



# Supreme Court of Victoria

## Practice Note SC Gen 10

### Conduct of Group Proceedings (Class Actions)

#### 1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of this Practice Note.
- 1.2 The purpose of this Practice Note is to provide guidance on the conduct and management of group proceedings (class actions) within the Supreme Court of Victoria.
- 1.3 The procedures adopted in this Practice Note are intended to facilitate the just, efficient, timely and cost-effective conduct of group proceedings by ensuring that the real issues in contest are identified at an early date and that group proceedings are not unnecessarily delayed by interlocutory disputes.
- 1.4 The procedures for the management of group proceedings issued in the Common Law Division and the Commercial Court are generally the same. Where different procedures apply, they are stipulated in this Practice Note.

#### 2. COMMENCEMENT

- 2.1 This Practice Note was re-issued on 1 July 2020.

#### 3. DEFINITIONS

- 3.1 In this Practice Note:

*Act* means the *Supreme Court Act 1986*

*Case Management Judge* means the judge or judges nominated by the Chief Justice as the judge(s) in charge of the Class Actions List, or, if the matter has been allocated to a judge for management or trial, that judge.

*CMC* means case management conference

*Litigation Funder* means a commercial entity that agrees to meet the costs of the litigation in return for a share of any amount recovered if the litigation is successful and is not a party to the proceedings and does not otherwise have an interest in the litigation

*Litigation Funding Agreement* means any agreement by which a third party other than the Plaintiff is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order and/or to receive payment of commission, costs or charges of any type in relation to the proceeding, whether by way of third-party or commercial litigation funding, litigation funding provided by some of the group members, or a group costs order.

*Litigation Funding Charges* means any Litigation Funder's commission, fees and other charges (including those estimated) to be charged to group members

#### **4. COMMENCEMENT OF PROCEEDINGS**

- 4.1 A group proceeding is to be commenced by writ in accordance with s 33H of the Act.
- 4.2 The statement of claim should be drawn so that the Plaintiff's personal claim can be used as the vehicle for determining the common questions in the action. Ordinarily the trial of the action will resolve all common questions together with any non-common questions raised by the Plaintiff's personal claim.
- 4.3 Once the defendant(s) have filed and served appearances to the writ the Court will initiate a CMC (see paragraph 7 below).

#### **5. CLASS ACTION SUMMARY STATEMENT**

- 5.1 The Plaintiff's solicitor must file, with the writ when it is filed, a class action summary statement.
- 5.2 The class action summary statement must:
  - (a) provide basic information about the group proceeding which must include, at a minimum, details of:
    - (i) the law firm acting for the Plaintiff;
    - (ii) the role and responsibilities of the Plaintiff in the proceeding;
    - (iii) the identity of any Litigation Funder, and how group members may obtain further information about the Litigation Funder and the terms of any funding being offered;

- (iv) whether any other group proceedings have been, or are likely to be, filed that relate to the same subject matter as the present group proceeding;
  - (v) how legal fees and disbursements will be charged, including the impact of any funding equalisation order; and
  - (vi) who group members may contact for further information (and should advise that group members will not be charged for such enquiries);
- (b) be clear, concise and use simple language;
  - (c) be no longer than two pages;
  - (d) be in a form that is appropriate for publication on the Supreme Court website.
- 5.3 The Plaintiff's solicitors are required to take reasonable steps to make the class action summary statement available to group members as soon as practicable after the commencement of the proceeding, for example by sending it to any known group members and, where the Plaintiff's solicitors' website is being used to communicate with group members, uploading the statement to that website.

## **6. FUNDING INFORMATION SUMMARY STATEMENT**

- 6.1 Where a Litigation Funder is funding the proceedings, the Plaintiff's solicitors must file, with the writ when it is filed, a funding information summary statement.
- 6.2 The funding information summary statement must:
- (a) provide the material terms of the funding arrangement of the proceeding, which would ordinarily include:
    - (i) the identity of the Litigation Funder;
    - (ii) how Litigation Funding Charges are calculated;
    - (iii) the basis on which Litigation Funding Charges will be charged; and
    - (iv) how group members may obtain further information;
  - (b) be clear, concise and use simple language; and
  - (c) be in a form that is appropriate for publication on the Supreme Court website.

- 6.3 The funding information summary statement is not required to include information that might reasonably be expected to confer a tactical advantage on another party to the proceeding.
- 6.4 See paragraphs 11 and 12 below for disclosure obligations in relation to Litigation Funding Charges (disclosure to group members) and Litigation Funding Agreements (disclosure to the Court and to the other parties), which apply from the commencement of proceedings.

## **7. MANAGEMENT OF GROUP PROCEEDINGS**

- 7.1 Group proceedings will be managed by the Case Management Judge with the assistance of an Associate Judge as necessary.
- 7.2 In either case, an initial CMC will be fixed by the Case Management Judge for a date within six weeks of the entry of appearances by the defendant(s).
- 7.3 The practitioners with primary responsibility for carriage of the proceedings within each party's law firms are expected to attend CMCs.
- 7.4 At the initial CMC the parties should be in a position to identify and discuss the following:
- (a) any issues concerning the description of group members;
  - (b) any issues concerning satisfaction of the threshold requirements for the commencement of a representative proceeding;
  - (c) a timetable for the filing of defences and further pleadings;
  - (d) a timetable for the determination of interlocutory matters;
  - (e) a timetable for determining the form and content of orders for the notification to group members of the proceeding and of their right to opt-out;
  - (f) whether the Defendant proposes to seek an order for security for costs;
  - (g) a protocol for communicating with unrepresented group members.
- 7.5 The parties should be in a position to address, at an early stage of the proceeding (at CMCs or directions to be subsequently scheduled):
- (a) the point at which the matter should be referred for alternative dispute resolution, including a proposed timetable for the steps necessary to facilitate effective early alternative dispute resolution;

- (b) their intentions, if any, to adduce expert evidence, and directions pursuant to part 4.6 of the *Civil Procedure Act 2010* (Vic);
- (c) the timing and form of opt-out notices;
- (d) the joinder of any additional parties;
- (e) the utility of requiring that evidence of lay or expert witnesses be filed at an early stage of the proceeding to enable a better understanding of the issues in dispute and the proper identification of individual and common questions;
- (f) in relation to discovery, the utility of orders for the provision of affidavits by any party as to where relevant documents are stored, what types of documents exist, in what form they are held, and the costs of making discovery of particular categories of documents; the utility of a discovery conference between the parties or their legal representatives, (with or without the assistance of an Associate Judge, Judicial Registrar or other suitably qualified person);
- (g) the preparation of a statement of issues;
- (h) whether there is utility in the use of sample group members;
- (i) the mode of conducting the trial;
- (j) the possible use of special assessors or special referees;
- (k) to the extent possible, the appropriateness of a split trial and the issues to be determined at a split trial.

7.6 The parties are to provide the Associate to the Case Management Judge with a jointly-prepared agenda at least **48 hours prior to each CMC or directions hearing**, identifying the major issues that each party wishes to raise and very briefly stating their agreed or respective positions on each issue. The parties are expected to confer prior to the filing of the agenda, with a view to narrowing the issues in dispute.

7.7 The Court may, pursuant to s 65A of the *Civil Procedure Act 2010*, require the solicitors to provide to the Court a memorandum of estimated legal costs and disbursements for any or all parties for the proceeding. The parties should anticipate that the Court may make such an order at the initial CMC or at any other time in a proceeding. See also paragraphs 11 and 12 below in relation to costs and funding agreement disclosure requirements.

#### *Competing group proceedings*

7.8 The parties' representatives must notify the Court as soon as practicable after becoming aware of the existence of any "competing" group proceeding that

appears to overlap in part or in whole with a proceeding being managed by the Court.

7.9 The Court may take the following factors into account in relation to the management of competing group proceedings:

- (a) the experience of the practitioners seeking to bring the group proceedings;
- (b) the costs the practitioners expect to charge for all work performed;
- (c) the litigation funding arrangements in each of the proceedings, including funding terms and conditions and percentages;
- (d) the resources made available by each firm of solicitors, and their accessibility to clients;
- (e) the state of preparation of the proceedings, however this will not be determinative if both proceedings will be ready for trial at the same time;
- (f) the number of group members signed up to each of the proceedings;
- (g) whether each of the proceedings would proceed without a common fund order, and the terms of any proposed common fund order that might be sought;
- (h) the position adopted by each Litigation Funder on the question of security for costs and generally their resources to meet any adverse costs order; and
- (i) any other matter it considers to be relevant.

7.10 Protocols for communication and cooperation between the Supreme Court and other superior courts in class action proceedings address measures by which class action proceedings can be cooperatively managed by the Supreme Court and other courts. The Protocols are available on the Supreme Court website.

## **8. APPLICATIONS**

8.1 Before making any interlocutory application, the parties' representatives must confer and attempt in good faith to resolve the dispute.

8.2 Applications should be brought by summons, supported by an affidavit verifying the material facts that are the basis for the application.

8.3 Return dates for summonses may be obtained from the Associate to the Case Management Judge.

- 8.4 Any urgent applications should be brought by contacting the Associate to the Case Management Judge.
- 8.5 Subject to any contrary order, the moving party must file and serve all supporting material for the application, including affidavits and outlines of argument no later than ten clear business days before the return date.
- 8.6 Subject to any contrary order, the responding party must file and serve any responding material, including affidavits and outlines of argument no later than five clear business days before the return date.
- 8.7 The Case Management Judge may refer an application or class of applications in the proceeding to an Associate Judge or a Judicial Registrar.

## **9. COMMUNICATIONS WITH GROUP MEMBERS**

- 9.1 In an appropriate case, the Court may make an order that the Plaintiff's solicitors identify to the other parties group members who are its clients. The Court may make orders concerning communications with group members who are not clients of the Plaintiff's solicitors.
- 9.2 In an appropriate case the Court may make orders establishing a protocol for communications between parties and such group members.

## **10. OPT-OUT PROCEDURES**

- 10.1 Group members may opt out of a group proceeding by giving a written opt-out notice to the Court by a date which must be fixed for that purpose by the Court. The form of the opt-out notice to be given by a group member is prescribed by the Supreme Court Rules: see r 18A.04 and Form 18AB.
- 10.2 The usual practice is to send the opt-out notices to group members shortly after the close of pleadings. The opt-out notice is not to be given to group members without prior direction or order of the Court approving its form, content, manner of distribution and manner of delivery of a completed opt-out notice to the Prothonotary.
- 10.3 The opt-out notice should, where appropriate, be in the same form as the standard form opt-out notice available on the Supreme Court website. The Plaintiff's solicitors should ensure that the opt-out notice:
  - (a) uses plain language and gives a balanced, succinct description of the claims and defences in the proceeding;
  - (b) informs class members of their right to opt out of the proceeding by the date the Court has fixed and clearly describes the consequences of

remaining a group member or alternatively opting out of the proceeding. This should include a succinct explanation of how a judgment or settlement in the proceeding will or may preclude group members from relying on the same or related claims or defences in other proceedings;

- (c) alerts group members to the fact and consequences of any costs agreement or Litigation Funding Agreement made or intended for the proceeding;
- (d) is sent, published or broadcast via media which are best calculated to achieve the effective dissemination of the notices among group members in the most cost-effective way.

10.4 The Court may request that the Plaintiff's solicitors indicate the approximate size of the group, including an estimate of the number of group members, to enable the Court to appropriately manage the volume of opt-out notices that may be received.

## **11. DISCLOSURE OF LITIGATION FUNDING CHARGES TO GROUP MEMBERS**

11.1 The Plaintiff's solicitors must notify group members (whether clients or potential clients) of any applicable Litigation Funding Charges. Such notice must be in clear terms and provided as soon as practicable after the commencement of proceedings. This is an ongoing obligation and applies to any material changes to the Litigation Funding Charges.

11.2 Failure by the Plaintiff's solicitors to give notice pursuant to paragraph 11.1 may be taken into account by the Court in relation to settlement approval under s 33V of the Act.

## **12. DISCLOSURE OF LITIGATION FUNDING AGREEMENTS TO THE COURT AND OTHER PARTIES**

12.1 Any Litigation Funding Agreement applicable to a proceeding issued in the Supreme Court of Victoria must be in writing.

12.2 The Plaintiff's solicitors are required to disclose to the Court and to the other parties to the proceeding, copies of the costs agreement between the Plaintiff and their solicitors, and any Litigation Funding Agreement (**costs and funding agreements**). They must do so prior to the initial CMC, and must provide copies of any updated costs or funding agreements as those agreements change. The procedures in this paragraph facilitate this objective.



- 12.3 Where the Plaintiff's solicitors consider that the disclosure of a costs or funding agreement will give rise to material prejudice or is inconsistent with the maintenance of client legal privilege, they may propose a sensible redaction process or object to making the required disclosure. Any proposed objection or redaction process should be raised with the Court and with other parties, so that the matter may be determined by the Court.
- 12.4 For the purpose of the disclosure required by this Practice Note, it is sufficient to provide a standard form of each agreement. Individual variations that might be negotiated with different group members need not be provided.
- 12.5 No later than 7 days before the initial CMC the Plaintiff's solicitors must email the costs agreement and any funding agreement to the Associate of the Case Management Judge. Both the email and agreement must be clearly marked as "confidential – for the Court Only."
- 12.6 The Plaintiff's solicitors must email to chambers any updated Litigation Funding Agreement or costs agreement as soon as practicable after the Plaintiff's solicitors become aware that:
- (a) there is a change to the standard form of agreement that significantly alters the agreement;
  - (b) a proceeding not previously subject to a Litigation Funding Agreement becomes subject to such an agreement;
  - (c) there is a change of the Litigation Funder funding the proceeding; or
  - (d) the Litigation Funder becomes insolvent or otherwise unable or unwilling to continue to provide funding for the proceeding.
- 12.7 No later than seven days prior to the initial CMC, the Plaintiff's solicitors must file and serve a copy of the Litigation Funding Agreement and costs agreement on all other parties. The disclosure may be redacted to conceal any information that might reasonably be expected to confer a tactical advantage on another party to the proceeding including, without limitation, information:
- (i) as to the budget or estimate of costs for the litigation or the funds available to the Plaintiff, in total or for any step or stage in the proceeding;
  - (ii) that might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.
- 12.8 Subject to any objection, the Plaintiff's solicitors must file and serve any updated Litigation Funding Agreement on the other parties in the event that the Plaintiff's solicitors become aware of any of the circumstances set out in paragraph 12.6 above.

### **13. APPLICATION FOR GROUP COSTS ORDER**

- 13.1 Any application by a plaintiff under s 33 ZDA of the *Supreme Court Act 1986* for approval of legal costs to be calculated as a percentage of any award or settlement in the group proceeding (group costs order), is to be by interlocutory application in accordance with paragraph 8 of this Practice Note filed at the earliest practicable time after filing the writ.
- 13.2 The Plaintiff's solicitors may contact the chambers of the Case Management Judge to discuss arrangements for the filing of any confidential supporting documentation for the application.
- 13.3 The application will be listed for a directions hearing at which time the Case Management Judge will make directions in relation to the application, including any directions in relation to confidentiality of documents relating to the application, and of the provision of notices or other relevant documentation to group members.
- 13.4 If the application is successful, the terms of the approval, including the amount of any percentage ordered, may be subject to review at any stage of the proceeding, including at judgment or settlement approval.
- 13.5 The litigation services to which the group costs order applies should include:
- (a) all services provided by the law firm;
  - (b) provision for security for costs if required;
  - (c) disbursements; and
  - (d) an indemnity for adverse costs.

### **14. TRIAL OF COMMON QUESTIONS**

- 14.1 In an appropriate case, determined by practical as well as legal considerations, the trial may be split so that common issues together with non-common issues concerning liability may be determined first.
- 14.2 In framing the issues to go to trial, the parties' lawyers should consider whether there are issues common to subgroups which also might efficiently be addressed at the initial trial.
- 14.3 Unless the Court otherwise orders, group members whose claims are presented at a split trial will retain their status as group members for the purposes of s 33ZD of the Act.

- 14.4 Following a trial on issues of liability it will be necessary to decide whether the individual claims of group members will be determined within the existing proceeding or determined in separate proceedings.

## **15. COURT APPROVAL OF SETTLEMENT**

- 15.1 Applications for the approval by the Court of a settlement or discontinuance of a group proceeding should be made by interlocutory process in the proceeding (see section 8 of this Practice Note).

- 15.2 Unless the Court is satisfied that it is just to do so, it will not determine an application for approval of a settlement unless a notice, approved by the Court, has been given to the group members.

- 15.3 When it is appropriate that notice of the proposed settlement be given to group members, the notice should be, so far as is practicable, in the same form as the standard form settlement notice available on the Supreme Court website. It should include the following:

- (a) a statement that the group members have legal rights that may be affected by the proposed settlement;
- (b) a statement that an individual group member may be affected by a decision whether or not to remain as a group member (where the opt-out date has not already passed or where there is a further opportunity to opt out);
- (c) a brief description of the factual circumstances giving rise to the litigation;
- (d) a description of the legal basis of the claims made in the proceedings and the nature of relief sought;
- (e) a description of the group on whose behalf the proceedings were commenced;
- (f) information on how a copy of the statement of claim and other legal documents may be obtained;
- (g) a summary of the terms of the proposed settlement;
- (h) information on how to obtain a copy of the settlement agreement;
- (i) an explanation of who will benefit from the settlement;
- (j) where all group members are not eligible for settlement benefits, an explanation of who will not be eligible and the reasons for such ineligibility;

- (k) an explanation of the Court settlement approval process;
  - (l) details of when and where the Court hearing will be and a statement that the group member may attend the Court hearing;
  - (m) an outline of how objections or expressions of support may be communicated, either in writing or by appearing in person or through a legal representative at the hearing;
  - (n) an outline of any steps required to be taken by persons who wish to participate in the settlement (in the event that affirmative steps are required);
  - (o) an outline of the steps required to be taken by persons wishing to opt out of the settlement if that is possible under the terms of the settlement; and
  - (p) information on how to obtain legal advice and assistance.
- 15.4 An application for approval of a settlement will not ordinarily be heard by the trial judge. Prior to any settlement approval application being made, directions must be sought from the Case Management Judge with respect to such application, including in relation to the filing of any supporting material, including expert opinion, and the engagement of special referees.
- 15.5 Where a proposed settlement contemplates that any part of the payment to be made to class members will be applied toward reimbursement of the unrecovered legal costs of the proceeding, or toward payment of litigation funding charges, the Court may appoint a special referee(s) to determine:
- (a) in relation to legal costs, whether the claimed costs are reasonable and proportionate in all of the circumstances;
  - (b) in relation to litigation funding charges, whether the charges ought reasonably and properly be allowed; and
  - (c) any other matter the Court considers to be relevant.
- 15.6 When applying for Court approval of a settlement, the parties will usually be required to address at least the following factors:
- (a) the complexity and likely duration of the litigation;
  - (b) the reaction of the group to the settlement;
  - (c) the stage of the proceedings;
  - (d) the likelihood of establishing liability;
  - (e) the likelihood of establishing loss or damage;

- (f) the risks of maintaining a group proceeding;
- (g) the ability of the Defendant to withstand a greater judgment;
- (h) the range of reasonableness of the settlement in light of the best recovery;
- (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
- (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

15.7 To the extent relevant, the affidavit or affidavits in support should address:

- (a) how the settlement complies with the criteria for approving a settlement;
- (b) why the proceeding has been settled on particular terms;
- (c) the effect of those terms on group members, including:
  - (i) the quantum of damages they are to receive in exchange for ceasing to pursue their claims and when the funds will be received; and
  - (ii) whether group members are treated the same or differently and why;
- (d) how the settlement process will be administered, supervised, monitored or audited;
- (e) the proposed measures that are to be taken in the settlement distribution scheme to ensure a just, efficient, timely and cost-effective outcome for group members;
- (f) how group members will be kept informed of the settlement distribution scheme, including measures to ensure easy access of these communications for group members;
- (g) the frequency of post-approval report(s) to be provided to the Court regarding the distribution of settlement funds;
- (h) the terms of fee and retainer agreements including the reasonableness of legal costs;
- (i) the terms of any Litigation Funding Agreement and its application if the settlement is approved;
- (j) a response to any arguments against approval of settlement raised by group members;

- (k) a hearing of the application for settlement approval, including consideration of any group members' objections to the settlement and an order dealing with costs;
  - (l) a mechanism for Court review of disputed decisions of the scheme administrator where the settlement involves complex individual assessments; and
  - (m) any issues that the Court directs be addressed.
- 15.8 The approving judge may appoint a contradictor or an amicus curiae and may direct that the costs and expenses associated with the appointment be paid out of the settlement sum.
- 15.9 The Court will require the administrators of the settlement:
- (a) to report to the Court every six months, or as otherwise determined by the Court, to advise the Court of the performance of the settlement (including any steps in the settlement distribution scheme), including the costs incurred and the distributions made;
  - (b) at the completion of the settlement distribution scheme, to file a final report with the Court outlining:
    - (i) the distributions made to group members;
    - (ii) the time taken for distributions;
    - (iii) the amounts charged to each group member for distributions; and
    - (iv) if portions of the settlement payment were unclaimed by group members, what amounts were unclaimed and what, if anything, has been done with those amounts.

## **16. COMMUNICATIONS WITH THE COURT**

- 16.1 At all stages of the proceeding, communications with the Court should be by email to the chambers of the Case Management Judge with a copy to all other parties, and should be confined to uncontroversial matters.
- 16.2 All correspondence regarding Common Law Division group proceedings should also be copied to ([cldclassactions@supcourt.vic.gov.au](mailto:cldclassactions@supcourt.vic.gov.au)).

## **17. AMENDMENT HISTORY**

1 July 2020: This Practice Note was reissued on 1 July 2020 and amends the version originally issued on 30 January 2017.

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Note No 10 of 2015

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1 July 2020