



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 the following Practice Note.
- 1.2 The purpose of this Practice Note is to provide guidance on the management and conduct of group proceedings (class actions) managed within the Supreme Court of Victoria in the Common Law Division and the Commercial Court.
- 1.3 The procedures for the management of group proceedings are generally the same in each Division. Where different procedures apply, they are clearly stipulated in this Practice Note

2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 January 2017 and commences on 30 January 2017 and applies to relevant proceedings commenced in the Common Law Division and the Commercial Court.

3. DEFINITIONS

- 3.1 In this Practice Note:

Act means the *Supreme Court Act 1986*

case management Judge means

- (a) if the matter has been allocated to a Judge for trial, the trial Judge; or
- (b) if the matters has not been allocated to a Judge for trial the List Judge for the Commercial Court List to which the proceeding has been allocated; or for Common Law Division matters the Judge in charge of the Major Torts List.

CMC means case management conference

4. COMMENCEMENT OF PROCEEDINGS

- 4.1 A group proceeding is to be commenced by writ in accordance with s 33H of the Act. The endorsement on the writ must, in accordance with s 33H of the Act:

- (a) describe or otherwise identify the group members to whom the proceeding relates,
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed, and
 - (c) specify the common questions of law or fact to the claims of the group members.
- 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 Commercial Court group proceedings should not be initiated on RedCrest without prior consultation with the Commercial Court Group Proceedings Coordinator (CommercialCourtGroupProceedings@supcourt.vic.gov.au).
- 4.4 When the writ is filed, and when appearances are filed and served, the filing party should email a copy to the Common Law Class Actions Coordinator (cldclassactions@supcourt.vic.gov.au) for Common Law proceedings, or to the Commercial Court Group Proceedings Coordinator (CommercialCourtGroupProceedings@supcourt.vic.gov.au) for Commercial Court proceedings (as the case may be). This is to initiate the listing of an initial case management conference for Common Law proceedings, or first directions hearing for Commercial Court proceedings.

5. MANAGEMENT OF GROUP PROCEEDINGS

- 5.1 Group proceedings in the Common Law Division will be initially managed by the Judge in charge of the Major Torts List and thereafter by the allocated trial judge, with the assistance of an Associate Judge as necessary, to ensure that matters are dealt with expeditiously and efficiently.
- 5.2 Group proceedings in the Commercial Court will be managed by the List Judge to whom the proceeding is allocated, with the assistance of an Associate Judge in appropriate cases. The Court may, of its own motion, enter a proceeding into a Judge-managed List in the Commercial Court, to ensure that matters are dealt with expeditiously and efficiently.
- 5.3 For Common Law proceedings the following procedure will take place upon the filing of the writ:
- An initial CMC will be fixed by the case management Judge for a date within six weeks from the date on which the writ is filed.
 - The initial CMC will take place before the case management Judge.
- 5.4 For Commercial Court proceedings, the following procedure applies:
- Shortly after commencement, the group proceeding will be allocated to a List Judge for management.
 - A first directions hearing will take place before the List Judge, within six weeks of the writ being filed, or upon the filing of appearances and an initial defence.
- 5.5 CMCs or first directions hearings will, insofar as it is appropriate, be conducted along relatively informal lines. Rather than the hearing occurring in a fixed

- sequence with counsel making submissions in turn, the emphasis will be on an 'exchange' between counsel and the case management Judge.
- 5.6 The practitioners with primary responsibility for carriage of the proceedings within each party's law firms are expected to attend the CMC or directions hearing.
- 5.7 At the initial CMC or directions hearing, the parties will be asked to outline the issues and facts that appear to be in dispute and to state whether any party intends to adduce expert evidence at trial. Usually, the parties will also be asked to indicate whether the matter should be referred for alternative dispute resolution and, if so, about a timetable within which the alternative dispute resolution might proceed.
- 5.8 In addition, the parties should be in a position to address the following:
- (a) any issues regarding the description of group members;
 - (b) any pleading issues;
 - (c) discovery, including the utility of orders for the provision of affidavits by any party as to where relevant documents are stored, what types of documents exist (from high level down to particular), in what form they are held, and the costs of making discovery of particular categories of documents;
 - (d) evidence, including the utility of requiring that affidavits 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;
 - (e) the joinder of additional parties;
 - (f) to the extent possible, the appropriateness of a split trial and the issues to be determined at a split trial;
 - (g) whether the Defendant proposes to seek an order for security for costs;
 - (h) the timetabling of any applications for resolving interlocutory matters;
 - (i) methods of communicating with unrepresented group members; and
 - (j) any need to relist or continue the CMC or directions hearing on either the following day or at some other suitable time.
- 5.9 During the progress of the proceeding the Court will direct as necessary that there be further CMCs or directions hearings. Issues that may be raised at such a hearing include the following:
- (a) any application for class closure,
 - (b) the timing and form of any opt out notice;
 - (c) any continuing discovery issues, including 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;
 - (d) preparation of a statement of issues;
 - (e) briefing experts, the provision of expert reports and production of joint expert reports;
 - (f) conferences or conclaves of experts, with or without the assistance of an Associate Judge, Judicial Registrar or other suitably qualified person;
 - (g) the use of concurrent evidence at trial;

- (h) whether there is utility in the use of sample group members;
 - (i) the possible use of special assessors or special referees; and
 - (j) the mode of conducting the trial, e.g. whether it is to be an electronic trial, whether witness statements will be used, and any application to change the mode of trial from a jury trial to judge alone or vice versa.
- 5.10 The parties are encouraged to file a joint position paper at least 48 hours prior to each CMC or directions hearing, listing the major points the parties anticipate raising and outlining their respective positions on each issue in one to three sentences.
- 5.11 In proceedings involving a large number of parties, practitioners may be requested to provide the Court with a table of appearances, listed by party and their respective representatives, prior to each CMC or directions hearing.

6. APPLICATIONS

- 6.1 Before making any interlocutory application, the parties' representatives must confer and attempt in good faith to resolve the dispute.
- 6.2 The Court will fix dates as early as practicable for the filing, service and return of any application which may include but is not limited to an application:
- (a) challenging the commencement of the proceeding as a group proceeding;
 - (b) seeking an order modifying or removing the group character of the action;
 - (c) seeking summary dismissal;
 - (d) seeking a striking out;
 - (e) seeking an order that the Plaintiff provide security for costs;
 - (f) seeking an order in relation to communication with group members by the parties;
 - (g) seeking an order for discovery; or
 - (h) seeking an order in relation to the mode of trial and/or place of trial.
- 6.3 In respect of any such application, it will be necessary for a party to issue a summons. Return dates for summonses may be obtained from the associate to the case management Judge or the List Judge (as the case may be).
- 6.4 The Plaintiff must file any supporting material to the application, including affidavits, exhibits and outlines of argument, with the Court no later than 4.00pm ten clear business days before the return date.
- 6.5 The Respondent must file any response material, including affidavits, exhibits and outlines of argument, with the Court no later than 4.00pm five clear business days before the return date.
- 6.6 The case management Judge may refer an application or class of applications in the proceeding to an Associate Judge.

7. URGENT APPLICATIONS IN THE COMMERCIAL COURT

- 7.1 Applications of an urgent nature which may arise in a Commercial Court group proceeding already entered into a Judge managed List should be brought in the first instance by contacting the associate to the List Judge.
- 7.2 If the proceeding has not yet been allocated, urgent relief can be sought via the Commercial Court urgent application procedure, by contacting (03) 9603 4105 and by email at commercialcourtturgents@supremecourt.vic.gov.au .
- 7.3 If urgent relief is required outside ordinary business hours, a hearing before the Commercial Court Duty Judge may be initiated by calling the 'urgent applications' telephone number notified on the Commercial Court page of the Supreme Court website.
- 7.4 In addition, any application of an urgent nature which may arise in the group proceeding must be promptly brought to the attention of the Commercial Group Proceeding Coordinator and to the associate to the List Judge. Urgent applications in Commercial Court group proceedings should not be brought in the Practice Court.

8. COMMUNICATIONS WITH GROUP MEMBERS

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

9. OPT OUT PROCEDURES

- 9.1 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 O 18A.04 and Form 18AB.
- 9.2 The usual practice is to send such notices to group members shortly after the close of pleadings. The Court will encourage the parties to discuss the appropriate form of the notice at the earliest opportunity. In any event, no such notice is to be given to group members without prior direction or order of the Court.
- 9.3 The Court may approve the form, content and manner of distribution of the notice to be given to group members informing them of the commencement of the group proceeding, of their right to opt out of the proceeding by the date that the Court has fixed, and the possible implications to a group member of not opting out.
- 9.4 Opt out notices must be addressed as follows:
- An opt out notice in a Common Law Division group proceeding will specify delivery of the completed notice to the Prothonotary at the Principal Registry of the Supreme Court, located at 436 Lonsdale Street, Melbourne.

- By contrast, an opt out notice in a Commercial Court group proceeding will specify delivery of the completed notice to the Prothonotary, care of the Commercial Court Registry located at 450 Little Bourke Street, Melbourne.

9.5 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.

10. PRELIMINARY QUESTIONS AND SUMMARY JUDGMENT

10.1 To narrow the scope of the dispute, at the earliest practicable date the Court may consider the utility of either:

- (a) determining any common question in the proceeding as a preliminary question; or
- (b) giving summary judgment on any common question in the proceeding.

11. TRIAL OF COMMON QUESTIONS

11.1 In an appropriate case the trial may be split so that common issues together with non-common issues concerning liability may be determined first. Appropriateness will be determined by practical as well as legal considerations.

11.2 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. Unless the Court makes orders otherwise, 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.

11.3 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.

12. SETTLEMENT

12.1 A group proceeding may not be settled or discontinued without the approval of the Court. If the Court gives its approval to a settlement, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

12.2 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.

13. COURT APPROVAL OF SETTLEMENT

13.1 When applying for Court approval of a settlement, the parties will usually need to persuade the Court that:

- the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and
 - the proposed settlement has been undertaken in the interests of group members, as well as those of the Plaintiff, and not just in the interests of the Plaintiff and the Defendant/s.
- 13.2 An application for approval of a settlement will not ordinarily be heard by the case management 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.
- 13.3 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.
- 13.4 A request for the Court's approval of a proposed settlement must be made by application. The orders which are commonly made on such an application include orders:
- (a) for the confidentiality of evidence;
 - (b) for notice to group members of the proposed settlement;
 - (c) approving any scheme for distribution of any settlement payment; and
 - (d) disposing of the proceeding (e.g. by dismissing the application).
- 13.5 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 proceedings have been settled on particular terms;
 - (c) the effect of those terms on group members (i.e. the quantum of damages they are to receive in exchange for ceasing to pursue their claims and 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 terms of fee and retainer agreements including the reasonableness of legal costs;
 - (f) a response to any arguments against approval of settlement raised by group members;

- (g) any issues that the Court directs be addressed; and
 - (h) a hearing of the application for settlement approval, including consideration of any group members' objections to the settlement and an order dealing with costs.
- 13.6 When it is appropriate that notice of the proposed settlement be given to group members, the notice 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.

14. COMMUNICATIONS WITH THE COURT

- 14.1 At all stages of the proceeding, communications with the Court should be by email with a copy to all other parties, and should be confined to uncontroversial matters.

- 14.2 All correspondence regarding group proceedings within the Common Law Division should be provided to the Class Actions Coordinator (cldclassactions@supcourt.vic.gov.au).
- 14.3 All correspondence regarding group proceedings within the Commercial Court should be provided to the Commercial Court Group Proceedings Coordinator (CommercialGroupProceedings@supremecourt.vic.gov.au).

AMENDMENT HISTORY

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

Vivienne Macgillivray
Executive Associate to the Chief Justice
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