COSTS ISSUES in representative proceedings

By Phillipa Alexander

Where a product liability claim involves seven or more claimants, the proceedings may be conducted as representative proceedings under Part IVA of the *Federal Court of Australia Act* 1976 (FCAA). Representative proceedings can also be brought in NSW state courts where 'numerous persons have the same interest in any proceedings' [1] or in Victorian courts under Part 4A of the *Supreme Court Act* 1986. »

© Barbara Battista/Dreamstime.com

Class actions give rise to a number of specific costing issues that should be considered both at the outset of the matter and during the course of conducting the proceedings.

COSTS AGREEMENTS

While courts have always had the power to regulate solicitors' costs by way of taxation or assessment, the solicitor's costs agreement may be subject to scrutiny by the federal court in a number of additional situations:

1. The form and content of an opt-out notice under s33X FCAA must be approved by the court. In *Johnson Tiles Pty Ltd v Esso Australia Ltd*[2] Justice Merkel held that as the group members were not informed about their potential costs liability in an opt-out notice, the 'no win no fee' costs agreements were not fair and reasonable and the court exercised its supervisory jurisdiction under ss23 and 33ZF to prevent the lawyers enforcing the agreements.
2. In obtaining the court's approval to a proposed settlement in accordance with s33V, the court may require evidence from an independent solicitor or cost consultant as to the fairness and reasonableness of the costs proposed to be paid to the firm, as was required in *Courtney v Medtel Pty Limited (No. 5)*.[3]
3. The court has an additional general power under s33ZF(1) to make *'any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding'*. This power extends to the approval or supervision of the form of costs agreements entered into between solicitors acting for a representative party and group members in relation to Part IVA federal proceedings.

Uplift fees

Prior to the introduction of the NSW *Legal Profession Act* 2004 (LPA) on 1 October 2005, many NSW-based product liability class actions were conducted on a speculative basis, with costs agreements providing for a 25% uplift in the event of a successful outcome.

Section 324(1) LPA prohibits a law practice from including a provision on a conditional costs agreement which provides for the payment of a premium upon a successful outcome of a damages claim.

Such agreements are void and a law practice that has entered into such an agreement is not entitled to recover any amount in respect of the provision of legal services. There is no *quantum meruit* recovery as may apply to other void agreements.

Section 324 applies to a matter if the client first instructs the law practice after 1 October 2005. Current representative actions may therefore comprise a group in which some members have entered into a conditional costs agreement with an uplift fee and some members have not.

Apart from the difficulties that this amendment presents to practitioners in providing estimates of the group members' own costs and the costs that may be recoverable from an opposing party where differing costs agreements apply, it also raises issues with respect to court approval of the agreements.

Potentially, agreements that do not contain an uplift fee may be regarded as more reasonable than those agreements that do. However, on the other hand, an agreement that provides for a base hourly rate of, say, $350, with a 25% uplift, may be regarded as more fair and reasonable than an agreement that provides for a base hourly rate of $437.50, irrespective of the outcome.

Pre- and post-1 October 2005, costs agreements will also be a challenge for firms required to demonstrate the fairness of their costs. Obtaining evidence to that effect across the whole group may be difficult.

ESTIMATES

Under ss309(c) and (f) of the NSW LPA, a solicitor is required to provide estimates of:

1. the total legal costs if reasonably practicable or, if it is not reasonably practicable to estimate the total legal costs, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs;
2. the range of costs that may be recovered if the client or prospective client is successful in the litigation; and
3. the range of costs the client or prospective client may be ordered to pay if they are unsuccessful.

These estimates must be provided before, or as soon as practicable after, the law practice is retained in the matter and they must be updated in writing where there is a substantial change to the estimate. The update must be provided as soon as is reasonably practicable after the law practice becomes aware of the change.

Clearly it will be extremely difficult to provide an accurate estimate of the total legal costs to be incurred by an individual member if the total number of group members is not known at the outset. In providing a range of estimates, one of the major variables will be the number of members who ultimately join the group. This variable should be noted when an estimate range is provided.

Updating estimates may prove to be a mammoth task where the group is large. Consideration should be given to providing a range of estimates that apply in certain circumstances, so as to keep updating within manageable levels.

PARTY-PARTY COSTS ORDERS

In Part IVA proceedings, the court can award costs against:

- the representative party;
- a person appointed by the court as a sub-group representative under s33Q; or
- an individual group member who has been permitted to appear pursuant to s33R.

Costs cannot be awarded against any other person on whose behalf the proceedings have been commenced, direct immunity being provided by s43(1A). Similar immunity is provided by s33ZD of the Victorian Supreme Court Act. Although there is no similar statutory protection for class actions brought in the NSW state courts, it would be relatively unusual for a court to make an order against a non-party who had not, in some way, been actively involved in the proceedings.

Uplift fee agreements are void and a law practice that has entered into such an agreement is not entitled to recover any amount in respect of the provision of legal services.

If the representative party succeeds, a costs order should be made in favour of all members of the class who have not opted out as at the date of the order.

Quantification of party-party costs

Difficulties in quantifying the group members' costs may arise where some members of the group have discontinued or settled their claims on a costs-inclusive basis. Generally, where a solicitor acts for more than one client in the same proceedings, representative or otherwise, costs will need to be apportioned where not all clients obtain a costs order in their favour. This is because, *prima facie*, each client is liable to their solicitor only for a pro rata proportion of the general costs plus the costs incurred exclusively for their claim. Pursuant to the 'indemnity principle', whereby a party cannot make a profit on party-party costs, recovery is limited to the amount for which a client is liable to their own solicitor.

For example, if the group comprised 100 members, 25 of whom opted out, discontinued or settled their claims on a costs-inclusive basis, *prima facie* only 75% of the general costs may be recoverable from the opposing party. This presumption may be subject to displacement where other arrangements have been made for payment of the costs, such as where the representative party has contracted with the solicitor to be liable for all the general costs or at least all the general party party costs. In this regard, it is worthwhile noting that s33ZJ FCAA entitles the representative party, or a sub-group representative party, to apply for an order, such that where costs reasonably incurred exceed the recoverable costs, the excess be paid out of the damages awarded.

It is important that record-keeping and time-recording be undertaken with this in mind. Work done to advance the claim generally must be separately identified from work done to advance individual claims. If group members join the group at different times, it may also be necessary to quantify the general costs as at that date so that varying apportionments can be applied for different time-periods.

Settlement of any individual's claim should be undertaken with regard to the consequences of the settlement on the remaining group members' costs. Where possible, settlement should not be made on a costs-inclusive basis; terms should be agreed that protect the party-party recovery of the general costs of the entire group.

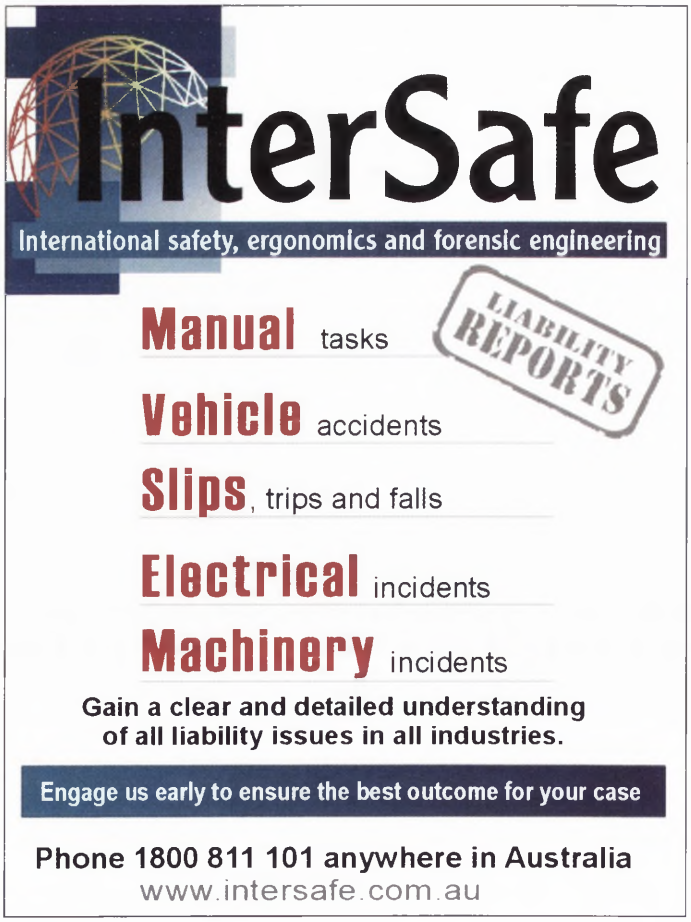
Maximum party-party costs

In the relatively rare circumstance that representative proceedings must be brought in the state courts because there is no infringement of a federal law and the sole cause of action is founded in negligence or contract, consideration should be given to the effect of state legislation. The application of the maximum costs provisions in NSW, for example, could prove difficult to resolve where some group members recover more than $100,000 and others recover $100,000 or less.

SECURITY FOR COSTS

Respondents to class actions more frequently make application for security for costs, particularly where it appears the representative applicant would be unable to satisfy an adverse costs order. Section 33ZG(c)(v) FCAA provides that, except as otherwise provided by Part IVA, nothing in the Part affects the operation of any law relating to security for costs.

In *Ryan v Great Lakes Council*,[4] Wilcox J acknowledged the incongruity and anomaly that while a direct costs immunity has been conferred under s 43(1A), the effect of that immunity has been indirectly removed by enabling orders for security for costs to be made *'on the basis that the applicant is bringing the proceedings for the benefit of others who ought to bear their share of the potential costs liability to other parties'*. Wilcox J upheld the approach taken by Merkel J in *Woodhouse v McPhee*,[5] in that: >>



> 'the fact that an impecunious applicant is bringing a Part IVA proceeding for the benefit of represented persons, whilst a relevant consideration in favour of granting security, ought not **of itself** be as significant a consideration as it might otherwise be in favour of the granting of security'. [original emphasis]

In refusing security, Wilcox J did, however, accept Merkel J's view that:

> 'if the claim was spurious, oppressive or clearly disproportionate to the costs involved in pursuing it or if the proceedings were structured so as to immunise persons of substance from costs orders I would not consider the fact that the represented persons were entitled to the benefit of s43(1A) to be a consideration which in any way operates against an order for security in such cases.'

An order for security for costs was made in *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd*,[6] where the representative applicant had been structured for the purpose of the class action so as to provide immunity from costs. While the applicant argued that since the proceeding had a high prospect of success, an order for security would stifle a valid claim, this was rejected by the court.

In *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*,[7] the Court did not have to specifically consider security for costs and costs order issues, but it was a case in which each claim was funded by Firmstones Pty Ltd and purported to be a representative action on behalf of all retailers who chose to opt in. Firmstones had indemnified the participants in respect of costs, including adverse costs orders, and had $1 million by way of security for costs. The court noted that:

> 'Defendants may in proper cases seek security for costs and they may obtain special costs orders against funders if the proceedings fail. But they have no entitlement ... to be protected from litigation where the appellants have been indemnified by an intermeddler, against the negative effect of adverse costs orders.'

In estimating costs for a fee agreement, one of the major variables will be the number of members who ultimately join the group. This variable should be noted when an estimate range is provided.

COSTS ORDERS AGAINST SOLICITORS

Instituting representative proceedings in the wrong jurisdiction can prove costly. In *Cook v Pasminco Ltd (No. 2)*[8] costs orders were made on an indemnity basis against an applicant's solicitors personally, as the court considered the solicitors gave no consideration, or no proper consideration, to the question whether the federal claim had any prospect of success at all. The court also seemed to have been influenced by the fact that the solicitors had devised and initiated the proceedings rather than acted upon a client's grievance.

COSTS OF CONDUCTING THE REPRESENTATIVE ACTION

In conducting a federal court representative action, practitioners should keep in mind s33N. This provides that the court may on application by the respondent, or of its own motion, order that the proceeding not continue as a representative proceeding where the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs were each group member to conduct a separate proceeding.

SUMMARY

In conducting class actions, the following costs issues require consideration:

- the form of the costs agreements, particularly that with the representative applicant, so as to ensure party-party recovery of the general costs is not eroded through apportionment;
- the manner in which estimates are provided and the form of such estimates;
- the way in which time is recorded for work so that the general costs can be separately quantified;
- the nature of the representative applicant, so as to enable any application for security for costs to be resisted;
- the form of the opt-out notice so as to provide information about the group members' liability for costs;
- the effect of terms of settlement of individual claims on remaining group members' costs;
- evidence to be provided to the court in relation to the fairness and reasonableness of the solicitor's costs when seeking court approval for a settlement; and
- the way in which the claim for party-party costs is presented to a respondent to ensure full recovery of party-party costs. ■

Notes: **1** See Rule 7.4 of the Uniform Civil Procedure Rules 2005. **2** *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 1363. **3** *Courtney v Medtel Pty Limited (No. 5)* [2004] FCA 1406. **4** *Ryan v Great Lakes Council (1998)* 154 ALR 584. **5** *Woodhouse v McPhee Federal Court of Australia,* 24 December 1997, unreported. **6** *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004. **7** *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 **8** *Cook v Pasminco Ltd (No. 2)* [2000] FCA 1819.

Phillipa Alexander *specialises in legal costs and is a director of Costs Partners.* **PHONE** *(02) 9006 1033*
EMAIL *phillipa@costspartners.com.au*