FEDERAL COURT OF AUSTRALIA

CLASS ACTIONS PRACTICE NOTE (GPN-CA)

General Practice Note

1. INTRODUCTION

1.1 This practice note sets out the arrangements for the management of class action matters within the National Court Framework ("NCF"). It applies to actions commenced under Part IVA of the *Federal Court of Australia Act 1976* (Cth) ("Federal Court Act") and:

(a) it is to be read together with:

- the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice Note is an essential guide to practice in this Court in all proceedings;
- Part IVA of the Federal Court Act and Division 9.3 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"); and
- any National Practice Area ("**NPA**") practice note of the NPA within which the class action is managed, such as the Commercial and Corporations Practice Note (C&C-1).

(b) it takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing (so far as the circumstances permit);

(c) it is intended to set out guiding principles for the conduct of class actions and is not intended to be inflexibly applied; and

(d) applies to all class actions, however, practitioners should also familiarise themselves with the General Practice Notes that operate across NPAs (see the further practice information in Part 18 below).

1.2 Taking into account that this practice note uses the common expressions "class action" and "class member" instead of "representative proceeding" and "group member", words and expressions in this practice note that are defined in Part IVA of the Federal Court Act and r 9.31 of the Federal Court Rules have the meanings given to them in that Part and rule.

2. OBJECTIVES

2.1 The aim of this practice note is to:

(a) address some of the practical issues which frequently arise in class actions and to indicate the Court's expectations regarding the management of those issues; and

(b) facilitate the efficient and expeditious conduct of class actions, in particular by ensuring that the issues that are in contest are exposed early in the proceeding and that class actions are not unnecessarily delayed by interlocutory disputes.

2.2 A practitioner who anticipates problems in complying with any aspect of this practice note is expected to raise the matter with the Court as early as is practicable.

3. COMMENCEMENT OF CLASS ACTION PROCEEDINGS

3.1 A class action is to be commenced by filing an originating application in accordance with Form 19. The originating application, statement of claim (Form 17) or affidavit (Form 59) filed in support of the application must, in accordance with s 33H of the Federal Court Act:

(a) describe or otherwise identify the class members either by name or characteristic;

(b) specify the nature of the claims and the relief claimed by the applicant on its own behalf and on behalf of the class members; and

(c) specify the common questions of law or fact which are said to arise in the action.

Except in cases where it is unlikely that there will be any substantial factual matters in contest, it will usually be the case that the concise statement pleadings process contemplated by the Central Practice Note and the Commercial and Corporations Practice Note will be inappropriate for use in class actions.

3.2 Any statement of claim should be drawn so that the applicant's personal claim can be used as the vehicle for determining the common questions in the action. Ordinarily the initial trial of the class action will be aimed at resolving:

(a) all common questions;

(b) any non-common questions raised by the applicant's personal claim (eg. the applicant's individual claim for damages) and also the claim of any sub-group representatives; and

(c) depending upon the circumstances, sample group member issues and "issues of commonality": see *Dillon v RBS Group (Australia) Pty Limited* [2017] FCA 896; (2017) 252 FCR 150 at 164-165, [66]-[67].

4. CASE MANAGEMENT

Allocation of Class Actions

4.1 At an appropriate time soon after filing, the class action may be allocated to a class actions management judge who will manage the class action and deal with all interlocutory issues up until the time when the class action is ready for an initial trial (at which time it will be allocated to a judge for hearing) or will be allocated to a docket judge.

The role of the Class Actions Registrar

4.2 In appropriate cases, a registrar of the Court may also be assigned to a class action proceeding as a Class Actions Registrar.

4.3 If a Class Actions Registrar is assigned, the role of that registrar is to assist the judge and the parties in the proceeding.

5. DISCLOSURE TO CLASS MEMBERS REGARDING COSTS AGREEMENTS AND LITIGATION FUNDING AGREEMENTS

5.1 In this practice note:

costs agreement:	means any fee and retainer agreement and costs disclosure entered into between the applicant's lawyers and the applicant and/or any class members, whether in standard form or otherwise;
litigation funding agreement:	means any agreement by which a litigation funder 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 or by way of litigation funding provided by some of the class members;
legal costs:	means any legal costs and disbursements (including those estimated) to be charged to class members;
litigation funding charges:	any litigation funder's commission, fees and other charges (including those estimated) to be charged to class members.

5.2 Any costs agreement and litigation funding agreement must be in writing.

5.3 In circumstances where the applicants' lawyers notify class members (who are clients or potential clients of the applicants' lawyers) of any applicable legal costs or litigation funding charges the applicant's lawyers should ensure that the notification is:

(a) in clear terms; and

(b) is provided as soon as practicable.

This is an ongoing obligation and applies to any material changes to the legal costs or litigation funding charges.

5.4 Failure to do so may be taken into account by the Court in relation to settlement approval under s 33V of the Federal Court Act (see paragraph 15.1 below).

5.5 The obligation on the part of the applicant's lawyers to notify class members of any applicable litigation funding charges is satisfied if class members have been provided a document that properly discloses those charges.

5.6 When notifying class members of any applicable legal costs in accordance with paragraph 5.3 above, the applicant's lawyers should bear in mind that there are various categories of legal costs which may arise in class actions. These may include:

(a) common benefit costs, being costs incurred in connection with managing and prosecuting the proceeding for the benefit of the class overall;

(b) sub-group costs, being costs incurred for the common benefit of the sub-group whose claims raise sub-group question(s);

(c) individual costs, being costs incurred in connection with issues which are individual to particular class members (eg. individual damages assessments); and

(d) any "uplift" which the applicant's legal representatives intend to charge (where permitted by applicable professional practice rules or regulations).

5.7 The applicant's lawyers should also bear in mind that the recoverability of legal costs in class actions is affected by:

(a) section 43(1A) of the Federal Court Act, which limits the circumstances in which costs orders may be made against class members;

(b) section 33ZJ of the Federal Court Act, which permits orders requiring that any damages awarded to class members be applied to reimburse the representative applicant for legal costs incurred by the applicant but not recovered from the respondent(s); and

(c) sections 33V(2) and 33ZF of the Federal Court Act, which permit orders requiring that settlement payments be applied to reimburse the representative applicant for unrecovered legal costs.

5.8 When notifying class members of legal costs, the applicant's lawyers should provide information in relation to the applicable categories of legal costs and the different situations in which class members may be required to meet a share of unrecovered costs.

Conflicts of Interest

5.9 Any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicant(s), the class members, the applicant's legal representatives and any litigation funder.

5.10 The applicant's legal representatives have a continuing obligation to recognise and to manage properly any conflicts of interest throughout the proceeding.

6. DISCLOSURE OF COSTS AGREEMENTS AND LITIGATION FUNDING AGREEMENTS TO THE COURT AND OTHER PARTIES

Confidential Disclosure to the Court

6.1 Subject to any objection, prior to the first case management hearing the applicant's lawyers shall, on a confidential basis, email the costs agreement and any litigation funding agreement to the associate of the judge presiding over the first case management hearing with both the email and the agreements clearly marked *"Confidential for the Court only (per Class Action Practice Note, paragraph 6.1)"*.

6.2 The provision of such agreements to the Court may be limited to an example of the standard form of each agreement, and need not include individual variations to the standard forms that might be negotiated with different class members.

6.3 Subject to any objection, the applicant's lawyers shall email to chambers any updated costs agreement and/or litigation funding agreement on the same confidential basis as soon as practicable after the applicant's lawyers become aware that:

(a) there is a change to the standard form of litigation funding agreement or costs agreement which 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.

Disclosure of Litigation Funding Agreements to other parties

6.4 Subject to any objection, no later than 7 days prior to the first case management hearing, the applicant's lawyers shall file and serve a notice in accordance with the "Notice of Disclosure - Litigation Funding Agreements" together with a copy of the litigation funding agreement. Such disclosure may:

(a) be limited to an example of the standard form of the agreement, and need not include individual variations to the standard form that might be negotiated with different class members;

(b) be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding being:

(i) the budget or estimate of costs for the litigation or the funds available to the applicants, in total or for any step or stage in the proceeding (so-called "war chest" information);

(ii) which 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.

6.5 Subject to any objection, the applicant's lawyers shall file and serve an updated Notice of Disclosure (with any appropriate redactions), in the event that the lawyers become aware of any of the circumstances set out in paragraph 6.3 above.

Objection to Disclosure

6.6 Where a question of legal professional privilege, prejudice or other significant detriment arises in making any disclosure under Part 6 of this practice note, the applicant's lawyers may object in whole or in part to the requirement to make such disclosure or alternatively propose a sensible redaction process.

6.7 Where such an objection is sought to be made, it should be raised with the Court and with other parties, with concise reasons provided, in writing no later than 7 days prior to the first case management hearing. The matter will then be substantively addressed at a hearing.

7. FIRST CASE MANAGEMENT HEARING

7.1 The first case management hearing will ordinarily be fixed for a date within 4 weeks from the date on which the application is filed, and the date will be noted on the application. The time allowed prior to the first case management hearing gives sufficient time to the parties to undertake a significant amount of case preparation to allow for the first case management conference to be conducted in accordance with this practice note.

7.2 If there is any genuine reason why a party may be unable to participate meaningfully in the first case management hearing on the date fixed, that party should liaise with all other parties about that as soon as practicable before that hearing. Where appropriate, the parties may approach the associate of the judge hearing the first case management hearing to propose a later date.

7.3 The parties are encouraged to file a joint position paper in advance of the first case management hearing, listing the major points the parties anticipate raising and outlining their respective positions on these points, with each one summarised in no more than 3 sentences.

7.4 The first case management hearing will usually be conducted by way of an "exchange" between all participants (rather than having only counsel speaking and then only in a fixed sequence). At least one of the counsel briefed to appear in the class action and the lawyer with primary responsibility for the class action must attend.

Matters to be dealt with at the First Case Management Hearing

7.5 This section should be read together with the Central Practice Note in regard to case management hearings (see Part 8 of the Central Practice Note, including the obligation to communicate with other parties in advance of a case management hearing in paragraph 8.6).

7.6 At the first case management hearing the parties will be asked to outline the issues and facts that appear to be in dispute.

7.7 Unless specific disclosure in accordance with Parts 5 and 6 above has already been made, the question of the disclosure requirements and any issues arising, including any objections, will be substantively addressed.

7.8 In addition, the parties should be in a position to address the following:

(a) any issues regarding the description of class members (see ss 33C(1) and 33H(1) of the Federal Court Act);

(b) a timetable for the delivery of a defence;

(c) any pleading issues;

(d) discovery, including the utility of orders for the provision of a core set of likely important documents to be discovered and affidavits by any party as to where relevant documents are stored, what types of documents exist, in what form they are held, and the likely timetable and costs consequences of making discovery of particular categories of documents;

(e) the financial basis upon which the class action is to be conducted and/or funded by the applicant and what, if any, orders are likely to be sought relating to these matters, which would impose any obligation on class members;

(f) subject to Part 8 below, whether any competing class action has been filed or has been foreshadowed;

(g) whether the respondent proposes to seek an order for security for costs;

(h) the issues referred to in Central Practice Note at [8.5], including preliminary views as to how the likely justiciable issues in the class action may best be managed, such as the possible separation of liability and damages, identifying any issues of fact or law ripe for preliminary determination, and considering whether or not some or all of the issues are susceptible to being referred to a referee under s 54A of the Federal Court Act and Division 28.6 of the Federal Court Rules;

(i) the timetabling of any interlocutory applications;

(j) the timetabling of a further case management hearing to deal with other issues; and

(k) any of the matters set out in paragraph 8.2 below where the parties are in a position to address such matters at the first case management hearing.

7.9 The Court will fix dates as early as are practicable for the determination of any interlocutory applications, and endeavour to deal with such applications on an expedited basis. Ordinarily, the Court will not give reasons for determining matters of practice and procedure but the Court will endeavour to give judgment and reasons within 6 weeks of a contested interlocutory hearing where reasons are sought by a party.

8. COMPETING CLASS ACTIONS

8.1 In this practice note a *competing class action* is a class action in which the claims of group members in a class action (as that term in understood in s 33C of the Federal Court Act) are sought to be advanced in another class action (irrespective as to differences as to the time period to which the class actions relate or differences in the way any allegations of contraventions are made in each class action).

8.2 Immediately upon becoming aware that a competing class action has been or is proposed to be filed in the Court or in a State court, the lawyers for the parties are to contact the associate to the judge informing the Court of the development, at which time the competing class action (if filed in the Court) will be listed for a case management hearing together with the first filed class action at the first case management hearing or, if the notification occurs after the first case management hearing, as soon as practicable.

8.3 If the competing class action is commenced in a State court, the Court will advise the parties as to the procedure to be adopted as to the management of the competing class actions including by convening a joint case management hearing of the type contemplated by the protocols for communication and cooperation between the Court and the Supreme Court of New South Wales and between the Court and the Supreme Court of Victoria.

8.4 As soon as practicable following notification to the Court of the existence or prospect of a competing class action, the lawyers for the parties to the class action (and, to the extent possible, the lawyers acting in any competing class action) should confer and by 4.00pm prior to the listing, the lawyers should provide to the associate to the judge an agreed proposal for the resolution of issues arising by reason of the existence of the competing class actions in accordance with the overarching purpose obligations in Part VB of the Federal Court Act (or failing agreement on such a proposal, the competing proposals of each party).

8.5 At any listing the Court will ascertain:

(a) whether there is any dispute that either of the competing class action is a representative proceeding for the purpose of the applicable legislation;

(b) any issue concerning the description of class members in the competing class actions;

(c) any issue concerning the identification of the common questions of fact or law in the originating process filed in the competing class actions;

(d) any other issues concerning the adequacy of the originating process;

(e) the suitability of the matters for joint or concurrent hearing of a selection hearing and procedures for the approval of fee and cost proposals from legal representatives / litigation funders; (to the extent relevant) the parties' submissions as to the appropriate jurisdiction; and any other matters relevant to the settling of a timetable for the efficient conduct of the competing class actions (including whether any security for costs will be sought and if so the amount, manner and timing of the provision of such security; and any protocol for communication with represented class members).

8.6 The Court will then determine how to proceed with the conduct of the class actions depending upon an analysis of all the relevant circumstances.

9. SUBSEQUENT CASE MANAGEMENT HEARINGS

9.1 This section should be read together with the Central Practice Note in regard to further interlocutory steps (see Part 12 of the Central Practice Note, including the obligation to communicate with other parties in advance of any interlocutory application in paragraph 12.2 of the Central Practice Note).

9.2 The complexity of class actions means that there may be a need for a number of case management hearings conducted by the judge to deal with issues, including the following:

(a) issues put over from the first case management hearing;

(b) discovery;

(c) whether the matter should be referred for alternative dispute resolution ("**ADR**") and, if so, a timetable within which the ADR process might proceed. Mediation, and information-sharing in that context, is likely to be considered proactively (see Part 9 of this practice note);

(d) the joinder of additional parties;

(e) whether or not sub-groups should be formed or sample class members put forward;

(f) the timing and form of the opt out notice;

(g) methods of communicating with non-client class members;

(h) whether there is utility in the use of sample class members;

(i) the common and other questions for trial including identifying, if appropriate, the matters to be determined at the initial trial for the purposes of the Court then making 'Merck Orders': see *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26 at [8];

(j) if appropriate, determining any common question as a preliminary question (r 30.01 of the Federal Court Rules) or giving summary judgment on any common question (s 31A of the Federal Court Act);

(k) whether it is appropriate to refer any one or more of the common questions to a Full Court pursuant to s 20(1A) of the Federal Court Act;

(l) the appropriateness of a split trial. It is usual for the common questions, together with such part of the applicant's case as is appropriate to decide at that stage, to be heard in an initial trial. Consideration should be given to whether the whole of the applicant's case should be heard at the initial trial or whether it is appropriate to hear and determine one or more separate questions at that trial;

(m) the provision of expert reports and production of joint expert reports, conferences of experts and the use of concurrent evidence at trial (see also the Expert Evidence Practice Note (GPN-EXPT));

(n) the possible use of referees (under s 54A of the Federal Court Act) or assessors; and

(o) the mode of conducting the trial (eg. whether it is to be an eTrial, whether witness statements will be used etc).

10. MEDIATION AND ADR

10.1 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. Registrars of the Court are experienced in assisting the parties to achieve settlement through mediation.

10.2 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 documents material to the issue of liability are not available to the applicant and class members, and the number of class members interested in participating in the class action and the quantum of claims made by them is not known and cannot readily be assessed by the respondent.

10.3 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. The Court will make such directions, including directions in relation to information sharing in a mediation or other ADR process, as it considers appropriate.

10.4 After the close of pleadings the Court will hold a case management hearing 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.

11. COMMUNICATIONS WITH CLASS MEMBERS

11.1 Unless leave is granted by the Court, if a class member is a client of the applicant's lawyers then any communication with the class member by the respondent or the respondent's lawyers or agents in relation to the proceeding shall only be through the applicant's lawyers. However, there is no intention to limit the respondent's communication with class members in the ordinary course of business. Where the respondent's lawyers are uncertain as to whether the class member is a client of the applicant they should liaise with the applicant's lawyers to clarify the status of the class member, before any communication takes place. In an appropriate case, the Court may make an order that the applicant's lawyers inform the other parties whether class members are clients of those lawyers.

11.2 The Court may make orders concerning communications with class members who are not clients of the applicant's lawyers, including establishing a protocol for such communications. Where class members are not clients of the applicant's lawyers then the respondent and its lawyers or agents should use reasonable endeavours to ensure that any communications with class members in relation to the proceeding are in writing.

11.3 Where a respondent and/or its lawyers or agents communicate with a non-client class member suggesting that the class member do or not do something, the communication should, in plain language, explain the consequences of following the suggestion and encourage the non-client class member to obtain legal advice.

12. OPT OUT NOTICE

12.1 Class members may opt out of a class action by giving a written opt out notice to the Court by a date which must be fixed for that purpose by the Court (see s 33J of the Federal Court Act). An opt out notice must comply with Form 21 (see r 9.34 of the Federal Court Rules).

12.2 The applicant's lawyers 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) clearly describes the consequences of remaining a class member or alternatively opting out of the proceeding, including a succinct explanation of how a judgment or settlement in the proceeding will or may preclude class members from relying on the same or related claims or defences in other proceedings;

(c) alerts class 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 class members in the most cost-effective way.

A sample form of such an opt out notice is available on the Court's website. It may be appropriate in some cases to use a shorter form of notice.

12.3 Where the class members are, or are likely to be, identifiable from a respondent's records (for example, shareholders of a respondent corporation or unitholders in a managed investment scheme) then the parties should, subject to any clear statutory or legal obligations requiring otherwise, cooperate with a view to using the respondent's records as the basis for a direct mail or email distribution of notices, whether by the applicant, by the respondent or by a third party (for example, a commercial mail house).

12.4 An objection to the use of the respondent's records to assist the opt out process in this way must be advised by the respondent to the applicant's lawyer at the earliest practicable opportunity. The parties should engage in a genuine effort to resolve the issue in a practical way before agitating the issue before the Court.

12.5 The Court will approve an appropriate manner of distribution of the notice to be given to class members informing them of the commencement of the class action, and of their right to opt out of the proceeding by the date that the Court has fixed (see ss 33X(1)(a), 33X(2) and 33Y of the Federal Court Act).

12.6 The timing of the opt out notice to class members is a matter to be dealt with at a case management hearing.

13. THE INITIAL TRIAL

13.1 In an appropriate case (and appropriateness will be 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. Such a trial may be structured to address:

(a) the issues raised by the claim of the representative applicant(s), namely the common questions as well as the individual issues relating to the representative applicant(s) including any individual claims for damages; and

(b) issues common to sub-groups which also might efficiently be addressed at the initial trial.

13.2 Unless the Court makes orders under ss 33Q or 33R of the Federal Court Act, "sample" class members whose claims are presented at a split trial will retain their status as class members for the purposes of s 43(1A) of the Federal Court Act.

13.3 Following an initial trial it will be necessary to decide whether the individual claims of class members will be determined within the existing proceeding (eg. under ss 33Q or 33R of the Federal Court Act) or determined in separate proceedings (s 33S of the Federal Court Act).

14. SETTLEMENT - REQUIREMENT FOR COURT APPROVAL & DOCUMENTATION

14.1 A class action may not be settled or discontinued without the approval of the Court (see s 33V(1) of the Federal Court Act). 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 (see s 33V(2) of the Federal Court Act; note also ss 33ZF and 33ZJ).

14.2 The Court will usually not determine an application for approval of a settlement unless a notice, approved by the Court, has been given to the class members (see ss 33X(4) and 33Y of the Federal Court Act).

14.3 In preparing documentation recording a settlement of a class action which will be the subject of an application for approval, the applicant's lawyers should be conscious that the applicant has a duty to not take steps to act contrary to the interests of class members connected with the conduct of the class action, and that the representation by an applicant of class members is for a limited purpose. That purpose is dealing, in accordance with Part IVA, with the claims of the class members which are in respect of, or arise out of, the same, similar or related circumstances and which give rise to at least one substantial common issue of law or fact.

14.4 In providing instructions for the preparation of any settlement documentation, the applicant should not, without express authority from class members, give releases, indemnities or covenants which go beyond dealing with the claim which are the subject of the class action.

15. SETTLEMENT - PROCEDURE

15.1 An application for the Court's approval of a proposed settlement must be made by interlocutory application. The orders which are commonly made on such an application include orders for:

(a) at the first return of the application:

(i) the confidentiality of evidence to be filed in support of the application for approval (which, in the usual course, will be restricted to the confidential opinion provided by counsel for the applicants);

(ii) the timetable for any person to file evidence in respect of the application for approval; and

(iii) Court approval of a notice to class members of the proposed settlement.

(b) at the second return of the application, Court approval of:

(i) the proposed settlement;

(ii) any scheme for distribution of any settlement payment; and

(iii) arrangements for the reimbursement of any costs incurred by the applicant(s) but not recovered from the respondents.

(c) following the completion of any settlement distribution scheme - disposing of the proceeding (eg. by dismissing the application).

15.2 Notice of the proposed settlement will usually be required to be given to class members. The notice should usually include the following:

(a) a statement that the class members have legal rights that may be affected by the proposed settlement;

(b) a statement that an individual class member may be affected by a decision whether or not to remain as a class member (in the event that 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 class 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 as to any order sought relating to the conduct and/or funding of the class action which would impose any obligation on group members;

(i) information on how to obtain a copy of the settlement agreement (except where confidentiality provisions in the settlement agreement preclude disclosure at that time);

(j) an explanation of who will benefit from the settlement, including an explanation as to how class members or sub-groups will benefit relative to each other;

(k) where all class members are not eligible for settlement benefits - an explanation of who will not be eligible and the reasons for such ineligibility;

(l) an explanation of the Court settlement approval process;

(m) details of when and where the Court hearing will be and a statement that the class member may attend the Court hearing;

(n) 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;

(o) 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);

(p) 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

(q) information on how to obtain legal advice and assistance.

15.3 When applying for Court approval of a settlement, the parties will be required to persuade the Court that:

(a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the class members who will be bound by the settlement; and

(b) the proposed settlement has been undertaken in the interests of class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).

15.4 Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action. The notices provided to class members should bring this to their attention as early in the proceeding as practicable.

15.5 The material filed in support of an application for Court approval of a settlement 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 class to the settlement;

(c) the stage of the proceedings;

(d) the risks of establishing liability;

(e) the risks of establishing loss or damage;

(f) the risks of maintaining a class action;

(g) the ability of the respondent 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.

15.6 Lengthy and unnecessary affidavit evidence on settlement approval applications is to be discouraged. The legal representatives of the applicant should ensure that only costs necessary to be incurred in the settlement approval process are incurred.

15.7 The Court will require to be advised of the performance of the settlement (including any steps in the settlement distribution scheme) and the costs incurred in administering the settlement in order that it may be satisfied that distribution of settlement monies to the applicant and class members occurs as efficiently and expeditiously as practicable.

16. COURT SUPERVISION OF DEDUCTIONS FOR LEGAL COSTS OR LITIGATION FUNDING CHARGES

16.1 Where a proposed settlement contemplates that any part of the payments 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 will usually require that the material filed in support of the application should demonstrate that reasonable steps were taken to alert class members to the likelihood of such deductions as soon as practicable after that became apparent, so that class members were, at the relevant time, able to take such steps as may have been practicably available to them to negotiate as to legal costs or as to litigation funding charges as applicable, or to remove themselves from the class action.

16.2 No lay or expert evidence should be filed by the lawyers for the applicant seeking to justify legal costs without prior leave being granted by the Court.

16.3 Although individual judges may approach the question of considering the reasonableness of legal costs differently depending upon the circumstances of the case, in class action settlements of significant size, the legal representatives of the applicant should be aware that that a referee may be appointed to inquire into and report upon the reasonableness of the legal costs proposed to be deducted. If such a referee is appointed, it is necessary for the lawyers for the applicant to assist the referee in the performance of the referee's task of inquiry and report.

16.4 Legal representatives should expect that a more extensive examination and assessment of legal costs, and a more extensive examination of the litigation funder's records may be required where:

(a) the class members include persons who are not clients of the applicant's lawyers or of the litigation funder;

(b) the deduction per class member constitutes a significant proportion of the settlement amount otherwise payable to each class member; or

(c) the litigation funder imposes charges beyond the percentage commission set out in the litigation funding agreement (eg. project management fees).

17. CONFIDENTIALITY ORDERS

17.1 The legal representatives of the parties should be aware that confidentiality or non-publication orders will not be made otherwise than in accordance with Part VAA of the Federal Court Act which provides that the starting point for consideration of such orders, for the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

17.2 Such orders will only be made if the Court must be satisfied that the order is necessary to prevent prejudice to the proper administration of justice (s 37AG(1)(a)). It should be recalled that "necessary" is a "strong word": *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30].

18. FURTHER PRACTICE INFORMATION AND RESOURCES

18.1 The following key documents are relevant to class actions matters and are available from the Court's website:

(a) Notice of Disclosure - Litigation Funding Agreements;

(b) Sample Opt Out Notice (including sample Form 21 – Opt Out Notice);

(c) Federal Court Form 21, Opt Out Notice.

18.2 Practitioners should also familiarise themselves with the General Practice Notes of the Court. The following practice notes can be of particular relevance to class actions: Expert Evidence Practice Note (GPN-EXPT), Survey Evidence Practice Note (GPN-SURV) and Subpoenas and Notices to Produce Practice Note (GPN-SUBP). These general practice notes and all of the Court's practice notes are available on the court's website.

18.3 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

18.4 In addition, further practice and procedure information and resources can be found on the Court's class actions webpage.

J L B ALLSOP
Chief Justice
20 December 2019