficiently and in a timely fashion in providing redress to group members.

In *Williams*[14] 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.

Clarity regarding the extent of the Court's powers on this topic may be considered desirable. It is noted that the VLRC has recommended an amendment to the legislation to provide a specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to ensure they are fair and reasonable.[15]

As the discussion paper notes, the idea of a tender process for administration of settlement schemes raises a number of questions. Of particular concern to the Court is that ultimately its role remains a judicial one.

There will be many settlements where a separate business could be cost effective and many where the plaintiff's law firm will likely be best placed to efficiently administer a settlement, due to its knowledge of the case. One advantage of administration of an involved distribution scheme by lawyers is the continuing duty owed to the Court.

Public disclosure in class action settlements

Open justice principles, the need to allow for a process of objection by group members, and the requirement to provide reasons, each militate in favour of public disclosure in settlement approval proceedings. However, there are necessarily limits that apply in the interests of justice. These can be diverse in nature, which means they do not lend themselves to precise definition.

In the experience of the Court, these are judgments best made by individual judges based on the particular circumstances of the case.

Supervision of settlement distribution

The Court now 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

[14] [2017] VSC 528, [2017] VSC 474.
[15] Above n 1, 123 (Recommendation 24).

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.[16] 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.

[16] See for example *Matthews v AusNet Electricity Services Pty Ltd* Ruling No. 40-46. [2015] VSC 131, [2016] VSC 394, [2016] VSC 583, [2016] VSC 732, [2017] VSC 187, [2017] VSC 360.