Law Council
OF AUSTRALIA

3 March 2016

The Hon J L B Allsop AO
Chief Justice
Federal Court of Australia
Chief Locked Bag A6000
Sydney South NSW 1235

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

Dear Chief Justice

Draft class actions practice note

Thank you for the opportunity to comment on the draft Class Actions Practice Note. The Class Actions Committee (CAC) and the Alternative Dispute Resolution (ADR) Committee in the Law Council's Federal Litigation and Dispute Resolution Section have provided the comments below. The CAC's members are eminent specialists in the practice and procedure of class actions in Australia and include those who regularly act for both applicants and respondents. Similarly, the ADR Committee members are ADR experts. The Law Council is the national peak body for the legal profession. Further information about the Law Council is at Attachment A.

Part 1 – Introduction

Law Council does not comment.

Part 2 – Objectives

Law Council does not comment.

Part 3 – Commencement of class actions proceedings

The Law Council notes that the draft Part 3 is consistent with Practice Note CM17, current class actions practice and the requirements of the *Federal Court of Australia Act 1976* (Cth) (the Act). The Law Council makes no further comment.

Part 4 – Case management

The Law Council supports the introduction of case management procedures in which actions are allocated to case management judges and trial judges, with defined and distinct roles for each judge. Specialist class action case management judges will, it is expected, be able to use their particular skills and experience to assist the parties to identify the real interlocutory issues in dispute and to ensure that such disputes are quelled quickly and efficiently.

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The Law Council supports the proposal, as noted in paragraph 4.6, that the Case Management Judge and the Trial Judge will work collaboratively and that the case management process is to be flexible and tailored to the particular needs of each case.

Part 5 – Disclosure to class members regarding costs agreements and litigation funding agreements

The Law Council agrees with the apparent intent of Part 5 of the draft; that is, that it is important that class members are properly informed about legal costs and of any obligations that they may ultimately have to third party litigation funders. However, the Law Council is concerned that the costs disclosure requirements in the draft practice note are too prescriptive, due to practical implementation problems and legal policy reasons.

It is suggested that the practice note might best achieve its intention, to ensure that proper disclosure is given, by stating:

> *"The applicant's lawyers should ensure that transparent and fulsome costs disclosure is made to class members from the commencement of proceedings and at various stages thereafter. Practitioners' attention is drawn to* Australian Securities and Investments Commission v Richards *[2013] FCAFC 89 in which the importance of clear disclosure at the outset, or as early as possible in the proceeding, is reinforced.*
>
> *When providing information to class members who are clients or potential clients in respect of costs, the applicant's lawyers should bear in mind that there are various categories of costs which can arise in class actions. These include . . . "*
>
> then insert 5(a) – (e) in the draft practice note.

In this way, the balance of Part 5, being the sub-categories (a) to (e) at least, can follow as a reminder rather than as a prescription. If prescriptive, the Law Council would be most concerned about the proposed Part 5, for three reasons.

First, complex disclosure requirements can have a detrimental impact as complex disclosure may confuse rather than inform and to comply such disclosure requirements will often be impractical in practice.

Secondly, legal practitioners are required in each Australian jurisdiction to comply with already onerous disclosure requirements. The consumer of legal services will not be assisted with yet another layer of complex disclosure.

Thirdly, legal practitioners should not be required to do what is the obligation of a third party, that is, to carry the burden of disclosing to their clients core information about a contract that their clients are entering into with a litigation funder. The disclosure burden should fall on the funder.

These issues are discussed in more below.

(a) **Complex disclosure**

The Law Council is concerned that compliance with the requirements in paragraph 5.2 is more likely to confuse than clarify.

The provision requires the applicant's lawyers to "*provide information as to the different categories of legal costs and litigation funding charges which can arise in class actions*". The provision then lists, on an inclusive basis, 6 different categories of costs.

The Law Council submits that this requirement is not likely to be practical for many class actions, at least, not at the outset. There are many different sorts of class actions and some clearly will not lend themselves to the disclosure contemplated by the draft practice note.

For example, an open class claim being conducted by the applicant's lawyers on a conditional fee basis for an estimated 35,000 consumers of a payday lending facility presents completely different disclosure fundamentals to an independently funded closed class shareholder action. In the former, the lawyers may have instructions only from the representative applicant and, until a settlement is processed, they will not know who the class members are.[1] In the latter, sophisticated institutions and superannuants may be required to enter into litigation funding agreements and retainers to be in the class. Each action, at different stages in the proceeding, calls for different disclosure.

To suggest that the applicant's lawyer in the payday lending case, is required, before the closure of pleadings and opt out, to alert the class members "*to the different categories of legal costs"* is problematic. The lawyer does not know who the class members are, only that they are persons who are alleged to be victims of the impugned conduct.

On the other hand, it may be possible to communicate with each class member in a shareholder class action at the commencement of the proceeding and, if sophisticated, the class member may benefit from full disclosure. The concern is that the disclosure prescribed by the draft will not clarify the class member's costs exposure but will confuse.

The lawyer may be able to estimate the "common benefit costs" at the commencement of proceedings but until settlement, this information is primarily relevant to the representative applicant.

Disclosure of "individual costs" is also problematic. A consequence of s 43(1A) of the Act is that the costs of a class action are the applicant's costs until the resolution of the common issues. Individual costs may have no relevance to class members as they may never be incurred. Even if the common issues are resolved favourably for the class, individual costs may not be relevant to individual class members as a settlement distribution scheme may separately provide for the costs of distribution.

Individual costs may also depend on the particular damages or losses claimed. For example, when a shareholder claim is settled, a formula is used to determine class member entitlements and it is not rationale to identify each class member's share of the cost of the administration of such a settlement. Alternatively, where personal injuries claims are made, individual costs will often be subject to significant variations depending on the manner in which individual claims are determined. The disclosure of sufficient individual costs information to properly disclose the various hypothetical alternatives may not, it is submitted, be of net benefit to the individual class member at the outset.

Again, if the action settles, it is then that the lawyer must give class members who want to participate in the settlement very clear information concerning costs. This information will be subject to an application to the court for its approval of its form and content under s 33X and s 33Y of the Act.

As to the requirement in class 5.2(e) that "costs-recovery" costs be disclosed, it is, with respect, submitted that to require a legal practitioner to separately disclose such costs to anyone but the representative applicant at the outset is likely to confuse.

(b) **Legal Profession Acts**

[1] As was the case in the matter of *Gray v Cash Converters International Limited and others* (No 2) [2015] FCA 1109.

The Law Council notes that legal practitioners are required to comply with detailed statutory requirements regarding costs disclosure in each Australian jurisdiction. The applicant's lawyer should be left to determine what sort of disclosure should be made in the circumstances of an individual case, provided that that disclosure complies with the applicable statutory requirements.

(c) **Litigation Funding**

The Law Council is concerned that the draft practice note imposes an obligation on the applicant's lawyer to alert the entire class of the detail of any litigation funding charges. These charges will be contained in a litigation funding agreement that is entered into between each class member and the litigation funder. If it is the intention of the practice note to impose an obligation on the applicant's lawyer to repeat the information in the funding agreement to the class members then that is opposed. If it is the intention that the lawyer is, by acting in a representative proceeding, taken to accept some responsibility to ensure that the class members are in possession of a document that properly discloses the funding charges, then that is not objectionable.

In relation to paragraph 5.5, it is noted that this requirement reflects the existing provisions of ASIC Regulatory Guide 248. It is submitted that there is therefore no need to replicate the requirement in the practice note.

Part 6 – Disclosure to other parties of costs agreements and litigation funding agreements

The disclosure of litigation funding agreements and the disclosure of costs agreements present different issues:

(a) **Litigation funding agreements**

The Law Council accepts that the applicant's lawyer should disclose a standard form of a litigation funding agreements in those class actions that have third party litigation funding, subject to the protection provided for in paragraph 6.3.

It may be of value for paragraph 6.3(b) to be clarified so that it expressly entitles the applicant's lawyer to redact those parts of a standard litigation funding agreement that contain information regarding the budget and estimates of costs of the litigation (to the extent that this is not encapsulated in the words "funds available to the applicant" and the commission payable to the litigation funder).

(b) **Costs agreements**

The Law Council is not comfortable with the proposal in 6.1 that the applicant's lawyer be required to disclose the standard form of "any fee and retainer agreement and costs disclosure" with class members.

Some of the content of retainers is subject to client legal privilege and the Law Council is concerned about the implied waiver of this privilege by the requirement to disclose. Furthermore, there is a risk that the disclosure requirement will invite the development of a new species of interlocutory disputes.

If the Court insists on the disclosure of some of part of the standard form of a costs agreement, it is suggested that the disclosure should exempt those parts of a standard form costs agreement that may provide the defendant with a strategic advantage or those parts that may be privileged.

Part 7 – First case management hearing

Paragraph 7.8 of the draft practice note sets out a catalogue of issues that often give rise to costly and time consuming interlocutory disputation and for this reason it is considered that the early exposure of these issues will assist the parties to resolve them and get to the substantive issues sooner rather than later.

The Law Council suspects the parties will not be ready to address all of the issues listed at the first case management hearing, as suggested, but will be more likely to be ready for the first case management conference after a directions hearing and with more time.

It is suggested that this CMC be held within 3 months of the commencement of a class action. It is also suggested that the practice note suggest that while most of the issues should be addressed earlier, rather than later, that the parties may require more than one CMC to address each of the issues listed in 7.8.

In order to avoid unnecessary interlocutory disputation, it is suggested that the practice note might provide for parties, by consent or with notice, to seek short extensions of time by written (email) application to the Case Management Judge or the Class Actions Registrar.

Part 8 – Further interlocutory steps

The Law Council supports case management initiatives that will minimize delay the cost and complexity of discovery, including the production of excessive volumes of material.

Part 9 – Mediation

Mediation is the only alternative dispute resolution (ADR) process referred to in the practice note. Standard mediation processes need to be adapted for complex matters including class actions. For example, managing expert evidence by ordering expert conclaves, joint expert reports or other appropriate methods ought to be considered. Complex multi-party disputes can be dealt with in whole or in part or at different developmental times during the litigation process by mediation, facilitation, expert appraisal or expert determinations and in rare cases by arbitration. A reference to ADR in the practice note would be preferred to a reference solely to mediation.

See s 53A of the Act as to the available ADR processes to be utilised:

> **Arbitration, mediation and alternative dispute resolution processes**
>
> (1) The Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:
>
> (a) to an arbitrator for arbitration; or
>
> (b) to a mediator for mediation; or
>
> (c) to a suitable person for resolution by an alternative dispute resolution process;
>
> in accordance with the Rules of Court. "

At an early stage of the proceeding, for example, at the first CMC, issues for resolution by mediation or other ADR process should be considered as well as at differing stages of the development of the proceeding.

The Court expects the parties to consider alternatives to contested litigation, see s 37M of the Act concerning its "overarching purpose".

An additional example when ADR may be utilised is in circumstances when preliminary issues are to be determined. See for example, "12. Initial Trial – Trial of Common Questions". In appropriate cases, trials may be split including dealing with common issues

together with non-common issues concerning liability. This may be a prime time for the Court to consider referring the issue/s for determination to an ADR process.

Suggested wording

A suggested alternative form of wording for the Practice Note could be:

> **"9. MEDIATION AND ADR**
>
> *9.1 The Court expects that the parties will mediate (or utilise other ADR processes) to resolve the claims of the applicant and class members on one or more occasions in the course of the action.*
>
> *9.2 At an early stage in the proceeding the parties should take steps to establish the methods by which relevant information might be gathered and exchanged which, without compromising the utility of the class action procedure, would assist the parties to have settlement discussions which are as informed as possible. Any obstacles to settlement should be raised with the Court. The Court will make such directions, including directions in relation to information sharing in a mediation or other ADR process, as it considers appropriate."*
>
> *9.3 There are often obstacles to the settlement of class actions which are not present in other types of litigation. For example, it is often the case that the documents material to the issue of liability are not available to class members and the quantum of claims made by class members is not known and cannot readily be assessed by the respondent/s.*
>
> *9.4 The Court will, after the close of pleadings, hold a case management conference for the purpose of investigating steps for the settlement of the claims including scheduling an appropriate ADR process to assist in achieving the overarching purpose."*

Part 10 – Communication with class members

The Law Council supports the introduction of clear guidelines for communication by the respondent and their lawyers with class members. The draft practice note strikes a reasonable balance between the interests of the applicant, class members and respondents.

Part 11 – Opt out notice

The Law Council does not have any comments regarding this part of the draft practice note, save to repeat that it may not be possible or sensible for the time for opt out to be as early as contemplated by the practice note. For example, it is not appropriate for opt out to occur before pleadings have closed.

Part 12 – Initial trial

The Law Council does not have any comments regarding this part of the draft practice note, except that in our view paragraph 12.1(a) should refer to "some or all of the individual issues relating to the representative applicant(s), including their damages claim".

Part 13 – Settlement – requirements for court approval

The Law Council does not have any comments regarding this part of the draft practice note,.

Part 14 – Settlement – procedure

The Law Council makes the following minor suggestions regarding concerning this part of the draft practice note:

Paragraph 14.1(a) should include another subparagraph 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.

Paragraph 14.2(h) could recognise that a settlement agreement or deed may contain confidential provisions that cannot be disclosed to class members at the time the settlement notice is sent.

Paragraph 14.6 could include a provision for the approval of settlement administration costs from time to time by application to the Case Management Judge in chambers if the circumstances suggest that this is in the interests of the class.

Part 15 – Court supervision of deductions for legal costs or litigation funding charges

The Law Council supports this part of the draft practice note.

The Law Council would welcome the opportunity to discuss this submission. Should you have any questions, in the first instance please contact the co-chairs of the Class Actions Committee in the Federal Litigation and Dispute Resolution Section or the Chair of the ADR Committee, Mary Walker:

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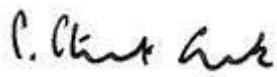
Yours sincerely,



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Profile of the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Arthur Moses SC, Executive Member
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