



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JC:P7:LI:CO:2009(7210)

Direct Line: 9926 0216

28 October 2009

Mr Laurie Glanfield AM
Director General
Attorney General's Department
DX 1227 SYDNEY

Dear Mr Glanfield,

Re: Possible reforms to NSW procedures for representative proceedings

I refer to your letter of the 1 October 2009.

The following comments are provided by the Litigation Law & Practice Committee (the Committee) on the reforms suggested by Justice Basten of the Supreme Court of NSW.

The Committee is generally in agreement with Basten J's proposal in which he favours a legislative version in NSW of Part IVA of the *Federal Court of Australia Act 1976* (Cth), as a means of updating class action procedures in NSW whilst also achieving uniformity across the Federal, Victorian and NSW jurisdictions.

Two observations are made by the Committee about a legislative class action procedure for NSW. Firstly, the Committee has previously provided suggested amendments to Rule 7.4 of the Uniform Civil Procedure Rules to the Uniform Civil Procedure Rules Committee, a copy of which is attached for your information. The lack of guidance provided by Rule 7.4 is of concern because the existence of uncertainty may lead to greater costs in litigation. Secondly, the Committee is amenable to a statutory class action procedure rather than a rules based procedure. Arguments may be made in support of both options. However, as class action procedures can be complicated, time-consuming and give rise to novel issues of natural justice because of the existence of group members that may not be identified or known, the procedure for class actions should be set out comprehensively and in the one place.

The Committee notes Justice Basten's discussion about ways in which the current Part IVA of the *Federal Court of Australia Act* could be improved. The reform of Part IVA has also been raised by the Federal Attorney General's report "*A Strategic Framework for Access to Justice in the Federal Civil Justice System*" (September 2009) at page 117, recommendation 8.11. A number of other suggestions have also been made by practitioners and academics including:

- the adoption of a certification process so as to reduce interlocutory applications;

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- the elevating of the importance of adequacy of representation in the schema of the class action requirements;
- procedures for addressing multiple class actions;
- regulating litigation funding;
- adopting the US common fund approach to legal costs; and
- setting out the requirements for approval of settlement in greater detail.


The Access to Justice Report (referred to above) recommends that the Federal Attorney-General should commission a review of the Part IVA class action provisions. Consequently, it is likely that Part IVA will be amended at some time in the future. There is no timeline in the Access to Justice Report, nor has there been any indication by the Federal Attorney General in relation to when a review would be commissioned or when it would report. However, considering the number of issues that have been raised and the greater prominence of class actions in the courts, it is something which one would not expect to occur quickly.

The Committee believes that the NSW Attorney General should act now to adopt a legislative class action procedure in NSW, but on the understanding that there may be need for further amendment in the future depending upon changes to Part IVA of the *Federal Court of Australia Act*.

If the NSW Attorney General prefers an approach that seeks to improve on Part IVA, the Committee will be pleased to contribute suggestions and make submissions on any proposal.

Thank you for seeking the Law Society's views on this important reform to civil procedure in NSW.

Yours sincerely,



Joseph Catanzariti
President