



## PRACTICE NOTE SC GEN 17

### SC Gen 17 – Supreme Court Representative Proceedings

#### Introduction

Representative proceedings under Part 10 of the *Civil Procedure Act 2005* (NSW) commonly described as class actions present complexities which are unique compared to other forms of civil and commercial litigation.

This Practice Note is designed to facilitate the management of representative proceedings. There are a number of features which are designed to assist in their prompt and efficient resolution. In particular the provisions of SC Gen 9, SC Gen 10, SC Gen 11, SC CL 5, SC CL 7, SC Eq 5 and SC Eq 11 will not apply save to the extent the judge managing particular proceedings orders to the contrary. This is to provide maximum flexibility in bringing the proceedings to trial and their prompt disposal at trial.

The proceedings will be assigned on their commencement to one of the judges on the panel of judges who will hear representative actions. The panel of judges of the Common Law Division is as follows: Hoeben CJ at CL, Garling J and Beech-Jones J.

Class actions commenced in the Equity Division will henceforth be assigned to the Commercial List. Such actions will be case managed either by the judge administering the List (Hammerschlag J), Ball J or Sackar J and will be heard by either one of those judges, Ward CJ in Eq, or one of the other judges assigned to the Commercial List.

Judges who are assigned to manage the proceedings will determine any common questions that may arise and give directions for the determination of the remaining questions.

Representative proceedings will be managed by way of case conferences, which will be a more informal procedure than a directions hearing. This is designed to promote discussion between the parties and the judge to whom the proceedings are assigned with a view to exploring the best method of bringing the case to a hearing. The case conferences can, if appropriate, take place by video link or by telephone.

#### Commencement

1. This Practice Note replaces the Practice Note SC Gen 17 issued on 27 July 2017 and commences on 31 July 2017.

## Application

2. This Practice Note applies to representative proceedings under Part 10 of the *Civil Procedure Act*.

## General

- 3.1 Words and expressions in this Practice Note have the meanings given to them in Part 10 of the Act.
- 3.2 Subject to Part 10 of the Act, the Uniform Civil Procedure Rules 2005 (NSW) apply to representative proceedings.
- 3.3 The aim of this Practice Note is to facilitate the just, quick and cheap conduct of representative proceedings by ensuring that the issues in contest are identified at an early date and that representative proceedings are not unnecessarily delayed by interlocutory disputes.
- 3.4 The provisions of SC Gen 9, SC Gen 10, SC Gen 11, SC CL 5, SC CL 7, SC Eq 5 and SC Eq 11 will not apply save to the extent the judge managing particular proceedings orders to the contrary. This is to provide maximum flexibility in bringing the proceedings to trial and their prompt disposal at trial.
- 3.5 Any practitioner who anticipates problems in complying with any aspect of this Practice Note is to raise the matter with the Court as soon as practicable to comply with obligations imposed by the *Civil Procedure Act*, s 56.

## Commencement of proceedings

- 4.1 Representative proceedings are to be commenced in the Division of the Court appropriate to their subject matter in accordance with the *Supreme Court Act 1970* (NSW) and the Uniform Civil Procedure Rules.
- 4.2 In addition to the requirements of Part 6, Division 4 of the Uniform Civil Procedure Rules, an originating process must:
  - (a) describe or otherwise identify the group members either by name or characteristic;
  - (b) specify the nature of the claims and the relief sought by the representative party on his or her own behalf and on behalf of the group members;
  - (c) specify the common questions of law or fact which are said to arise in the proceedings;
  - (d) indicate whether the proceedings are commenced in the Common Law Division or the Equity Division; and

- (e) contain a notation that the proceedings are listed for an initial case conference at 9:00am on the Wednesday after the expiration of 42 days following the filing of the originating process.

### **Assignment of proceedings**

- 5.1 When the proceedings are commenced they will be assigned to a judge on the panel of the Division in which the proceedings are filed (the presiding judge).
- 5.2 The proceedings will be made returnable for an initial case conference before the presiding judge at 9:00am on the Wednesday after the expiration of 42 days from the filing of the originating process.

### **Case conferences**

- 6.1 Representative proceedings will be managed by the presiding judge.
- 6.2 There will be an initial case conference and subsequent case conferences at times determined by the presiding judge in consultation with the parties.

### **The initial case conference**

- 7.1 The parties should be in a position to deal to the extent possible with the following matters at the initial case conference:
  - (a) whether there is any dispute that the proceedings are representative proceedings for the purpose of Pt 10 of the *Civil Procedure Act*;
  - (b) any issue concerning the description of group members;
  - (c) any issue concerning the identification of the common questions of fact or law in the originating process;
  - (d) any other issues concerning the adequacy of the originating process;
  - (e) a timetable for the service of defences, cross-claims and further pleadings;
  - (f) whether any security for costs will be sought and if so the amount, manner and timing of the provision of such security; and
  - (g) any protocol for communication with unrepresented group members.
- 7.2 At or prior to the initial case conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceedings, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.

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**Subsequent case conferences and further interlocutory steps**

- 8.1 It may not be possible to deal with all the matters referred to in par [7] above at the initial case conference. To the extent that it is not possible to do so, those matters will be dealt with at a subsequent case conference or conferences at a time or times fixed by the presiding judge after consultation with the parties. The following additional matters will be dealt with at subsequent case conferences:
- (a) The date before which a group member may opt out of the proceedings (*Civil Procedure Act*, s 162).
  - (b) The form and content of the notice to group members advising of the commencement of the proceedings and their right to opt out of the proceedings before a specified date (*Civil Procedure Act*, s 175) (the opt out notice).
  - (c) The manner of publication and dispatch of the opt out notice.
  - (d) The extent of discovery/disclosure.
  - (e) The steps necessary for the determination of the representative party's claim and the common questions including:
    - (i) the provision of witness statements; and
    - (ii) the provision of expert evidence and the manner that such evidence will be taken.
  - (f) Such further directions as may be necessary.
  - (g) The date of the hearing.
- 8.2 The form, content and manner of service of the opt out notice is required to be approved by the Court (*Civil Procedure Act*, s 176). The representative party within seven days following the initial case conference or such further time as directed by the presiding judge should file and serve:
- (a) a draft opt out notice;
  - (b) draft orders with respect to the proposed manner and timing of giving the opt out notice;
  - (c) information as to the anticipated costs of giving the opt out notice in the manner proposed; and
  - (d) a draft order as to the payment of costs of giving the opt out notice if not to be borne by the representative party.

## Interlocutory disputes

- 9.1 In the event that agreement cannot be reached on the matters referred to in pars [7] and [8] above or any other interlocutory matter at the case conferences, the presiding judge:
- (a) after hearing from the parties may make such directions as he or she thinks appropriate; or
  - (b) direct that a motion and to the extent necessary a supporting affidavit be filed in respect of the matters in dispute and fix a date for an interlocutory hearing on those matters.

## Mediation

- 10.1 As a matter of general practice the proceedings will be referred to mediation at an appropriate time. The timing of that mediation and the identity of the mediator will be a matter for decision by the parties. In the event the parties are unable to agree on a mediator, the mediator will be selected by the presiding judge from persons nominated by the parties. Unless otherwise agreed or ordered the costs of the mediation will be borne by each party equally.

## Notice to group members

- 11.1 Subject to directions of the Court, notice is to be given to group members of the following matters in a form approved by the presiding judge:
- (a) amendment of the originating process varying the persons who may be group members (*Civil Procedure Act*, s 163(4));
  - (b) a motion seeking dismissal for want of prosecution (*Civil Procedure Act*, s 175(1)(b));
  - (c) proposed settlement or discontinuance of the proceedings (*Civil Procedure Act*, s 173);
  - (d) proposed withdrawal of the representative party (*Civil Procedure Act*, ss 174 and 175(1)(c));
  - (e) the bringing of money into court (*Civil Procedure Act*, ss 175(3) and 177(4)); and
  - (f) the need for proof of individual claims in respect of a fund (*Civil Procedure Act*, s 178(5)).



**Issues remaining for the determination of the common questions**

12. In the event there are any matters remaining following determination of the common questions, the presiding judge shall give direction as to the disposal of the remaining issues.

**Third party access to Court files and placing documents on the website**

- 13.1 Access to the Court file by third parties will be under the control of the presiding judge.
- 13.2 The Supreme Court website lists some details of class actions currently before the Court and provides links to some of the documents that have been filed including the pleadings and opt out notices. The presiding judge will decide which documents will be available on the website.

**T F Bathurst AC**

Chief Justice of New South Wales

31 July 2017

**Related information**

See also:

*Civil Procedure Act 2005**Supreme Court Act 1970**Uniform Civil Procedure Rules 2005***Amendment history**

31 July 2017: This Practice Note replaced the previous version of SC Gen 17 that was issued on 27 July 2017.

27 July 2017: This Practice Note replaced the previous version of SC Gen 17 that was issued on 12 August 2014.

12 August 2014: This Practice Note replaced the previous version of SC Gen 17 that was issued on 22 February 2011.

22 February 2011: This Practice Note was issued on 22 February 2011 and commenced on 4 March 2011.