Supplementary note for consultation: Leave to proceed

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Introduction

1.1 Multiple class actions with respect to the same legal dispute increase cost and delay for both plaintiff class members and respondents. In order to address this, in *Discussion Paper: Inquiry into Class Action Proceedings and Third-party Funders (2018)* (the Discussion Paper), the Australian Law Reform Commission (ALRC) proposed that where there are two or more competing class actions, the Court should permit only one proceeding to progress and should permanently stay the competing proceeding(s), subject to the overriding discretion to do otherwise if the interests of justice so require.

1.2 Following receipt of submissions, the ALRC considers that it may be desirable to introduce a mechanism that would not only minimise the costs and delay imposed on both plaintiffs and defendants when multiple actions are filed in respect of the same circumstances, but would also facilitate the efficient disposition of preliminary issues. This brief note sets out the rationale for such a mechanism and how the ALRC envisages it would work in practice.

Original ALRC Report (1988) – No certification

1.3 In its original report on *Grouped Proceedings in the Federal Court* (No 46, 1988), the ALRC considered and rejected the additional requirement of a preliminary hearing (a certification or authorisation hearing) to authorise the commencement of representative proceedings.

1.4 The policy objectives of such a hearing were said to be to ensure that:

- the requirements for commencing the proceeding have been complied with;

- the interests of the group members (who may not yet have been identified) are adequately protected; and
- the interests of the respondent are protected.

1.5 The ALRC concluded, based on the experience of certification procedures in the United States and Quebec, that there was no need to go to the expense of a special hearing to determine that the requirements for group proceedings have been complied with as long as the respondent has a right to challenge the validity of the proceedings at any time. It pointed to the existing Federal Court Rules that permit a party to apply to strike out a pleading and to apply to stay or dismiss proceedings generally, and to the provisions dealing with vexatious litigants.[1]

1.6 The ALRC also expressed the view that protection against blackmail suits would be enhanced by its recommendations on costs by which the principal applicant would be left with the full burden of costs, which would be higher than if individual proceedings were brought.[2]

1.7 The ALRC observed that a certification does not always achieve its goal of protecting individual class members. Class members' interests are better served by adequate notices informing them of their rights to opt-out if their interests would be better served by bringing individual actions.[3]

Developments since original ALRC Report

1.8 Since 1988, a number of factors which were influential to the ALRC's original recommendations have changed. Significantly, the protection that was said to be provided against blackmail suits by visiting the full burden of costs on the principal applicant is not of the same character; that burden is now being borne in over 50% of class actions by third-party litigation funders. That is not to suggest that funders are supporting unmeritorious actions; rather it is to highlight that the circumstances of the party who is assuming the full burden of costs are fundamentally different from those that were envisaged by the ALRC in 1988.

1.9 Secondly, the procedural measures then in place in the US and Canada, and which were examined by the ALRC have, in some relevant respects, evolved. In particular all Canadian provinces have enacted an additional leave

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1 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) [146], [149].
2 Ibid [319].
3 Ibid [147].

requirement as a 'screening mechanism' in respect of securities class actions based on breach of the continuous disclosure obligations.[4]

The VLRC Report

1.10 Several submissions to the VLRC Inquiry into Access to Justice: Litigation Funding and Grouped Proceedings (2018) supported the introduction of a certification in Victorian class actions, although overwhelming the submissions did not favour such a proposal. Ultimately, the VLRC recommended against the introduction of a certification process in Victoria 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.[5] Nevertheless, the VLRC did make recommendations about the Supreme Court of Victoria's powers to address issues about the conduct of class actions, from the earliest stages and throughout the proceedings, in a manner consistent with the powers of the Federal Court pursuant to the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and the Class Action Practice Note (GPN-CA), with the expressed aim of advancing nationally consistent regulation and conduct of class actions.[6]

Support for certification to the ALRC Discussion Paper

1.11 Several submissions in response to the Discussion Paper urged the ALRC to reconsider whether a statutorily required certification procedure should be introduced. These submissions were, in the main, directed at a means of dealing with competing class actions, although the Australian Bar Association (ABA) noted that the issues that have arisen in recent competing class actions may not be confined to such actions.[7] These issues may also arise in circumstances where there is a class action against a particular defendant and a parallel proceeding commenced against that defendant for related loss and damage by receivers, liquidators and special purpose receivers on behalf of the company and its creditors/shareholders (being broadly the same constituency as the members of the class).

1.12 The ALRC was also told by representative plaintiffs and group members of the deleterious effect on group members when informed that their class action might be delayed for another 12 months whilst subsequently filed class actions "catch-up" to the level of preparation of their existing matter and of the

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4 *Securities Act*, RSO 1990, s 138.8(1)

5 Victorian Law Reform Commission, 'Access to Justice—Litigation Funding and Group Proceedings' (March 2018) [4.57].

6 Ibid recs 1, 9, 11.

7 Australian Bar Association, *Submission 69*.

consequent desire to settle quickly (and adversely) simply to bring the proceedings to an end.

No certification procedure is required

1.13 The ALRC remains unpersuaded that the introduction of a certification procedure would enhance the practice and procedure of the class action regime. In particular, the ALRC notes that Canada is currently considering whether its certification procedure should be abandoned given the additional costs and delay that it imposes on parties.

Leave to proceed

1.14 However, the ALRC considers that a mechanism might be introduced to enable the efficient disposition of preliminary issues, such as the approval of litigation funding agreements (and potentially contingency fee agreements), and to minimise the costs and delay imposed on both plaintiffs and defendants when multiple actions against the same defendant are filed seriatim in respect of the same circumstances.

1.15 Such a mechanism should not be interpreted as a de facto certification procedure. No hurdles would be placed on applicants beyond those matters that are already required by the Class Action Practice Note (GPN-CA) to be addressed at the first case management hearing. Rather, the mechanism is envisaged as providing a trigger for the class action to proceed in the ordinary course or, in the event that competing class actions are anticipated, for it to abide a timetable for the determination of a carriage motion.

1.16 The ALRC suggests that, at the first case management hearing, an applicant who wishes to proceed with the class action that has been commenced will make an application for leave to do so. The application for leave will be included in the originating application.

1.17 Upon that application, the parties should be in a position to address the matters currently specified in [7.6]-[7.8] of GPN-CA. (If the proposal to permit contingency fees is adopted, [6.1]-[6.5] of GPN-CA will be amended appropriately to encompass similar disclosure obligations in relation to the contingency fee agreement). The parties should also be in a position to advise the Court as to whether any competing class actions have been foreshadowed or are anticipated.

1.18 If no competing class actions are foreshadowed or anticipated, the Court may:

1. reject, vary or set the commission rate and/or the contingency fee;
2. approve the costs agreement and/or the litigation funding agreement;

3. grant leave to proceed on such terms as the Court sees fit.

1.19 If a competing class action or actions is anticipated, the Court would then determine the timeframe by which such competing class actions must be commenced and the date on which the carriage motion is to be heard. Upon the conclusion of the hearing of a carriage motion, the Court may grant leave to proceed to one or more of the applicants on such terms as the Court sees fit.

1.20 The ALRC is not calling for formal submissions in response to this supplementary note. However, the ALRC would welcome comments via email to class-actions@alrc.gov.au by 30 September 2018.