

**PROTOCOL FOR COMMUNICATION AND COOPERATION
BETWEEN SUPREME COURT OF NEW SOUTH WALES
AND FEDERAL COURT OF AUSTRALIA
IN CLASS ACTION PROCEEDINGS**

November 2018

INTRODUCTION

This protocol has been drafted to address measures by which management of representative or class action proceedings involving common parties and the same or similar issues that are commenced at or about the same time in the Supreme Court of New South Wales and the Federal Court of Australia can be co-operatively managed with a view to facilitating access to justice and the just, quick and cheap resolution of the real issues in dispute.

The impetus for development of a protocol in this regard was the commencement, almost simultaneously, of five open class securities class actions against AMP Limited, the first, on 9 May 2018 by Ms Marion Wigmans in the Supreme Court and the four remaining class actions commenced between 9 May and 7 June 2018 by Komlotex Pty Ltd, Mr Andrew Georgiou, WileyPark Pty Ltd and Fernbrook (Aust) Investments Pty Ltd, respectively, in the Federal Court. The claims made in each of those proceedings arise out of the same facts and raise the same issues.

The commencement of those proceedings in the respective courts led to conflicting applications for the transfer of proceedings in each court to the other and to the spectacle of anti-suit injunctions which had the capacity to affect the integrity of the processes of each of the respective courts and thus to undermine the administration of justice.



With the intent of facilitating the co-operative and efficient management of similar or substantially similar class actions on foot in each of the Supreme and Federal Courts at the same time, this draft protocol is put forward for consideration and approval.

BACKGROUND

Representative proceedings in the Federal Court of Australia are governed procedurally by the provisions of Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCAA) and in the Supreme Court of New South Wales by Part 10 of the *Civil Procedure Act 2005* (NSW) (CPA) (the latter being modelled on the former).

Where the threshold requirements for the commencement of a representative proceeding (group number; similarity of circumstances in respect of or out of which the claims arise; and existence of a substantial common question of law or fact to which those claims give rise – see FCAA, s 33C(1); CPA, s 157(1)), representative proceedings (commonly referred to as class actions) may be commenced in each court; the representative party being the person who commences those proceedings (FCAA, 33A; CPA, s 161(1)).

In each court, the originating process is required to demonstrate that the threshold requirements are satisfied and must: describe or otherwise identify (with sufficient precision) the group members to whom the proceedings relate; specify the nature of the claims made on behalf of the group members and the relief claimed, and specify the question of law or facts common to the claims of the group members (FCAA, s 33H(1); CPA, s 161(1)).

Representative proceedings can be commenced either as an opt-out proceeding (i.e., without the express consent of absent class members who are subsequently afforded an opportunity to “opt-out” of the class) or as a closed class proceeding.

The Court must fix a date before which a group member may opt out of the proceeding (FCAA, s 33J(1); CPA, s 162(1)) (though may dispense with this were appropriate in proceedings commenced by reference to a closed class (FCAA, s 33ZF(1); CPA, s 183). Notice must then be given to group members of the



proceeding and of the right which they have to opt out (unless dispensed with) (*FCAA*, s 33X(1)(a); *CPA*, s 175(1)(a)). The Court must approve the form and content of the opt-out notice (*FCAA*, s 33Y(1); *CPA*, s 176(1)) and must specify who is to give the notice and the way in which it is to be given.

Both Courts have published practice notes in relation to the case management of class action proceedings (see Federal Court Class Actions Practice Note (GPN-CA); Supreme Court Practice Note SC Gen 17). See attached.

PROPOSED PROTOCOL

The overarching objective of the proposed protocol is to ensure access to justice and to facilitate, in the interests of all stakeholders, the efficiency and effectiveness of class action proceedings in circumstances where multiple proceedings are brought in competing courts and across more than one jurisdiction. It is the intention of the proponents of the protocol that coordination and cooperation be enhanced between courts under whose supervision class action proceedings are being conducted.

In the application of this protocol, Courts should aim to promote the efficient and timely coordination and administration of competing class action proceedings in the most convenient and appropriate jurisdiction having regard to: the issues raised in the respective proceedings; the interests of the parties and group members in the respective proceedings; the minimisation of costs and inconvenience to the parties associated with the existence of competing class action proceedings; the management of the competing class action proceedings in ways that are proportionate to the size and nature of the respective classes, the complexity of the issues, the nature of the proceedings, and the number of jurisdictions involved. At all times, the interests of justice are paramount.

Under this Protocol, there shall be nominated by the Chief Justice of the respective Courts a senior judge to take the role of the representative of the Chief Justice for the purpose of implementing this Protocol ("the Class Action Representative Judge"). At the earliest practicable opportunity after the existence of competing class action proceedings is disclosed to the Court or otherwise ascertained, the Class Action



Representative Judges may convene a joint case management hearing for the purpose of ascertaining matters such as:

- (a) whether there is any dispute that either of the competing proceedings is a representative proceeding for the purpose of the applicable legislation in each of the jurisdictions;
- (b) any issue concerning the description of group members in the competing proceedings;
- (c) any issue concerning the identification of the common questions of fact or law in the originating process filed in the competing proceedings;
- (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 procedure for the approval of fee and cost proposals from lawyers/litigation funders; the parties' submissions as to appropriate jurisdiction; and any other matters relevant to the setting of a timetable for the efficient conduct of the competing proceedings (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 unrepresented group members).

After hearing from the parties, the Class Action Representative Judges from each Court will then confer and (after taking into account the submissions of the parties) determine the appropriate management of the competing class actions, including, where considered appropriate for the facilitation of the just, quick and cheap resolution of the issues in dispute in the competing class actions, matters such as: the convening of a joint selection hearing; the approval of fees/cost proposals; a concurrent hearing of the competing class actions; and/or to the extent possible the appointment of an acting judge from one jurisdiction to hear one of the competing class action proceedings in the other jurisdiction. It may be that the Class Action



Representative Judges will, after conferral, wish to hear further submissions from the parties in relation to particular issues.

The mechanisms provided for in this Protocol for cooperation between the Courts to facilitate appropriate management of competing class action proceedings can operate alongside, in an appropriate case, each Court's existing powers pursuant to the respective cross-vesting legislation applicable in each jurisdiction, and supplement each Court's broad powers to make any orders appropriate or necessary in a particular proceeding (including staying proceedings) to ensure that justice is done.

This Protocol is not intended to be exhaustive and in each case consideration ought be given to any special requirements or issues arising in the competing proceedings that are before the respective Courts.

Finally, the respective Courts should encourage, and where necessary direct if there is power to do so, the parties to make the necessary applications to the Court(s) to facilitate implementation of this Protocol; and should encourage the parties to act so as to promote the objectives and aims of this Protocol wherever possible.



The Honourable T F Bathurst AC
Chief Justice of New South Wales



The Honourable J L Allsop AO
Chief Justice, Federal Court of Australia

1 November 2018