THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: LitLaw:GUlw:1094403

4 March 2016

The Hon Justice James Allsop, AO
Chief Justice
Federal Court of Australia
Level 16, Law Courts Building
Queens Square
SYDNEY NSW 2000

By email: practice.notes@fedcourt.gov.au

Dear Chief Justice,

National Court Framework ("NCF") - Draft Class Actions Practice Note

The Law Society of NSW welcomes the Court's initiative in seeking to implement flexible efficiencies in case management. The Law Society is grateful for the opportunity to provide feedback on the draft practice notes published to date. We provide the following comments on the draft Class Actions Practice Note:

1. Case Management Judge and Class Actions Registrar (Part 4)

The Law Society agrees with the proposal to introduce a separate Case Management Judge and Class Actions Registrar in class action proceedings. There are a number of interlocutory disputes that commonly arise in class actions. These include pleading arguments, disputes over definitional issues with respect to the class, and applications for security for costs. The Law Society considers that the appointment of a Case Management Judge (i.e. a judge with experience in the management of class actions) should facilitate the efficient and expeditious conduct of the proceedings.

Paragraph 4.3 provides that, when the Court considers it appropriate, the Trial Judge and the Case Management Judge may be the same judge. The Law Society's preference is to separate these roles. Such separation is an effective mechanism to address perceptions of prejudice arising from pre-trial applications.

The Law Society also supports the introduction of the Class Actions Registrar, but considers that the Practice Note could usefully provide more details as to the intended role of the Class Action Registrar.

2. Disclosure to Class Members Regarding Costs Agreements and Litigation Funding Agreements (Part 5)

The Law Society is supportive of greater transparency in relation to the disclosure to class members of costs arrangements and potential categories of costs.

Some members have concerns regarding the interpretation and practical application of Part 5, in particular paragraph 5.2, and its interaction with existing statutory requirements regarding costs disclosure e.g. under the Legal Profession Uniform Law. The Law Society considers that there may be utility in the Court providing further guidance and clarity in relation to the intended effect of Part 5. Such guidance could possibly take the form of a suggested draft template document. Further consultation between the Court and the profession in relation to Part 5 may also assist.

The Law Society also raises the issue of whether class members should be provided with information regarding any proposed payments that may potentially affect the ultimate settlement amount received by class members who do not enter into a litigation funding agreement. Such payments have been previously considered by the Court in cases such as *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 at [55]-[61], *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029 at [26]-[28] and *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19 at [17].

The Law Society supports the requirement, in paragraph 5.5, for the applicant's solicitors, and separately any litigation funder, to disclose any potential conflicts of interest to the applicant and class members. The Law Society also recommends that any such potential conflicts of interest should be promptly disclosed to the Court, given the Court's role in managing the proceedings and experience in understanding the potential implications of any conflict.

3. Disclosure to Other Parties of Costs Agreements and Litigation Funding Agreements (Part 6)

The Law Society considers that the disclosure of litigation funding agreements and the disclosure of costs agreements may present different issues.

Litigation funding agreements

The Law Society supports the requirement for the applicant and/or the applicant's lawyers to disclose to the parties and the Court the standard form of any litigation funding agreement, subject to any genuine objection. In the Law Society's experience, this requirement is broadly consistent with current practice. This requirement is, of course, subject to any redaction permitted under paragraph 6.3. There may be utility in paragraph 6.3(b) providing greater clarity in relation to whether the applicant's lawyers may redact information regarding the budget and estimated costs of the litigation.

Costs agreements

The Law Society queries whether the starting position should be that the applicant and/or the applicant's lawyers should disclose the standard form of any fee and retainer agreement and costs disclosure. While such documents could be relevant to certain interlocutory applications e.g. security for costs, it may be preferable for the disclosure of such materials to be dealt with by the Court on a case-by-case basis.

4. First Case Management Hearing and Further Interlocutory Steps (Parts 7 and 8)

The Law Society is generally supportive of the matters set out in Parts 7 and 8 of the draft Practice Note regarding the first case management hearing and further interlocutory steps.

Paragraph 7.1 notes that the first case management hearing will be fixed for a date within eight weeks from the date on which the application is filed. We suggest that some flexibility is needed in relation to this timing. As observed in the draft Practice Note, class actions are often large and complex. It may take some time for the parties' legal representatives to be appropriately appraised of the likely facts and issues that will be in dispute, and the potential interlocutory applications that may be made. The respondents' legal representatives may, in particular, be at a timing disadvantage. Paragraph 7.2 states that, if a party may be unable to participate meaningfully in the first case management hearing on the date fixed, that party should liaise with the other parties and then collectively approach the Court.

The Law Society agrees with the use of joint position papers in advance of case management hearings in class action proceedings. The experience has been that the use of such joint position papers is often an effective way to crystallise, in advance of hearings, the real issues in dispute. It may be appropriate for the Court, in due course, to issue a 'template' form of this joint position paper.

The Law Society generally agrees with the content of paragraphs 7.6 to 7.8, as to the matters that the parties should be in a position to address at the first case management hearing.

Paragraph 7.8(d) identifies that one matter to be addressed is 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 as to the costs of making discovery of particular categories of documents.

The Law Society assumes that this must be read subject to Part 10 of the draft Central Practice Note. Part 10 makes it clear that no party has a right to discovery, and that prior to the Discovery Applicant approaching the Court with a Request, the Court expects that the parties will have discussed discovery issues between them and, if possible, agreed on a protocol for discovery. While the circumstances of each case need to be considered, the Law Society does not believe that there is any reason in principle why the practice in relation to discovery should be different in class action proceedings from other commercial cases.

The Law Society supports case management initiatives that will minimise delay, and the cost and complexity of discovery, including the production of unnecessary material.

5. Mediation (Part 9)

The Law Society endorses the Court's encouragement of the mediation of class action claims. In general, a mediator should be appointed at the earliest opportunity, for example at one of the early case management hearings.

Paragraph 9.3 notes that, at an early stage, the parties should take steps to establish the methods by which relevant information might be gathered and exchanged. The Court

may make directions including in relation to information sharing in a mediation, as it considers appropriate.

The Law Society submits that there would be utility in the Practice Note containing more detail and precision in relation to the information that, ordinarily, should be exchanged to facilitate the effective conduct of mediations.

6. Communications with Class Members (Part 10)

The Law Society agrees with the content of Part 10 of the draft Practice Note, which is consistent with current practice in the Court.

7. Opt Out Notice (Part 11)

The Law Society agrees with the content of Part 11 of the draft Practice Note which, again, is consistent with current practice. The Law Society also considers that it would be helpful to have, at Schedule A, a 'sample' opt out notice, noting of course that the opt out notice will need to be tailored to meet the circumstances of each case.

8. Initial Trial – Trial of Common Questions (Part 12)

The Law Society considers that Part 12 of the draft Practice Note is consistent with current practice, and with what the class action mechanism is intended to achieve.

The Law Society suggests that there could be utility in amending paragraph 12.1(a) so that it refers to "some or all of the individual issues relating to the representative applicant(s), including their damages claim."

9. Settlement (Parts 13 and 14)

The Law Society agrees with Parts 13 and 14 of the draft Practice Note, which are broadly consistent with current practice in the Court.

In addition, the Law Society makes the following suggestions for consideration in relation to the drafting of Part 14:

(a) Paragraph 14.1(a) should include a further sub-paragraph which expressly contemplates an order regarding the timetable for the applicant (and, if appropriate, the respondent) to file evidence in support of the orders to be sought at the second return of the application.

(b) The drafting of paragraph 14.2(h) could be amended to expressly recognise that a settlement agreement or deed may contain confidential information that cannot be disclosed to class members at the time the settlement notice is sent.

(c) Paragraph 14.6 should refer to the approval of settlement administration costs on an ongoing basis.

10. Court Supervision of Deductions for Legal Costs or Litigation Funding Charges (Part 15)

Subject to one observation, the Law Society agrees with the content of Part 15 of the draft Practice Note.

Paragraph 15.4 states that where any application for Court approval of a proposed settlement or settlement distribution scheme involves an evaluation as to whether the legal costs incurred on behalf of the class members are reasonable,

> the Court may have regard to the corresponding legal costs incurred by the respondent to the action and make such orders for the confidentiality of the applicant's legal costs or a respondent's legal costs as may be appropriate.

In the Law Society's view, this proposal is inconsistent with current practice, and undesirable. The respondent's legal costs are unlikely to provide any form of reliable guide as to the reasonableness, or otherwise, of the applicant's legal costs. For example, a respondent is likely to incur substantial categories of cost that an applicant will not in relation to discovery.

The Law Society thanks you for the opportunity to comment. If there are any enquiries in relation to this submission, Leonora Wilson, policy lawyer for the Litigation Law and Practice Committee, can be contacted by phone on (02) 9926 0323 or by email to leonora.wilson@lawsociety.com.au.

Yours sincerely,

Gary Ulman
President