Te Aka Matua o te Ture
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Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa

Class Actions and Litigation Funding: Supplementary Issues Paper

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Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

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We want to know what you think about the issues, options and proposals set out in this paper.

Submissions on our Issues Paper must be received by **12 November 2021**.

You can email your submission to cal@lawcom.govt.nz.

You can post your submission to

Review of Class Actions & Litigation Funding
Law Commission
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b. The court having an express power to make funding equalisation orders.

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b. At an early stage of the proceeding, with the court providing a provisional or maximum rate at this stage and setting the final rate at a later stage.

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a. The terms and conditions of the settlement.

b. Any legal fees and litigation funding commissions that will be deducted from class member relief.

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Introduction

IN THIS INTRODUCTION WE DISCUSS:

- The purpose and approach of the Supplementary Issues Paper.
- Significant developments since our Issues Paper was published.
- Our views on some of the questions we asked in the Issues Paper.
- The process for feedback on the Supplementary Issues Paper.

PURPOSE AND APPROACH OF THIS PAPER

1. In December 2020 we published Issues Paper 45: *Class Actions and Litigation Funding | Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa*. The Issues Paper did not seek feedback on all aspects of a class actions regime. Rather, we sought feedback on:
   (a) Whether a statutory class actions regime was desirable.
   (b) The appropriate objectives of class actions.
   (c) Principles for the design of a class actions regime.
   (d) The scope of a class actions regime.
   (e) Key design features of a class actions regime, namely: whether to have a certification stage and the requirements of any certification test, the role of representative plaintiff, the mechanism for determining class membership and whether the adverse costs rule should apply.
2. We also sought feedback on whether litigation funding is desirable in principle and, if so, whether and how it should be regulated. We sought feedback on how any concerns about funder control of litigation, conflicts of interest, capital adequacy or funder profits should be managed.
3. We received 51 submissions on the Issues Paper, including from Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Te Hunga Rōia Māori o Aotearoa, law firms, litigation funders, barristers, insurers, individuals and Government agencies. We also received feedback from the judiciary.
4. The purpose of this Supplementary Issues Paper is to seek feedback on some additional class actions issues, namely:
   (a) Issues relating to commencement of a class action, including class actions with multiple defendants and the impact of a class action on limitation periods. We are also seeking feedback on a detailed proposal for certification.
   (b) How competing class actions should be managed.

(c) Relationships with class members, including the obligations of the representative plaintiff and the nature of the lawyer-class member relationship.

(d) Issues that arise during a class action, including giving notice to class members, case management, discovery, managing individual issues and whether to allow common fund orders or funding equalisation orders.

(e) Several issues associated with judgments in class actions, namely the binding effect of a judgment on common issues, assessment of damages, and appeal rights.

(f) Settlement of a class action.

5. We have expressed a preliminary view on most of the topics we discuss in this paper. We have also provided some draft provisions for submitters to consider, and we acknowledge the work of the Parliamentary Counsel Office in drafting these for us. It was not feasible to produce an entire draft Bill for consultation at this stage of the process. We have focused on draft provisions for five topics: commencement, certification, effect of a judgment, aggregate monetary relief and settlement.

6. While we have carefully considered all the submissions we received on the Issues Paper, the Supplementary Issues Paper only provides a very high-level summary of submitters' feedback. This is to keep the paper at a manageable length for readers and to enable a focus on matters requiring further consultation. Our final report will contain a more detailed explanation of the views expressed by submitters and our response to those.

7. As the Issues Paper contained a comprehensive discussion of litigation funding issues, it has not been necessary to develop supplementary chapters on litigation funding. This paper does not address litigation funding issues, other than whether:

(a) The court should consider respective funding arrangements when assessing competing class action proposals (Chapter 2).

(b) Common fund orders or funding equalisation orders should be available in Aotearoa New Zealand (Chapter 4).

(c) The court should consider litigation funding commissions when deciding whether or not to approve a class action settlement (Chapter 6).

8. These issues are a sub-set of some broader questions about litigation funding which we discussed in the Issues Paper. Our policy decisions on these matters will need to be consistent with the overarching recommendations we make with respect to any regulation and oversight of litigation funding.

SIGNIFICANT DEVELOPMENTS SINCE OUR ISSUES PAPER

9. There have been a number of developments with respect to representative actions, class actions and litigation funding since the Issues Paper was published in December 2020.

10. Developments with respect to litigation under High Court Rule (HCR) 4.24 include:

(a) The Court of Appeal upheld the High Court's decision to strike out *Houghton v Saunders.* [1]

(b) The Government announced a proactive settlement package for Southern Response claimants in December 2020. [2] This may provide an alternative to participating in the *Ross v Southern Response* representative action for some claimants.

(c) The Court of Appeal upheld the High Court's decision to grant a representation order in *Smith v Claims Resolution Service.* [3]

(d) A settlement was reached in *Strathboss Kiwifruit v Attorney-General*, with the Government agreeing to pay the claimants $40 million. [4]

(e) Litigation was discontinued in *Paine v Carter Holt Harvey*, as the result of Harbour Litigation Funding withdrawing from funding the case. [5] The same funder also withdrew from funding *White v James Hardie*, which resulted in the litigation being discontinued part-way through the substantive hearing. [6]

(f) The High Court released its substantive judgment in *Cridge v Studorp,* which found for the defendants. [7]

(g) A settlement has been reached in *Scott v ANZ,* which was a case brought on behalf of investors in Ross Asset Management. We understand the parties are seeking High Court approval of the settlement. [8]

(h) In September 2021, the High Court released four interlocutory judgments in *Ross v Southern Response*. [9]

(i) A proceeding has been brought against two banks with respect to alleged breaches of the Credit Contracts and Consumer Finance Act 2003. [10]

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1 *Houghton v Saunders* [2020] NZCA 638. As outlined at [4], the High Court had made an "unless" order striking out the proceedings unless security for costs was provided by a specified date and senior counsel for the claimants confirmed the claimants were adequately resourced to prepare for and present their stage two claims. The Supreme Court declined leave to appeal the Court of Appeal's decision: *Houghton v Saunders* [2021] NZSC 38.

2 David Clark "Proactive package for Southern Response Claimants" (press release, 14 December 2020).

3 *Claims Resolution Service Ltd v Smith* [2020] NZCA 664.

4 Ministry for Primary Industries "Crown and kiwifruit sector plaintiffs settle long-running litigation over PSA (press release, 13 February 2021). The Crown's insurer contributed $15 million.

5 See Tim Hunter "Carter Holt Harvey class action discontinued" *The National Business Review* (online ed, Aotearoa New Zealand 16 June 2021).

6 See Rob Stock "Shock end to James Hardie class action lawsuit prompts calls for controls over litigation lenders" *Stuff* (online ed, 8 August 2021). Note that *White v James Hardie* was brought with a large number of plaintiffs, rather than as a representative action under HCR 4.24.

7 *Cridge v Studorp Ltd* [2021] NZHC 2077.

8 See Tim Hunter "ANZ settles class action claim on Ross Fraud" *The National Business Review* (online ed, Aotearoa New Zealand, 23 August 2021).

9 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment); *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements); *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (review of defendant's communication); and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2454 (set-aside application).

10 Jenny Ruth "ANZ, ASB sued in multimillion dollar class action" *BusinessDesk* (online ed, Aotearoa New Zealand, 29 September 2021).

11. A broader civil litigation development is the Rules Committee's consultation on reforms to improve access to civil justice.[11] The Committee released a consultation document in May 2021 and is currently considering the submissions it received.[12] The NZLS also continues its work on improving access to justice, including a recent survey of the profession on access to justice to build its evidence base.[13]

12. Overseas developments include:

    (a) The report of the Australian Parliamentary Joint Committee on Corporations and Financial Services on litigation funding and the regulation of the class action industry (Australian Parliamentary Inquiry).[14]

    (b) The High Court of Australia released its decision in *Wigmans v AMP Ltd*, which addressed competing class actions.[15]

    (c) The United Kingdom Supreme Court released its decision in *Mastercard Inc v Merricks*.[16] The case considered the certification criteria for class actions in the United Kingdom Competition Appeal Tribunal.

13. We consider these developments in this paper, where relevant.

A SUMMARY OF SOME KEY POLICY DECISIONS

14. While it is not the purpose of this Supplementary Issues Paper to outline our views on all the questions we asked in the Issues Paper, we need to explain our views on some matters to provide context for the further issues we discuss. In this section we briefly summarise the conclusions we have reached on the following matters:

    (a) Desirability of a statutory class actions regime.

    (b) Objectives of class actions.

    (c) Design principles for a class actions regime.

    (d) Retention of HCR 4.24.

    (e) Defendant class actions.

15. In Chapter 1, we also discuss the conclusions we have reached on whether to have a certification stage and the certification test. This includes our conclusion on whether both opt-in and opt-out class actions should be allowed.

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11 Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021).

12 See "Improving Access to Civil Justice" (20 July 2021) Ngā Kōti o Aotearoa | Courts of New Zealand <www.courtsofnz.govt.nz>.

13 See "Access to Justice survey of the profession" (30 August 2021) Te Kāhui Ture o Aotearoa | New Zealand Law Society <www.lawsociety.org.nz>.

14 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020).

15 *Wigmans v AMP Ltd* [2021] HCA 7. We discuss this decision in Chapter 2.

16 *Mastercard Incorporated and Ors v Merricks* [2020] UKSC 51.

Statutory class actions regime is desirable

16. The Issues Paper discussed the issues that have arisen with using the representative actions rule in HCR 4.24 for group litigation and the potential advantages and disadvantages of class actions. We asked submitters:

    (a) What problems have you encountered when relying on HCR 4.24 for group litigation (Q 1)?[17]

    (b) Which kinds of claims are unlikely to be brought under HCR 4.24 and why (Q 2)?[18]

    (c) What do you see as the advantages of class actions (Q 3)?[19]

    (d) Do you have any concerns about class actions (Q 4)?[20]

17. We received extensive submissions on each of these questions and we will discuss that feedback in the final report. One common theme was that HCR 4.24 does not provide sufficient clarity on when cases should be allowed to proceed and how they should be managed. This can increase delay and cost and affect the viability of cases. Submitters were more divided on other issues. Some submitters saw class actions as a means of improving access to justice and considered risks such as meritless litigation and negative impacts on the insurance market to be unfounded. Other submitters expressed reservations about the extent to which class actions can improve access to justice and pointed to potential disadvantages of class actions, such as forcing defendants to settle unmeritorious claims, negative impacts on the insurance market and deterring people from becoming directors.

18. Our Issues Paper expressed the preliminary view that it would be desirable to have a statutory class actions regime for Aotearoa New Zealand.[21] We reached this view because:

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17 We received 21 submissions on this question. They were from: Andrew Barker QC, Bell Gully, Buddle Findlay, Carter Holt Harvey, Colin Carruthers QC, Chapman Tripp, Claims Resolution Service, Gilbert Walker, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Solicitor-General, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Kate Tokeley and Tom Weston QC.

18 We received 11 submissions on this question. They were from: BusinessNZ, Consumer NZ, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson, Nicole Smith, Te Kāhui Inihua o Aotearoa | Insurance Council, Kate Tokeley and Tom Weston QC.

19 We received 31 submissions on this question. They were from: Barry Allan, Association of Litigation Funders of Australia, Bell Gully, Samuel Becher, Jennifer Braithwaite, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Consumer NZ, Michael Duffy, Tony Ellis, Gilbert Walker, Hīkina Whakatutuki | Ministry of Business, Innovation and Employment, International Bar Association Antitrust Committee, Jasminka Kalajdzic, Michael Legg, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Shareholders' Association, Omni Bridgeway, Simpson Grierson, Nicole Smith, Christopher St Johanser, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Komihana Tauhokhoko | Commerce Commission, Te Mana Mātāpono Matatapu | Privacy Commissioner, Kate Tokeley, Vicki Waye and Tom Weston QC.

20 We received 28 submissions on this question. They were from: Barry Allan, Association of Litigation Funders of Australia, Bell Gully, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Consumer NZ, Michael Duffy, Gilbert Walker, Institute of Directors, International Bar Association Antitrust Committee, Johnson & Johnson, Michael Legg, LPF Group, Marsh, Maurice Blackburn/Claims Funding Australia, NZX, Omni Bridgeway, Shareholders' Association, Simpson Grierson, Solicitor-General, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Komihana Tauhokhoko | Commerce Commission, Vicki Waye and Tom Weston QC.

21 Te Aka Matua o te Ture | Law Commission *Class Actions and Litigation Funding | Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa* (NZLC IP45, 2020) at Chapter 7.

(a) Group litigation is beneficial but HCR 4.24 and other group litigation procedures are inadequate.

(b) Class actions are likely to improve access to justice, facilitate efficiency and economy of litigation and strengthen incentives for compliance with the law.

(c) Many of the potential disadvantages of class actions can be mitigated by the design of the regime.

(d) A statutory regime can provide greater certainty, predictability and transparency in the law.

19. We asked submitters whether Aotearoa New Zealand should have a statutory class actions regime (Q 5). There were 38 submissions on this question, with 35 of those in favour of a statutory class actions regime.[22] We will discuss the feedback in detail in our final report. Some key reasons for favouring a statutory class actions regime were:

(a) It would be preferable to relying on HCR 4.24 and the law developing on an ad hoc basis.

(b) It would provide greater certainty for participants.

(c) It would be the result of a more considered policy and legislative process.

(d) It could increase access to justice.

(e) It could be designed in a way that mitigates the potential disadvantages of class actions.

20. While most submitters were in favour of a statutory class actions regime, this did not mean all of these submitters thought class actions were desirable. As noted above, some submitters were sceptical of the potential benefits of class actions and highlighted potential disadvantages. These submitters tended to support a statutory class actions regime because it would be preferable to the uncertainty that arises from relying on the representative actions rule.

21. Two submitters were opposed to a statutory class actions regime.[23] One doubted that good design could mitigate the substantial risks of a class actions regime,[24] and the other preferred retaining HCR 4.24 and the body of case law which had developed under it.[25] Another submitter considered it was difficult to answer the question definitively.[26]

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22 Submissions in favour of a statutory class actions regime were from: Barry Allan, Association of Litigation Funders of Australia, Samuel Becher, Bell Gully, Buddle Findlay, Colin Carruthers QC, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Consumer NZ, Michael Duffy, Hīkina Whakatutuki | Ministry of Business, Innovation and Employment, Institute of Directors, Gilbert Walker, International Bar Association Antitrust Committee, Johnson & Johnson, Jasminka Kalajdzic, Michael Legg, LPF Group, Marsh, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Shareholders' Association, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Solicitor-General, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Komihana Tauhokhoko | Commerce Commission, Te Mana Tatai Hokohoko | Financial Markets Authority, Kate Tokeley, Tom Weston QC and Woodsford Litigation Funding.

23 Carter Holt Harvey and Tony Gavigan.

24 Carter Holt Harvey.

25 Tony Gavigan.

26 BusinessNZ.

22. After considering the feedback we received, we confirm our view that a statutory class actions regime is desirable.[27] Essentially this is for the reasons we identified in our Issues Paper. We consider that HCR 4.24 is insufficient for modern group litigation and, if properly designed, the benefits of a statutory class actions regime could outweigh the disadvantages. We acknowledge that the design of the class actions regime will be critical. We have therefore thought carefully about how each aspect of a class actions regime can give effect to our preferred objectives for class actions and design principles for a class actions regime.

Two objectives for class actions

23. In our Issues Paper we said it was important to clearly identify the objectives of the class actions procedure as these would drive the design of the legislation and the detailed drafting decisions needed.[28] We suggested that improving access to justice was the clearest advantage of class actions and should be the main objective of a statutory class actions regime.[29] We also expressed the view that improving efficiency and economy of litigation was an important objective for a class actions regime.[30] We noted that both objectives would not necessarily be met in all cases.[31] We said it was less clear whether improving incentives to comply with the law should be seen as an objective of a class actions regime or whether it would be better viewed as a "useful by-product".[32]

24. We asked submitters what the objectives of a statutory class actions regime should be and whether there should be a primary objective (Q 10).

25. Twenty-two submitters addressed this question.[33] Ten submitters saw access to justice as the main objective of class actions.[34] Other submitters said access to justice must be considered from the perspectives of class members and defendants, not just from a plaintiff perspective.[35] One expressed scepticism about the extent to which class actions would provide access to justice.[36] Two submitters indicated court efficiency should be the

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27 We also note that some aspects of a class actions regime would need to be in the High Court Rules rather than in a statute. We envisage there could be a separate class actions part of the Rules. On some matters we ask whether existing provisions of the Rules are adequate or whether new provisions for class actions may be needed.

28 Issues Paper at [9.4].

29 Issues Paper at [9.6].

30 Issues Paper at [9.7].

31 Issues Paper at [9.9].

32 Issues Paper at [9.10].

33 Barry Allan, Association of Litigation Funders of Australia, Bell Gully, Jennifer Braithwaite, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Consumer NZ, Michael Duffy, Gilbert Walker, International Bar Association Antitrust Committee, Jasminka Kalajdzic, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Kate Tokeley and Tom Weston QC.

34 Association of Litigation Funders of Australia, Jennifer Braithwaite, BusinessNZ, Consumer NZ, Jasminka Kalajdzic, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Te Kāhui Inihua o Aotearoa | Insurance Council, Kate Tokeley. Submitters phrased this in different ways including "promoting the role of law and equal justice for all" or "promoting access to justice to plaintiffs who would otherwise struggle to obtain access to the courts". In addition to these 10 submitters, Te Kāhui Ture o Aotearoa | New Zealand Law Society said that while it saw access to justice as the main objective of class actions, it was not desirable to treat it as an overriding objective.

35 Barry Allan, Bell Gully and Gilbert Walker.

36 Tom Weston QC. Other submitters made this point in response to Q 3.

main objective,[37] while other submitters critiqued the idea that class actions could improve efficiency and economy of litigation.[38] Five submitters saw both access to justice and economy and efficiency of litigation as important objectives, with no need for a primary objective.[39]

26. Eight submitters said they did not see improving incentives to comply with the law as the purpose of a class actions regime,[40] although some saw this as a possible by-product or consequence of class actions. Three submitters appeared to support the objective of strengthening incentives for compliance with the law.[41] Several submitters also identified other objectives for class actions.[42]

27. We consider that the objectives of class actions should be improving access to justice and managing multiple claims in an efficient way.[43] We consider "access to justice" to be broader than simply allowing access to the courts. It also includes procedural access to justice (for all participants) and substantive access to justice (the extent to which class actions lead to a substantively fair result).[44] We have phrased the efficiency objective slightly differently to the Issues Paper, although our intention is the same. We think that "efficiency" is a broad concept and can encompass managing claims in an economic way. We think that managing multiple claims in an efficient way is beneficial for the parties, other court users and the court system.

28. We think these should be equal objectives, rather than access to justice being the primary objective.[45] We think this is consistent with the objective of the High Court Rules, which refers to the "just, speedy and inexpensive" determination of proceedings and interlocutory applications.[46] As the NZLS pointed out, if access to justice was seen as an overriding consideration for class actions, this could upset this balance and have a negative impact on defendants. There will also be some class actions which engage one objective more than the other.

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37 Michael Duffy (he considered access to civil justice should be an important secondary objective); and Claims Resolution Service.

38 Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC.

39 Barry Allan, Bell Gully, Nikki Chamberlain, Chapman Tripp and Simpson Grierson. Some of these submitters supported additional objectives as well.

40 BusinessNZ, Nikki Chamberlain, Consumer NZ, Gilbert Walker, International Bar Association Antitrust Committee, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council and Kate Tokeley.

41 Maurice Blackburn/Claims Funding Australia, Jasminka Kalajdzic and Tom Weston QC (while he was not persuaded of any of the proposed advantages of class actions, he saw strengthening compliance with the law as the most real).

42 These included: the need to protect the rights and interests of defendants, providing clear guidance on oversight of litigation funding, protecting the interests of class members, proportionality and certainty and clarity. We think these fit better as considerations for the design of a class actions regime, rather than the objectives of class actions themselves.

43 We refer to these as the objectives of class actions to distinguish them from our broader design principles for a class actions regime. In other words, we see the objectives as the goals of class actions themselves and the key reasons for having a class actions regime.

44 Issues Paper at [5.4]–[5.28].

45 We have therefore revised the view we expressed in the Issues Paper that access to justice should be the primary objective: Issues Paper at [9.6].

46 High Court Rules 2016, r 1.2.

29. We do not consider that strengthening incentives for compliance with the law should be an objective of class actions, although it may be a beneficial effect. We think it is more appropriate for this objective to sit with regulators, with class actions primarily serving a compensatory role. If strengthening incentives for compliance with the law was an objective of class actions, there is a risk that this would dilute the other objectives. [47]

30. We suggest that improving access to justice and managing multiple claims in an efficient way could become the stated objectives of class actions in the legislation.

Principles for the development of a class actions regime

31. Our Issues Paper proposed eight principles to guide the development of a class actions regime. We said that a class actions regime should:

    (a) Have clear objectives for the class action procedure.

    (b) Strike an appropriate balance between the interests of plaintiffs and defendants.

    (c) Ensure that the interests of class members are safeguarded.

    (d) Provide a procedure that is just, speedy, inexpensive and proportionate.

    (e) Be appropriate for contemporary Aotearoa New Zealand.

    (f) Recognise and provide for relevant tikanga Māori concepts.

    (g) Not adversely impact on other methods of bringing collective litigation.

    (h) Provide clarity on issues arising in funded class actions.

32. We asked submitters specific questions in relation to each of these proposed principles (Q 10 to Q 17). The feedback we received on these questions has been relevant to many specific features of a class actions regime, and not simply to the design principles. For example, many submitters identified practical ways of giving effect to these principles.

33. We also asked submitters if they agreed with our overall list of principles (Q 18). We received 15 submissions on this question. [48] Of these, 11 submitters said they agreed with our list of principles, although some indicated provisos or supported additional principles. [49]

34. We have concluded that a statutory class actions regime should:

    (a) Consider the interests of both plaintiffs and defendants.

    (b) Safeguard the interests of class members.

    (c) Consider the principle of proportionality, meaning that the time and cost of litigation should be proportionate to what is at stake.

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47 For example, it might allow a class action to be certified where the main benefit would be strengthening a defendant's incentives to comply with the law, but the class action would result in very minimal compensation to class members and would be lengthy and expensive to run.

48 Association of Litigation Funders of Australia, Samuel Becher, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Vicki Waye.

49 Association of Litigation Funders of Australia, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson and Te Kāhui Inihua o Aotearoa | Insurance Council.

(d) Strike an appropriate balance between flexibility and certainty.

(e) Be appropriate for contemporary Aotearoa New Zealand.

(f) Recognise and reflect tikanga Māori.

(g) Not adversely impact on other methods of group litigation.

(h) Provide clarity on issues arising in funded litigation.

35. We see these as principles that should guide the policy process of developing a class actions regime, rather than being the objectives of class actions themselves.[50] They are the principles that are guiding our work in developing recommendations on class actions. These principles are similar to those we outlined in our Issues Paper, with two key differences.

36. We have decided it is unnecessary to expressly include the objective of the High Court Rules as a principle as this will necessarily apply to all civil litigation, including class actions. Therefore, our principle (c) simply refers to proportionality, which was a concept that was supported by many submitters.[51]

37. We have included a new principle of striking an appropriate balance between flexibility and certainty. Several submitters referred to the need to ensure that a court has sufficient flexibility and discretion.[52] This point was made most strongly by NZLS which cautioned against a regime acting as a "straitjacket", precluding a court from implementing procedures suited to a particular case. However, many submitters were critical of the uncertainty caused by HCR 4.24 and said that a class actions regime should provide clarity and certainty. We think the appropriate degree of flexibility or prescription will depend on the aspect of the class actions regime at issue. For example, we think courts will need a high degree of flexibility with respect to case management to allow for the circumstances of individual cases. Greater prescription might be appropriate for a certification test so that a claimant can assess whether a potential class action is feasible or not.

Representative actions rule should be retained

38. In our Issues Paper we discussed whether the representative actions rule in HCR 4.24 should be retained if a class actions regime were adopted. We suggested that a representative action may be preferable to a class action in some cases, such as where the class is small, or a non-monetary remedy is sought.[53] However, we also expressed concern that a parallel representative actions procedure might undermine a class actions regime.[54]

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50 To avoid confusion, we have removed principle (a) from the list we outlined in the Issues Paper (have clear objectives for the class action procedure).

51 We asked submitters whether proportionality was an appropriate principle for a class actions regime and, if so, what features of a regime could help to achieve that (Q13). There were 15 submissions which addressed this question. Twelve agreed that proportionality was an appropriate principle (Association of Litigation Funders of Australia, Bell Gully, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC). In addition, Barry Allan and Michael Duffy indicated some limitations of a proportionality requirement, while BusinessNZ did not express a clear preference on this question.

52 Simpson Grierson, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Vicki Waye.

53 Issues Paper at [8.29].

54 Issues Paper at [8.28].

39. We asked submitters whether the representative actions rule should be retained alongside a class actions regime and, if so, whether it should be limited to certain kinds of cases (Q 9). We received 20 submissions on this question.[55] There were 12 submitters who supported retaining a representative actions rule.[56] Submitters noted representative actions might be more appropriate for claims involving small groups, non-monetary claims, claims against multiple defendants, and trusts and estates claims. Some submitters pointed to HCR 4.24 as potentially providing greater flexibility than a class actions regime. There were seven submitters who thought the representative actions rule should be abolished.[57] Submitters pointed to the potential for confusion and the lack of necessity for HCR 4.24 if there were a class actions regime. One submitter did not express a clear preference.[58]

40. We have concluded that HCR 4.24 should be retained. We expect there will be cases which are unsuitable to be brought as a class action, but where it would still be efficient for the court to consider multiple claims together. However, we think it would be undesirable if HCR 4.24 were used as an alternative means of bringing a class action, as a way of avoiding the requirements of a class actions regime. It may be desirable to amend HCR 4.24 to provide that it should not be used where a class action would be a more appropriate procedure. We will return to this issue in our final report.

Class actions regime should not provide for defendant class actions

41. Defendant class actions involve a plaintiff bringing a claim against a group of potential defendants who are represented by a representative defendant. In our Issues Paper, we observed that defendant class actions may enhance procedural efficiency and access to justice.[59] However, while some features of plaintiff class actions could apply to defendant class actions, we noted that certain differences between plaintiff and defendant class actions posed difficulties.[60] We observed that while defendant class actions are allowed in some overseas regimes, they are very rare.[61]

42. We asked submitters whether a class actions regime should include defendant class actions (Q 8). We received 12 submissions on this question.[62] Three submitters were in

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55 Barry Allan, Bell Gully, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, Gilbert Walker, LPF Group, Michael Legg, NZX, Omni Bridgeway, Michael Riordan, Shareholders' Association, Simpson Grierson, Nicole Smith, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC.

56 Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, LPF Group, NZX, Michael Riordan, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Nicole Smith.

57 Barry Allan, BusinessNZ, Carter Holt Harvey, Claims Resolution Service, Omni Bridgeway, Shareholders' Association, and Tom Weston QC.

58 Michael Legg.

59 Issues Paper at [8.20].

60 Issues Paper at [8.23]. These include: the representative defendant is selected involuntarily and may be unwilling to perform the role; defendant class members are likely to opt out if given the option; unlike plaintiff class members, defendant class members are exposed to liability; the suspension of the limitation period gives the plaintiff additional time to pursue individual claims against defendant class members,

61 Issues Paper at [8.24].

62 Bell Gully, BusinessNZ, Claims Resolution Service, Michael Duffy, LPF Group, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC.

favour of defendant class actions.[63] They noted that this would increase the economy and efficiency of litigation, and that there is no basis for excluding defendant class actions. Three submitters were opposed to defendant class actions.[64] They pointed to the lack of any clear need for defendant class actions and the difficulty in adapting class action rules for defendant class actions. Six submitters did not express a clear view on the question.[65]

43. We have concluded that a class actions regime should not provide for defendant class actions. There are significant differences between plaintiff class actions and defendant class actions, which would need to be reflected in a class actions regime. Given that claims involving representative defendants are likely to be rare and to involve small numbers of defendant class members, we think it is preferable to bring these as defendant representative actions. As noted above, we favour retaining the representative actions rule.

PROVIDING FEEDBACK ON OUR SUPPLEMENTARY ISSUES PAPER

44. We are receiving submissions on our Supplementary Issues Paper until 12 November 2021. We welcome feedback on any of the questions we have raised as well as our draft provisions.

45. We had originally intended to hold policy workshops in Auckland, Wellington and Christchurch, to facilitate feedback on our Supplementary Issues Paper. Due to the uncertainty and restrictions caused by COVID-19, we have decided that workshops should primarily take place online. We have scheduled zoom workshops on 19, 20 and 26 October 2021. We have also scheduled an in-person workshop in Wellington on 27 October 2021 (subject to COVID-19 restrictions). People who are interested can sign up for these workshops on our website.[66] We have designed these as workshops rather than presentations, as the purpose is to provide an efficient way for people to give feedback on our proposals.[67] This feedback can be instead of, or as well as, a submission.

46. The views expressed in this Supplementary Issues Paper are preliminary and we will consider all the feedback we receive before forming our final recommendations. We intend to deliver our final report to the Minister of Justice in May 2022.

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63 LPF Group, NZX and Te Kāhui Inihua o Aotearoa | Insurance Council.

64 Bell Gully, Simpson Grierson and Tom Weston QC.

65 BusinessNZ, Claims Resolution Service, Michael Duffy, Omni Bridgeway, Nicole Smith and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

66 Te Aka Matua o te Ture | Law Commission "Class Actions and Litigation Funding" (2020) <www.lawcom.govt.nz>.

67 We intend to consider feedback received at these workshops when preparing our final report, without attributing workshop feedback to any particular participant.

CHAPTER 1

Commencement and certification of a class action

INTRODUCTION

In this chapter, we:

- Outline who should be able to commence a class action.
- Explain why a class actions regime should have a certification stage.
- Discuss our proposed certification test.
- Identify some additional certification issues to be considered.
- Discuss the impact of a class action on limitation periods.

COMMENCEMENT

1.1 In this section we discuss our proposals on when a class action may be commenced. In particular, we consider:

(a) A class action is aggregate litigation.

(b) There must be two or more persons represented by a representative plaintiff.

(c) The representative plaintiff must usually be a class member.

(d) A State entity can be a representative plaintiff where it has the ability to bring a proceeding on behalf of two or more people under other legislation.

(e) There should be a representative plaintiff for every defendant.

1.2 We discuss each of these aspects below and then set out our draft commencement provisions.

A class action is aggregate litigation

1.3 We see class actions as a form of aggregate litigation. A class action requires a group of litigants who each have a claim which is typically seeking damages. It can be contrasted with forms of group litigation where multiple people will be affected by the determination of a single claim, such as a proceeding under the Declaratory Judgments Act 1908 or a challenge to a resource consent decision. One of our proposed objectives for class actions is to manage "multiple claims" in an efficient way, which reflects our concept of aggregate litigation.

1.4 The idea of aggregate claims is also reflected in our draft commencement provision which envisages each class member having a claim.[1] Each claim will need to raise a common issue of fact or law of significance to the resolution of the claim.[2] We discuss this proposed commonality standard in our discussion of the certification test below.

1.5 Our draft commencement provision refers to class members each having a "claim" and our preliminary view is that it should not be necessary for class members to have the same cause of action. There may be situations where small differences in factual circumstances lead to class members having different causes of action and it would still be efficient to consider the claims together. An example might be where new legislation applies to some class members rather than others, depending on the date their cause of action arose.

There must be two or more persons represented by a representative plaintiff

1.6 Our Issues Paper outlined four different approaches to minimum class size (or numerosity): a descriptive requirement such as "numerous persons", a minimum specified number of plaintiffs (for example, the Australian regimes require seven or more), impracticality of joinder, and a bare threshold test (such as a class of two or more).[3]

1.7 There were 16 submissions which addressed the issue of numerosity.[4] Of these, 10 submitters supported having a numerosity requirement.[5] Submitters who favoured a numerosity requirement suggested a variety of different approaches including:

(a) A minimum specified number of class members, such as seven to align with Australia.

(b) Impracticality of joinder.

(c) Numerosity considered on a case-by-case basis at the certification stage.

(d) A number large enough to obtain litigation funding.

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1 See our draft legislation, cl (1)(1). See also cl 2.

2 See our draft legislation, cl 1(1)(b), cl 1(3)(b), cl 1(5) and cl 4(1)(b).

3 Issues Paper at [10.33].

4 Barry Allan, Bell Gully, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson, Nicole Smith, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC.

5 Bell Gully, Nikki Chamberlain, Claims Resolution Service, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Nicole Smith, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC.

1.8 In our view, having a minimum specified number such as seven is too arbitrary a mechanism for determining whether the size of the class justifies the use of the class action procedure. Some claims with six or eight class members could be appropriate to bring as a class action, while others may not.

1.9 We do not favour impracticality of joinder as the numerosity threshold because it may pose too high a bar. In the United States, for example, joinder is presumed to be impractical if there are more than 40 class members, while classes of under 20 people have difficulty being certified.[6] An approach which requires a high numerosity threshold could lead to many cases being pursued through HCR 4.24 instead, resulting in a parallel regime. We also consider that plaintiffs should have some choice about how they pursue a proceeding, and a class action should not be barred where the option of joinder is a possibility. Rather than being a threshold criterion, we think the appropriateness of the joinder procedure should form part of the court's assessment of whether a class action is an appropriate procedure for the efficient resolution of class members' claims.[7]

1.10 While a descriptive approach such as "numerous persons" has some appeal as it allows for flexibility, this may simply result in a minimum number for what constitutes "numerous" developing through case law.

1.11 We have therefore decided that a more nuanced approach to numerosity is appropriate. Our draft provision on commencement only requires a representative plaintiff and two other persons.[8] The size of the class can then be considered at certification as part of the court's consideration of whether a class action is an appropriate procedure for resolving the claims.[9] This will enable the court to consider the size of the class in the context of other aspects of the case, such as the type of claim and the other procedures that might be available. For example, a class action might be an appropriate procedure for a class action involving 20 people with individual claims of $500,000 each but may be a less suitable procedure in a case involving 20 people with a claim of $1,000 each. In the latter case, the Disputes Tribunal would likely be a more appropriate forum for resolving the dispute.

Representative plaintiff should ordinarily be a class member

1.12 Our Issues Paper explained that in some jurisdictions, a representative plaintiff must be a class member, while other jurisdictions allow non-class members (sometimes known as ideological plaintiffs) to commence class actions on behalf of others.[10] We asked submitters whether a representative plaintiff must be a class member (Q 29).

1.13 We received 24 submissions on whether a representative plaintiff must be a class member, with submitters divided on this issue.[11] Fourteen submitters said a representative

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6 Issues Paper at [10.33(c)].

7 See our draft legislation, cl 4(3)(e).

8 See our draft legislation, cl 1(1)(a) and (3)(a). See also cl 2.

9 See our draft legislation, cl 4(3)(a).

10 Issues Paper at [11.24].

11 Barry Allan, Samuel Becher, Bell Gully, Jennifer Braithwaite, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Consumer NZ, Michael Duffy, International Bar Association Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith,

plaintiff should have some sort of interest in the proceeding, either because they are a class member or have statutory standing.[12] Submitters commented that the representative plaintiff should have the same or a similar interest in the subject matter as those they represent, so they would have a self-interest in protecting the interests of the class. Submitters noted that allowing a person without their own claim to be representative plaintiff would be a significant departure from the current rules on standing.

1.14 There were seven submitters who thought a broader range of persons, such as an ideological plaintiff, could fulfil the role of representative plaintiff.[13] Submitters noted that being a representative plaintiff could be a heavy burden and there may be situations where no class member is able to fulfil this role, such as claims involving vulnerable groups. There were also three submissions which made points relevant to the question of who should be able to bring a class action, without expressing a position on whether the representative plaintiff must be a class member.[14]

1.15 We have concluded that the representative plaintiff must ordinarily be a class member, which is reflected in our draft commencement provision.[15] Allowing non-class member representative plaintiffs would be a significant departure from normal standing rules and we are not satisfied that it is necessary to ensure access to justice or the efficient management of multiple claims. There are benefits to having a representative plaintiff who has their own claim at stake, including demonstrating that the class action is supported by a genuine claimant and an understanding of what is at issue for class members. There is one exception to our proposal, which is where the representative plaintiff is a government entity. We discuss this below.

Government entity can be a representative plaintiff in some cases

1.16 We received 19 submissions on the question of when a government entity should be able to bring a class action as a representative plaintiff.[16] Submitters supported government representative plaintiffs in several circumstances:

(a) Where the government entity is a class member.[17]

Christopher St Johanser, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Mana Mātāpono Matatapu | Privacy Commissioner, Vicki Waye, and Tom Weston QC.

12 Submitters that said a representative plaintiff must be a class member were: Claims Resolution Service, Michael Duffy, Meredith Connell, Simpson Grierson, Nicole Smith, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC. Submitters that said a representative plaintiff could be a class member or have statutory standing were: Nikki Chamberlain, LPF Group, Maurice Blackburn/Claims Funding Australia, NZX and Omni Bridgeway. We also consider the submissions from Bell Gully and Te Kāhui Inihua o Aotearoa | Insurance Council fall into the latter category.

13 Barry Allan, Samuel Becher, Jennifer Braithwaite, Chapman Tripp, Consumer NZ, International Bar Association Antitrust Committee and Vicki Waye.

14 BusinessNZ, Christopher St Johanser and Te Mana Mātāpono Matatapu | Privacy Commissioner.

15 See our draft legislation, cl 1(1)(a)–(b). Note that there may be more than one representative plaintiff in a class action.

16 Barry Allan, Samuel Becher, Bell Gully, Jennifer Braithwaite, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, Institute of Directors, International Bar Association Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, NZX, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC.

17 Bell Gully (where the government entity shares the class members' cause of action against the defendant and is seeking the same kind of relief); Nikki Chamberlain (where a government entity has its own claim against the defendant); Claims Resolution Service; Michael Duffy (where the government entity is among victims of illegality which involve common

(b) Where there is statutory standing.[18]

(c) A broader ability for government entities to be representative plaintiffs.[19]

1.17 Some submitters indicated a regulator could be the preferable representative plaintiff in some circumstances.[20]

1.18 We agree a government entity should be able to bring a class action as representative plaintiff where they are a class member. We also consider a government entity should be allowed to bring a class action where another statute provides it with the ability to bring a proceeding on behalf of two or more people. In this situation, a policy decision has already been made that it is appropriate for a particular entity to bring a claim on behalf of others. Allowing these entities to bring a class action would simply provide them with another procedural tool.

1.19 This would allow, for example, Te Mana Tatai Hokohoko | Financial Markets Authority and Te Komihana Tauhokohoko | Commerce Commission to bring a class action in appropriate circumstances, although it would not oblige them to. We think the exception should be general, rather than referring to particular entities or statutes, so that the provision does not require regular updating. This is reflected in our draft commencement provision.[21]

1.20 Where a statute permits a government entity to bring proceedings on behalf of others subject to certain considerations or limitations, those should apply to the entity's ability to bring a class action proceeding. For example, Te Mana Tatai Hokohoko | Financial Markets Authority is required to consider certain public interest criteria before exercising a person's right of action.[22] This is reflected in our draft provision.[23]

There should be at least one representative plaintiff for every defendant

1.21 In some cases, a class action will be brought against more than one defendant. This raises the issue of whether the class members and each representative plaintiff must have a claim against all defendants. This is an issue that courts have had to grapple with in other jurisdictions and we think it is desirable for a class actions regime to provide clarity on the issue.[24]

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issues); Simpson Grierson (where the government entity is a class member, although it said in some cases it may not be desirable for this to occur because the position of a government entity is likely to be very different to a typical class member); Te Kāhui Inihua o Aotearoa | Insurance Council (when they have their own claim); and Maurice Blackburn/Claims Funding Australia (when a government entity also has its own claim).

18 Nikki Chamberlain, Maurice Blackburn/Claims Funding Australia (it may be appropriate for certain other groups or entities to be given statutory standing), Omni Bridgeway, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC.

19 Jennifer Braithwaite (where this does not conflict with the government entity's statutory functions); and International Bar Association Antitrust Committee (in matters relating to their public purposes).

20 Institute of Directors (consideration should be given to regulators playing a special role as lead claimants in class actions); and NZX (there should be a requirement for class actions to involve the appropriate regulatory body as representative plaintiff, particularly in relation to financial markets claims).

21 See our draft legislation, cl 1(3). Our provision uses the term "State entity" to ensure it includes wider state sector organisations such as independent Crown entities.

22 Financial Markets Authority Act 2011, s 34(3) and (5).

23 See our draft legislation, cl 1(4).

24 See discussion of overseas case law on this issue in Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 110113 and Vince Morabito "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 Alta L Rev 295.

1.22 There are several potential approaches to standing in cases where a class action is brought against multiple defendants:

(a) Each representative plaintiff and each class member must have a claim against each defendant. This is the strictest approach.

(b) Each representative plaintiff must have a claim against each defendant. However, it is not necessary for each class member to have a claim against each defendant.

(c) At least one representative plaintiff must have a claim against all defendants. It is not necessary for each class member to have a claim against each defendant.

(d) For every defendant, there must be a representative plaintiff with a claim against it. However, it is not necessary to have a representative plaintiff with a claim against all defendants.

(e) It is not necessary for each defendant to have a representative plaintiff with a claim against it. For each defendant, there must be at least one class member with a claim against them. This is the most liberal approach.

1.23 We consider the approach set out in (d) is appropriate. We do not think it should be necessary for class members or representative plaintiffs to have a claim against every defendant. We think that could be too restrictive and could prevent a class action in situations where it may be an efficient way of dealing with multiple claims. There may be scenarios where it would be very unlikely for a claimant to have a claim against more than one defendant, such as a case against multiple councils or associated businesses that operate in different parts of the country.

1.24 However, we think that for each defendant, there should be a representative plaintiff with a claim against them. When an opt-out class action is brought, a defendant faces significant uncertainty about the claim against them due to the unknown size of the class. We think having at least one named plaintiff will help to provide some clarity to a defendant about the claim brought against them and will also enable a defendant to obtain discovery from a named party. In addition, the interests of all class members are likely to be better represented when there is at least one representative plaintiff with a claim against each defendant.

1.25 We think there should be at least two class members with a claim against each defendant, to align with our proposed commencement requirements.[25] There must also be a common issue that applies to all class member claims, even if there are different defendants.

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[25] See our draft legislation, cl 2(1)(a), 2(2)(a).

Draft commencement provisions

1 Commencement of class action

(1) A person may commence a class action proceeding against 1 or more defendants in the High Court as a representative plaintiff—

(a) on behalf of themselves and 2 or more other persons; and

(b) if their claim and the claims of the other persons all raise a common issue.

(2) A proceeding under **subsection (1)** may be commenced by more than 1 representative plaintiff.

(3) A State entity that has the power under another Act (the **empowering Act**) to bring proceedings on behalf of 2 or more persons may commence a class action proceeding against 1 or more defendants in the High Court as a representative plaintiff—

(a) on behalf of 2 or more persons; and

(b) if the claims of those persons all raise a common issue.

(4) The commencement of a proceeding under **subsection (3)** is subject to any limits or requirements in the empowering Act.

(5) In this section, **common issue** means a common issue of fact or law of significance to the resolution of each person's claim.

2 Multiple defendants

(1) If a class action proceeding is commenced under **section 1(1)** against more than 1 defendant,—

(a) for each defendant there must be a representative plaintiff and at least 2 other persons with a claim against that defendant:

(b) if there are 2 or more representative plaintiffs, it is not necessary for each representative plaintiff to have a claim against all of the defendants:

(c) it is not necessary for each person on whose behalf the proceeding is commenced to have a claim against all of the defendants.

(2) If a class action proceeding is commenced under **section 1(3)** against more than 1 defendant,—

(a) for each defendant there must be at least 2 persons with a claim against that defendant:

(b) it is not necessary for each person on whose behalf the proceeding is commenced to have a claim against all of the defendants.

3 Application for class action

When a class action is commenced it must be accompanied by an application for—

(a) an order certifying the proceeding as a class action proceeding; and

(b) an order appointing 1 or more representative plaintiffs for the proceeding.

QUESTION

Q1 Do you agree with our draft commencement provisions? If not, how should they be amended?

CERTIFICATION IS DESIRABLE

1.26 In our Issues Paper we explained that most overseas jurisdictions with class actions regimes require the court to approve the claims proceeding as a class action, which is generally known as certification.[26] A notable exception is Australia, where none of the class actions regimes have a certification requirement.[27] Our Issues Paper summarised the advantages and disadvantages of certification and asked submitters whether a class actions regime in Aotearoa New Zealand should have a certification stage.[28]

1.27 We received 28 submissions on this question. Of these, 16 submitters supported a certification stage,[29] eight did not favour certification,[30] and four submitters did not indicate a clear preference.[31]

1.28 Submissions in favour of certification saw this process as having the following benefits:

(a) Preventing vexatious or unsuitable claims.

(b) Enabling the early identification and management of issues.

(c) Helping to proactively manage conflicts of interests.

(d) Providing an opportunity to manage competing class actions.

(e) Ensuring class members are protected, particularly in opt-out class actions.

(f) Ensuring that claims are properly pleaded.

(g) Placing the onus on a plaintiff to show that a claim has been properly brought, rather than leaving it to the defendant to raise any issues.

1.29 Key themes in submissions opposed to certification were:

(a) Certification could be cumbersome and costly and may be an unreasonable barrier to bringing meritorious claims.

(b) The Australian approach of having powers to discontinue a class action is preferable.

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26 Issues Paper at [10.4]–[10.19].

27 Issues Paper at [10.4].

28 Issues Paper at [10.20]–[10.28].

29 Bell Gully, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Institute of Directors, International Bar Association Antitrust Committee, Johnson & Johnson, LPF Group, NZX, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Tom Weston QC.

30 Association of Litigation Funders of Australia, Tony Gavigan, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Nicole Smith, Vicki Waye and Woodsford Litigation Funding.

31 Barry Allan, Samuel Becher, Colin Carruthers QC and Michael Legg.

(c) The risk of vexatious or meritless claims is overstated and the risk of adverse costs provides a deterrent. Defendants have alternative means of challenging meritless or vexatious claims, such as strike-out.

1.30 Some submitters also commented that it is difficult to assess the costs and benefits of certification in the abstract as it will depend on the requirements of the certification test.

1.31 We have formed the view that a class actions regime should have a certification stage. While class actions may provide improved access to justice for plaintiffs and class members, they also place a significant burden on defendants and the court system. Class actions also risk insufficient protection of class members' interests. Many submitters highlighted the importance of the court's supervisory jurisdiction as a way of protecting class members and saw certification as a key part of this.

1.32 A certification stage will also provide an early opportunity to consider issues such as whether the case should proceed as an opt-in class action or an opt-out class action and how competing class actions should be managed.[32] Having to meet a certification test could deter meritless or vexatious class actions although, as we discuss below, we consider the risk of such claims to be relatively low.

1.33 We acknowledge the concern that certification could cause unwarranted cost and delay and make it more difficult for plaintiffs to commence proceedings. We think this will depend in large part on the requirements of the test, and we have taken this concern into account when developing our proposed certification test. We also note that in most cases under HCR 4.24, applicants must obtain an order allowing the claim to proceed as a representative action and this has not posed an insurmountable barrier.[33] If there were no certification stage, many preliminary issues would still need to be determined and there may be significant cost and delay associated with multiple interlocutory applications.[34]

CERTIFICATION TEST

1.34 In this section we discuss the following issues related to certification:

(a) Commonality.

(b) Whether a class action is an appropriate procedure.

(c) Membership of the class.

(d) Preliminary merits test or cost-benefit analysis.

(e) Suitability of the representative plaintiff.

(f) Litigation plan.

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32 In Chapter 2 we propose that competing class actions should be considered at the same time as certification.

33 An order will not be necessary if the person sues or is sued on a representative basis with the consent of the other persons who have the same interests in the subject matter of the proceeding: High Court Rules 2016, r 4.24(a). However, few representative actions have proceeded on this basis: see Issues Paper at [3.6].

34 There has been some suggestion that the lack of certification requirement in Australia has led to numerous interlocutory applications in class actions: see Issues Paper at [10.24].

(g) Litigation funding and certification.

1.35 We then outline our draft certification provision.

Commonality

1.36 Our Issues Paper explained that the advantages of a class action can only be gained if the case will resolve a common issue for a group.[35] We discussed the commonality test that applies under HCR 4.24, noting that the rule requires a person to bring a claim "on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding".[36] Relevant principles developed by the courts include:

(a) The words "same interest" extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.[37]

(b) There must be a common issue of fact or law of significance for each member of the class represented.[38]

(c) There is a sufficient community of interest if there is common interest in the "determination of some substantial issue of law or fact".[39]

(d) Commonality of interest is not a high threshold and a liberal or flexible approach should be taken.[40]

(e) The common question does not need to make a complete resolution of the case, or even liability, possible.[41]

1.37 We asked submitters what the commonality test for class actions should be (Q 21) and whether the common issues must be substantial or predominate (Q 22). We received 18 submissions which addressed these issues.[42] There were eight submitters who supported the commonality test that applies under HCR 4.24 (or something close to it).[43] There were seven submitters who supported a stricter test, with five of these submitters supporting

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35 Issues Paper at [10.35].

36 Issues Paper at [3.32]–[3.36] and [10.47]–[10.48].

37 *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(d)].

38 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [53] per Elias CJ and Anderson J.

39 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [51] per Elias CJ and Anderson J, citing *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 per Brennan J and at 430 per McHugh J.

40 *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11](g)] and [11(h)].

41 *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(e)].

42 Barry Allan, Andrew Barker QC, Bell Gully, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, Jasminka Kalajdzic, Michael Legg, LPF Group, Maurice Bridgeway/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC. Of these, 16 submissions which addressed both commonality and predominance, one submission addressed commonality only and one addressed predominance only.

43 Barry Allan, BusinessNZ, Nikki Chamberlain, Chapman Tripp, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson.

a predominance requirement.[44] Three submitters did not express a clear preference on what the test should be.[45]

1.38 Submitters who supported the current approach pointed to the flexibility it provides. A stricter test such as predominance was not seen as consistent with access to justice or enabling efficiency. Submitters who supported a stricter test considered that the current threshold was too low. This was said to create issues such as uncertainty, a significant number of issues being left to determine at stage two, disparate claims being grouped together, and a risk of speculative claims designed to force settlement.

1.39 Our preferred approach to commonality is that each class member's claim should raise a common issue of fact or law which is of significance to the resolution of each claim.[46]

1.40 We prefer a common *issue* test rather than the common *interest* test which applies to representative actions, to help reduce possible confusion about how class membership is determined. Under the representative actions rule, it is the interest that determines the class (with the opt-in and opt-out mechanisms able to reduce the class).[47] In a class action, it is the class definition (and any opt-in or opt-out mechanisms) that determines the class. We propose later in this chapter that when the court certifies a class action, it would make a certification order which includes a class definition. We also note that class actions regimes in our comparator jurisdictions use a common issue (or question) test rather than a common interest test.[48] Consistency with those jurisdictions may facilitate courts being able to draw upon that jurisprudence to aid interpretation of new law in Aotearoa New Zealand.

1.41 The benefits of a class action are unlikely to be fully realised if the common issue is not sufficiently central to the claims. For this reason, we consider that the common issue(s) must be significant to the resolution of each class member's claim. We note that a significance requirement has been referred to in some of the case law on the commonality test in HCR 4.24.[49] We prefer this over a predominance standard. In our view, requiring the common issues to predominate may frustrate the objective of access to justice by making it too hard for plaintiffs to bring class actions. It may also frustrate the objective of managing multiple claims in an efficient way, by requiring claims with common issues which do not predominate to be brought as individual proceedings or as representative actions.

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44 Andrew Barker QC, Bell Gully, Buddle Findlay, Claims Resolution Service, Carter Holt Harvey, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC. Submitters who supported a predominance requirement were: Andrew Barker QC, Bell Gully, Claims Resolution Service, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC.

45 Michael Duffy, Jasminka Kalajdzic (although she indicated that she did not support a predominance test) and Michael Legg.

46 See our draft legislation, cls 1(1)(b), 1(5) and 4(1)(b).

47 See *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [163].

48 We note that the rules around joinder and consolidation require a "common question of law or fact": High Court Rules 2016, rr 4.2(1)(b) and 10.12(a). To avoid the risk of class actions case law applying to joinder and consolidation, we prefer the slightly different wording of "common issue of law or fact".

49 See *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [53](b) per Elias CJ and Anderson J ("there must be a common issue of fact or law of significance for each member of the class represented") and *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11(d)].

1.42 A key concern expressed by submitters who wanted a stricter test was that class actions may be unmanageable if they have a significant number of individual issues that require consideration once the common issues are determined. We see a predominance test as a relatively blunt tool for considering the issue of manageability. Whether a subsequent hearing to consider individual issues would be manageable will depend on a range of factors including the size of the class and the nature and scope of the claims, as well as the extent of the common issues. We think it would be better to consider the issue of manageability as part of the court's consideration of whether a class action is an appropriate procedure for the efficient resolution of class members' claims. One of the factors we have proposed is the extent of the issues that will need to be determined once the common issue is resolved.[50] We discuss procedures for managing individual issues in Chapter 4.

Appropriate procedure

1.43 Our Issues Paper explained that some jurisdictions require the court to assess whether a class action is the preferable or superior means of resolving the dispute.[51] We asked submitters whether such a test should apply in Aotearoa New Zealand (Q 23). We received 15 submissions on this question.[52] There were six submitters who supported a preferability or superiority test.[53] Six submitters were opposed to either a preferability or superiority test, with two of those submitters in favour of the court considering whether a class action was appropriate or suitable.[54] Three submitters did not express a clear preference.[55]

1.44 In our view, a court should be able to consider whether there are other procedures for resolving claims that are clearly more suitable than a class action. For example, a class action only seeking a declaration may be better brought by a single plaintiff under the Declaratory Judgments Act 1908 or as an application for judicial review. A proceeding involving a very small group may be more suitable to bring as a representative action. However, we think it would be unduly burdensome if a plaintiff had to demonstrate that a class action was preferable or superior to every alternative means of bringing a claim and this might frustrate the access to justice objective of class actions. Further, there will often be a range of ways of proceeding with a claim and we think a plaintiff should have some choice as to the procedure.

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50 See our draft legislation, cl 4(3)(c).

51 Issues Paper at [10.50]–[10.55].

52 Bell Gully, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, International Bar Association Antitrust Committee, Jasminka Kalajdzic, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC.

53 Bell Gully, Carter Holt Harvey, Chapman Tripp, Michael Duffy, Te Kāhui Inihua o Aotearoa | Insurance Council (in circumstances where the class action follows an extant non-class action proceeding or the class action is brought on an opt-out basis) and Tom Weston QC.

54 Nikki Chamberlain, Jasminka Kalajdzic, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, and Simpson Grierson. Nikki Chamberlain said the court should determine whether the claim is suitable to be brought as a class action. Simpson Grierson said the representative plaintiff should be required to establish that a class action is an appropriate means of pursing the claim.

55 BusinessNZ, Claims Resolution Service and International Bar Association Antitrust Committee.

1.45 Our draft certification provision would require the court to consider whether a class action is an appropriate procedure for the efficient resolution of class members' claims.[56] This would enable the court to consider whether another procedure would be a more appropriate means of resolving claims without requiring the class action to be the preferable or superior procedure. We think that a court should only consider alternative procedures that a claimant has available to them and not regulatory action, which is reflected in the wording of "another procedure available to class members".[57]

1.46 Our proposed test would also enable the court to consider factors such as the size of the class, the nature of the claims and the extent of the issues to be determined once the common issue is resolved.[58] We also suggest the court should be able to consider any other factors it sees as relevant, to allow flexibility.[59]

Membership of the class

1.47 Our Issues Paper discussed the advantages and disadvantages of both the opt-in and opt-out approaches to class membership.[60] We asked submitters whether class membership should be determined on an opt-in basis or an opt-out basis or whether multiple approaches should be available (Q 32). If multiple approaches were available, we asked what the criteria should be and whether there should be a default approach (Q 33).

Submissions on class membership

1.48 There were 30 submissions which addressed class membership,[61] with submitters favouring the following options:

(a) Four submitters supported having opt-in only.[62]

(b) Four submitters supported having opt-out only.[63]

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56 See our draft legislation, cl 4(1)(e).

57 See our draft legislation, cl 4(3)(e).

58 See our draft legislation, cl 4(3).

59 See our draft legislation, cl 4(3)(f).

60 Issues Paper at [12.15]–[12.58].

61 Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC, Bell Gully, Jennifer Braithwaite, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Services Ltd, Michael Duffy, Gilbert Walker, International Bar Association Antitrust Committee, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, NZX, Omni Bridgeway, Ross Asset Management Investment Group, Simpson Grierson, Nicole Smith, Solicitor-General, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Mana Mātāpono Matatapu | Privacy Commissioner, Kate Tokeley, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.

62 Carter Holt Harvey, Gilbert Walker, Te Kāhui Inihua o Aotearoa | Insurance Council (it said class membership should be determined on an opt-in basis, but if both approaches are available there should not be a default approach) and Tom Weston QC.

63 Ross Asset Management Investors Group, Woodsford Litigation Funding (but there should be the ability to close the class in some circumstances, such as settlement), International Bar Association Antitrust Committee (although it said there should be a power to close the class in certain circumstances, such as settlement) and Maurice Blackburn/Claims Funding Australia (opt-out is preferable, but if multiple approaches are available, opt-out should be the default).

(c) Four submitters supported having opt-in as the default or preferred mechanism, with opt-out allowed in some situations.[64]

(d) Two submitters supported having opt-out as the default or preferred mechanism, with opt-in allowed in some situations.[65]

(e) Twelve submitters supported having both opt-in and opt-out available, with no default mechanism.[66]

(f) Five submitters also supported a universal approach being available.[67]

1.49 There were several submissions which set out some matters to consider, without expressing a view on a preferred approach.[68]

1.50 Submitters who favoured opt-in noted that this mechanism was more straightforward, had been shown to work in Aotearoa New Zealand, ensured a clear class size and could ensure parties were committed to funding arrangements. These submitters also pointed to disadvantages of an opt-out approach, including high burdens on defendants, the risk of opportunistic claims and being inconsistent with traditional notions of party autonomy. Submitters who preferred an opt-out approach saw this as promoting access to justice, with some considering it could be an efficient use of court resources and could provide finality for defendants. Submitters who preferred having multiple approaches available (with no default) noted that each mechanism had advantages and disadvantages and considered it would be desirable to have flexibility to choose the most appropriate mechanism for each case.

1.51 Submitters also raised a number of consequential issues that would need to be considered depending on the mechanism chosen.

Our preferred approach to class membership

1.52 There are advantages and disadvantages to both opt-in and opt-out approaches to class membership, which we set out in detail in our Issues Paper.[69] Our preferred approach is to allow both opt-in and opt-out mechanisms for forming a class because we do not think class actions in Aotearoa New Zealand suit a "one size fits all" approach.

1.53 We think a regime which prevents opt-out claims altogether would be very limiting and would not promote access to justice, particularly where individual claims are modest. Few submitters supported this option. This option would also be inconsistent with the

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64 Bell Gully, BusinessNZ, NZX and Kate Tokeley.

65 Nicole Smith and Jennifer Braithwaite (especially if children and young people are possible class members).

66 Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC (but queries how opt-out would work when class members have individual causes of action, separate to the claim in the class action), Nikki Chamberlain, Chapman Tripp, Michael Duffy, Michael Legg, LPF Group, Omni Bridgeway, Simpson Grierson, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Vicki Waye.

67 Nikki Chamberlain, Chapman Tripp, NZX, Simpson Grierson and Te Kāhui Ture o Aotearoa | New Zealand Law Society.

68 Buddle Findlay (tended to prefer opt-in but anticipated the Supreme Court decision in *Southern Response v Ross* had pre-empted the approach), Claims Resolution Service, Solicitor-General and Te Mana Mātāpono Matatapu | Privacy Commissioner.

69 Issues Paper at [12.15]–[12.58].

Supreme Court's decision in *Southern Response v Ross,* which held that opt-out representative actions should be available in Aotearoa New Zealand. [70]

1.54 Equally, an option that prevents opt-in claims would remove a mechanism that may work well for certain types of case, such as claims involving a small number of high value claims or where the claims involve sensitive matters. In any case, preventing opt-in claims might simply lead to plaintiffs seeking to define the class very narrowly, such as referring to those who have signed up to a litigation funding agreement. [71]

1.55 We prefer a case-by-case approach rather than specifying that either opt-in or opt-out should be the default mechanism. We are not convinced that a particular mechanism is better in most cases and think it will depend on the type of class actions that are brought in Aotearoa New Zealand. While specifying opt-out as a default might be seen as promoting access to justice, few submitters supported this approach, and it could pose an additional hurdle for a plaintiff seeking to bring an opt-in class action.

1.56 We anticipate that a plaintiff's application for certification will specify whether they seek to have class membership determined on an opt-in or opt-out basis and the reasons for this. Our draft provision on certification requires the court to consider whether the opt-in or opt-out mechanism proposed for the proceeding is an appropriate means of determining class membership in the circumstances of the case. [72] The plaintiff's preferred approach will therefore be the starting point.

1.57 Our draft provision does not specify criteria for the court to apply when deciding whether it is appropriate for class membership to be determined on the basis proposed by the representative plaintiff. We think it is preferable for the court to have broad discretion to consider the circumstances of a particular case, rather than have rigid legislative criteria. However, we think the considerations identified by the Supreme Court in *Southern Response v Ross* as relevant to whether an opt-in or opt-out representative action is appropriate are also likely to be appropriate under a class actions regime. These are:

(a) In general, the court should adopt the approach proposed by the representative plaintiff unless there is good reason not to. [73]

(b) The court should consider the relevant factors in light of what will meet the objectives of HCR 4.24 in a particular case. [74]

(c) An opt-in approach should be favoured where there is a real prospect that some class members may end up worse off or adversely affected by proceedings. This would include the potential for a counterclaim. [75]

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70 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [108].

71 This has occurred in Australia, with the development of 'closed class actions'. We discuss this in our Issues Paper at [12.50(a)].

72 See our draft legislation, cl 4(1)(d).

73 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [95]. The Court said it saw no basis in policy or practical terms for not taking this approach, so long as the court turns its mind to all of the relevant factors.

74 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [95]. We suggest that under a class actions regime, the court could consider whether the plaintiff's proposed approach would be appropriate, having regard to the objectives of improving access to justice and managing multiple claims in an efficient way.

75 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [97].

(d) An opt-in approach may be preferable where the class size is small, relative to other claims, and there is a natural community of interest. In such a case, it is likely to be easier to contact class members. However, class size will not necessarily be determinative.[76]

(e) Whether a class member's participation is required at stage two may be relevant to the approach to stage one. If continuing an opt-out approach at stage two would lessen the benefits of the proceeding or increase any unfairness or prejudice, this could be a factor suggesting that opt-out is not appropriate for stage one.[77]

1.58 We note the Supreme Court also said that a universal approach to group membership in representative actions may be appropriate in some circumstances.[78] As we discuss below, we consider it is unnecessary to provide for universal class actions.

1.59 There are several other factors that we think may be relevant to the court's consideration of whether the opt-in or opt-out approach proposed by the plaintiff is appropriate:

(a) The subject matter of the proceeding. For example, we think opt-out is unlikely to be appropriate in a case involving sensitive matters such as allegations of abuse as it could be distressing for individuals to be included in such litigation without their consent.

(b) The size of individual claims. An opt-out class action may be particularly appropriate where individual claims are relatively small as it is unlikely that an individual would otherwise pursue their own claim.

(c) Whether the defendant would be unfairly prejudiced, for example, by making it difficult for a defendant to identify any contributory claims within a limitation period.

(d) How easy or difficult it will be to notify the potential class of the proceeding.

1.60 We acknowledge that our approach will create some uncertainty because of the risk of a court declining certification because it does not think the proposed opt-in or opt-out approach is appropriate. However, we think this is outweighed by the benefits of allowing flexibility in approach, to suit the circumstances of different cases. As the case law develops in this area, we would expect there to be greater clarity as to the kinds of case in which opt-in or opt-out is likely to be appropriate.

1.61 Under our proposed approach, a plaintiff would not make a separate application for an order that a class action can be brought on an opt-in or opt-out basis. Rather, the court would either certify the proceeding on the basis proposed by the plaintiff (opt-in or opt-out) or decline certification. A plaintiff may only consider its claim to be feasible under one of these mechanisms, so we do not consider a class action should be certified on a different basis without the plaintiff's agreement.

1.62 A situation might arise where a plaintiff seeks to bring an opt-out class action but is prepared to proceed with an opt-in class action (or vice versa) if the court is only willing to certify a class action on this basis. In this scenario, the plaintiff may wish to bring its certification application in the alternative, to avoid having to bring a fresh certification

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76 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [98].

77 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [99].

78 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [100]. As we discuss below, in the United States it is not necessary to provide an opportunity to opt out of this type of claim.

application if the original application is declined. Alternatively, a court could provide a plaintiff with an opportunity to amend its certification application if the court is likely to decline certification on the basis of the proposed approach to class membership.

1.63 Where competing class actions have been filed with respect to a dispute, the opt-in or opt-out basis proposed by the respective plaintiffs is likely to be relevant to the court's consideration of how to manage the cases. Where there is a proposed opt-in class action and a proposed opt-out class action, the court might decide that only one meets the certification criteria because either opt-in or opt-out would be inappropriate. Alternatively, it might find that while the case could be certified on either an opt-in or an opt-out basis, it is relevant to consider the respective merits of opt-in and opt-out when comparing the class actions.[79] Another situation that could arise is where competing class actions both seek to be certified as opt-in class actions. In some circumstances, the court might consider it appropriate for both class actions to proceed (and perhaps be heard together). We discuss competing class actions in Chapter 2.

Universal class actions

1.64 Our proposed certification provision does not provide for 'universal' or 'compulsory' class actions. This is a form of class action where class members do not have the ability to opt out. In the United States there are three categories of class actions where there is no requirement to provide an opportunity to opt out.[80]

1.65 The first category is where there is a risk of multiple individual claims leading to incompatible standards of conduct for the defendant.[81] These types of class action are relatively infrequent.[82] They include cases involving statutory assessments and bond issues, cases seeking non-monetary remedies as well as damages, and cases involving pension plans.[83] We anticipate that there would be few situations where this kind of class action would arise in Aotearoa New Zealand and we consider that courts could use their existing powers to ensure defendants do not face contradictory orders.

1.66 The second category is where separate decisions could practically dispose of others' claims or impede their ability to protect their interests.[84] The classic example is a 'limited fund class action', where many litigants have claims against a single asset which is unlikely to be sufficient to satisfy all claims.[85] While individuals opting out of a class action and successfully obtaining their own judgments would reduce a defendant's assets before a class action can proceed to judgment, we think it would be heavy handed to respond to this risk by removing class members' autonomy. If a defendant has limited assets, this will

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79 As we discuss in Chapter 2, we think that how the respective cases are formulated is likely to be relevant to the court's assessment of how to manage competing class actions.

80 Note that courts do have discretion to permit class members to opt out of these kinds of case and have occasionally allowed this: see William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 9:51.

81 United States Federal Rules of Civil Procedure, r 23(b)(1)(A).

82 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 4:9.

83 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 4:7.

84 United States Federal Rules of Civil Procedure, r 23(b)(1)(B).

85 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 4:16.

be a matter for a plaintiff and funder to consider when assessing the viability of a class action.

1.67 The third category of cases is where a declaration or injunction is sought.[86] This third category of case is said to be "the closest incarnation" to the English representative action rule.[87] In *Southern Response v Ross,* the Supreme Court indicated that universal representative actions may be appropriate where the only relief sought is a declaration or injunction and the outcome will affect class members identically.[88] As we have discussed earlier in this chapter, we see class actions as being a form of aggregate litigation, which will primarily be used to determine multiple claims for damages. We think that claims seeking only a declaration or injunction may be more appropriately brought as a declaratory judgment or judicial review proceeding or as a representative action.

1.68 We consider it is unnecessary to provide for universal or compulsory class actions in Aotearoa New Zealand. We think the situations in which these might be appropriate would be relatively rare and we think the individual autonomy of litigants supports giving class members an opportunity to either opt in or opt out of a class action.

Preliminary merits test or cost-benefit assessment

1.69 In our Issues Paper we said there may be a benefit in having a preliminary merits test or a cost-benefit assessment as part of a certification test, given the burden a class action can place on the court system. However, we also said burdensome preliminary tests may risk undermining the objectives of class actions.[89] We asked submitters whether the court should be required to conduct a preliminary merits test or cost-benefit assessment (Q 24). We received 17 submissions on this question.[90]

Preliminary merits test

1.70 There were seven submitters who supported a preliminary merits test,[91] and nine who were opposed to such a test.[92]

1.71 Those who supported a preliminary merits test thought it could protect the court and defendants from wasted time and expense on meritless claims, as well as protecting the interests of class members. Submitters proposed a range of different thresholds, including "arguable case", "good arguable case" and "real prospects of success".

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86 United States Federal Rules of Civil Procedure, r 23(b)(2).

87 Rachael Mulheron "Opting in, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers" (2011) 50 CBLJ 376 at 388.

88 *Southern Response Earthquake Servicees Ltd v Ross* [2020] NZSC 126 at [100].

89 Issues Paper at [10.57].

90 Barry Allan, Andrew Barker QC, Bell Gully, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, Jasminka Kalajdzic, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC.

91 Andrew Barker QC, Bell Gully, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp (it said the court should either conduct a preliminary merits assessment or a cost-benefit analysis but its reasons related to the former), Claims Resolution Service and Te Kāhui Inihua o Aotearoa | Insurance Council.

92 Barry Allan, BusinessNZ, Jasminka Kalajdzic (she simply noted that the Law Commission of Ontario studied this at length and did not recommend a preliminary merits test), LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

1.72 Many of the submitters who did not support a preliminary merits assessment pointed to existing mechanisms for filtering out meritless claims, such as the powers to strike out or seek summary judgment. Some submitters commented that litigation funders were incentivised to assess the merits of a potential case. Submitters expressed concern that it would be difficult to assess the merits of a case prior to discovery and that a preliminary merits test could cause unnecessary cost and delay.

1.73 We think the risk of meritless class actions being brought is relatively low, because of the expense of bringing a class action and the deterrent effect of adverse costs. It will also be in the interests of litigation funders to carefully assess the merits of a potential case before committing to funding it. However, even if the risk is low, the potential effect of a meritless case is amplified in a class action because of the greater expense and time these cases take and the number of litigants affected. We have considered three options for preventing meritless class actions.

(a) A certification test could have a preliminary merits assessment, which requires the court to consider whether the case is likely to be resolved in favour of the plaintiff.[93] This would engage the court in reviewing the merits of the case at an early stage and this might require a significant amount of evidence to be filed in support of a certification application.

(b) Another option is the Canadian approach, where the certification test includes a requirement that the pleadings disclose a cause of action.[94] This is not a preliminary review of the merits and it is assessed on the same standard of proof as a "motion to dismiss" (strike out application).[95] The Court of Appeal has indicated that the "provisional appraisal of the merits" test under HCR 4.24 is consistent with the Canadian approach.[96]

(c) Finally, meritless class actions could be managed with existing mechanisms in the High Court Rules. If a plaintiff files a class action proceeding that is clearly an abuse of process, then the court can strike this out prior to service.[97] If it appears that a claim may not disclose a reasonably arguable cause of action, then a defendant could file an application for strike-out or summary judgment.

1.74 On balance, we prefer an option similar to (b) and propose the court must be satisfied, as part of the certification test, that the statement of claim discloses a reasonably arguable cause of action.[98] As the Court of Appeal said in a case under HCR 4.24, "…the Court cannot grant leave to the bringing of plainly meritless claims, and so allow those

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93 For example, the test proposed by the Ontario Law Reform Commission was "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 324.

94 See for example Class Proceedings Act SO 1992 c 6, s 5(1)(a).

95 See *Hollick v Toronto (City)* 2001 SCC 68, [2001] 3 SCR 158 at [16] and *Pro-Sys Consultants Ltd v Microsoft Corporation* [2013] 3 SCR 477 at [63].

96 See *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16]–[17] citing *Hollick v City of Toronto* 2001 SCC 68, [2001] 3 SCR 158 at [16].

97 High Court Rules 2016, r 5.35B(2)(a).

98 See our draft legislation, cl 4(1)(a).

propounding the claim to invite others to join the group represented".[99] We think it would be anomalous for the court to consider whether the class action would be an appropriate procedure for resolving class member clams, while being unable to consider whether there is a reasonably arguable cause of action as part of certification. Nor do we think it would be in the interests of class members, the parties or the court to certify a class action which cannot possibly succeed.

1.75 We have deliberately used the language that applies to a strike-out application and consider that the same test should apply. That is, a court would only find this requirement of the certification test is not met where all of the causes of action are "so clearly untenable that they cannot possibly succeed".[100] We also envisage the court's assessment would proceed on the basis that the pleaded facts are true.[101]

1.76 We prefer this approach to a preliminary merits test. We do not think the court should be assessing the prospects of the plaintiff's case at an early stage without the plaintiff having the benefit of obtaining information from the defendant through discovery and being able to present its case fully. There is also risk of every certification hearing turning into a 'mini-trial', with a plaintiff having to bring evidence to show the claim has sufficient prospects of success, causing considerable delay and expense.

1.77 We acknowledge that our proposal reverses the usual approach where a defendant must file an application to strike out a statement of claim that does not raise a reasonably arguable cause of action. However, we think this is justified given that a class action with no reasonably arguable cause of action will place a much greater burden on the court and the defendant than an ordinary case.

Cost-benefit assessment

1.78 There were six submitters who supported a cost-benefit or proportionality assessment.[102] Some submitters supported a relatively general proportionality assessment, while others supported a more specific test (such as whether the cost of identifying class members and distributing payments would be disproportionate). Several submitters expressed some reservations about having a cost-benefit assessment.[103] For example, ensuring that important class action safeguards were not abandoned in the interests of proportionality.

1.79 Our draft certification provision would enable the court to consider whether the time and expense of a class action is proportionate to the remedies sought when assessing whether a class action is an appropriate procedure.[104] We think this is consistent with the objectives of improving access to justice and managing multiple claims in an efficient way. As discussed in our Issues Paper, the concept of access to justice is broader than simply

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99 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16].

100 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267. See also *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

101 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267.

102 Bell Gully, Carter Holt Harvey, Claims Resolution Service, Omni Bridgeway, Simpson Grierson and Te Kāhui Inihua o Aotearoa | Insurance Council.

103 Barry Allan, BusinessNZ, Michael Duffy and Tom Weston QC.

104 See our draft legislation, cl 4(3)(d).

access to the courts and includes a substantively fair result (which in a class action, may include the amount of compensation class members receive).[105] In a case where the amount sought by each claimant is modest and the costs of bringing the class action and distributing any award to class members would be high, a class action may not facilitate substantive access to justice for those class members.

1.80 We note that the need for proportionality in class action litigation has been recognised in other jurisdictions, given the significant cost such litigation can impose on defendants and the courts.[106] The need for proportionality in civil litigation has also been discussed in Aotearoa New Zealand and the Rules Committee has proposed adding the concept of proportionality to the objective of the High Court Rules.[107]

Representative plaintiff

1.81 In this section we discuss:

(a) Suitability of the representative plaintiff.

(b) The relevance of tikanga on representation.

(c) Replacing a representative plaintiff and sub-class representative plaintiffs.

Suitability of the representative plaintiff

1.82 In our Issues Paper we asked whether the court should consider the representative plaintiff's suitability as part of the threshold legal test for a class action and, if so, what the criteria should be (Q 28).[108] We received 17 submissions on this question.[109] There were eight submitters who considered it was appropriate to consider the suitability of the representative plaintiff as part of a certification process.[110] Some submitters saw this as a key means of protecting the interests of class members and defendants. Three submitters were opposed to the court considering a representative plaintiff's suitability at the outset.[111] Submitters expressed concern that it may lead to unnecessary cost and delay and deter litigants from taking on the role. A further six submitters did not express a clear position as to whether they supported the suitability of the representative plaintiff being part of a threshold legal test.[112]

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105 Issues Paper at [5.6]–[5.8].

106 See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [6.78]–[6.79] and Law Commission of Ontario *Class Actions: Objectives, Experiences* and *Reforms – Final Report* (July 2019) at 50.

107 Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at [72].

108 Issues Paper at [11.2]–[11.23].

109 Barry Allan, Bell Gully, Jennifer Braithwaite, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, International Bar Association Antitrust Committee, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Woodsford Litigation Funding.

110 Bell Gully, Jennifer Braithwaite, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, International Bar Association Antitrust Committee, Simpson Grierson and Te Kāhui Inihua o Aotearoa | Insurance Council.

111 LPF Group, Maurice Blackburn/Claims Funding Australia and Omni Bridgeway.

112 Barry Allan, BusinessNZ, Michael Duffy, Michael Legg, Te Kāhui Ture o Aotearoa | New Zealand Law Society and Woodsford Litigation Funding.

1.83 Whether a person could adequately represent class members was seen as a key test for assessing the representative plaintiff's suitability, along with assessing whether a conflict of interest exists. Some submitters supported consideration of the plaintiff's understanding of the role and/or a plaintiff's financial resources. Few submitters commented on whether the plaintiff's claim must be typical of the class.

1.84 We have concluded that a court should consider the representative plaintiff's suitability for the role as part of the certification test. The representative plaintiff has an important role in protecting the interests of class members and we think the court should be satisfied that the person is able to fulfil that role. We do not think the alternative approach, of requiring a class member to apply to replace the representative plaintiff on the grounds of inadequacy, offers sufficient protection to the class or would be very efficient.

1.85 Our draft certification provision requires the court to be satisfied there is a suitable representative plaintiff who is able to fairly and adequately represent the class.[113] Our main comparator jurisdictions refer to adequacy of representation and submitters saw this as the essential consideration. The draft provision lists several factors that a court may consider when assessing the suitability of a representative plaintiff and whether they will fairly and adequately represent the class.[114] We consider that courts should have a degree of flexibility as to what they consider when assessing the test for a representative plaintiff and so the factors we list are permissive and non-exhaustive.

1.86 Our first factor is any conflict of interest which could prevent the person from properly fulfilling their role as representative plaintiff.[115] We acknowledge that some potential conflicts of interest may not always be apparent at an early stage of proceedings when the identity of many class members is unknown. If a conflict of interest emerged subsequent to certification, this could be a ground for replacing the representative plaintiff or creating a sub-class.[116]

1.87 Another relevant factor is whether the person has a general understanding of the nature of the claims and their obligations as representative plaintiff, including their liability for adverse costs.[117] In Chapter 3, we discuss what we think the obligations of a representative plaintiff should be. We do not think it is necessary for a plaintiff to establish that they have the financial resources to meet an adverse costs award (or have been provided with a costs indemnity). We think this can be sufficiently covered by the security for costs mechanism. However, whether the plaintiff understands their own costs obligations may be a relevant consideration.

1.88 Where a person seeks to represent members of their hapū or iwi, tikanga on representation may be relevant.[118] We discuss this in the following section.

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113 See our draft legislation, cl 4(1)(c).

114 See our draft legislation, cl 4(2).

115 See our draft legislation, cl 4(2)(a).

116 Later in this chapter, we suggest the court should have a power to replace a representative plaintiff and discuss sub-classes.

117 See our draft legislation, cl 4(2)(b).

118 See our draft legislation, cl 4(2)(c).

1.89 We do not think that typicality needs to be specified as a factor (i.e. whether the representative plaintiff's claim is typical of the class), as we have already proposed that a plaintiff must be a class member and that claims must have sufficient commonality. However, a court would not be prevented from taking this into account if relevant to adequacy of representation in a particular case.

Tikanga on representation

1.90 In our Issues Paper, we asked submitters about the role of tikanga Māori when a person seeks to represent the interests of a whānau, hapū or iwi through a class action (Q 31). We received 10 submissions on this question.[119] Most of these submitters appeared comfortable with the court considering a representative plaintiff's suitability in terms of tikanga Māori when the person is seeking to represent the interests of a whānau, hapū or iwi.

1.91 A class action will not necessarily be the best way of pursuing a claim on behalf of hapū or iwi. This is because such claims often seek redress for the collective, rather than redress for each individual member of the hapū or iwi. As we noted in our Issues Paper, rangatira and entities such as trusts can generally pursue claims on behalf of the collectives they represent.[120] The class actions mechanism is different in that it is designed to aggregate individual claims that share a common issue. The representative plaintiff is permitted to seek redress for each individual member of the class, but class members are otherwise typically unconnected to each other.

1.92 Where a person does seek to use a class action to bring a claim on behalf of members of their hapū or iwi, we consider that the court should be able to consider tikanga on representation. We think this would be consistent with one of our principles for designing a class actions regime, namely to recognise and reflect tikanga Māori.[121] In our proposed provision for assessing the suitability of the representative plaintiff, one factor the court may consider is: "if they will be representing members of their hapū or iwi, the tikanga of the hapū or iwi as relevant to representation".[122] While our Issues Paper also referred to a person bringing a claim on behalf of their whānau, we have not included this concept in our draft provision. Representation issues may be less contentious within an individual whānau. In some cases it may also be difficult to establish tikanga on representation within an individual whānau.

1.93 Our intention is that this factor should support existing tikanga regarding representation and the determination of who has responsibility for upholding collective interests. It is not intended to be an additional hurdle which makes it more difficult for Māori litigants to bring a class action. We have not made it a mandatory consideration as it may not be necessary for the court to consider this in all cases, for example, where a person is clearly recognised as having a mandate.

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119 Bell Gully, Jennifer Braithwaite, BusinessNZ, Nikki Chamberlain, Chapman Tripp, LPF Group, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council and Te Hunga Rōia Māori o Aotearoa.

120 Issues Paper at [11.42].

121 We have outlined our principles for designing a class actions regime in the Introduction.

122 See our draft legislation, cl 4(2)(c).

1.94 We have considered whether it is appropriate to require a rangatira to demonstrate that they will be a suitable representative plaintiff who will fairly and adequately represent the class, when they already have customary authority to represent their people. We think this would be appropriate because:

(a) If the rangatira a becomes representative plaintiff, they will need to take on the obligations of this role, which include acting in the interests of class members who are not before the court and having adverse costs liability.[123] A suitability assessment may help to ensure the rangatira is aware of, and can plan for, costs liability.

(b) The adequacy test is flexible and is not designed to be overly onerous. It should not be difficult for a person who is a rangatira to establish they would fairly and adequately represent their people.

(c) The adequacy test allows consideration of tikanga on representation.

1.95 We anticipate that as part of the certification process, the court could receive evidence of the iwi or hapū's tikanga on representation and any tikanga process that has been undertaken with respect to the proposed representative plaintiff.

1.96 We do not think a class actions regime needs to specify a process for the court to follow when considering tikanga on representation. Courts consider issues of tikanga on a regular basis and can appoint an expert to assist if appropriate.[124] The Māori Land Court could also advise the High Court on representation.[125] If there is a need for a more formal or specific mechanism to assist the court to consider issues of tikanga, we think it would be preferable to have a general provision in the High Court Rules rather than a specific process applying only to class actions. Otherwise, there is a risk of inconsistencies between class action cases and other types of case.

Other representative plaintiff matters

1.97 We also consider the court should have powers to replace a representative plaintiff, for example where the person settles their individual claim or is no longer meeting the requirement that they are a suitable person who can fairly and adequately represent the class.

1.98 Later in this chapter, we suggest that sub-classes may be appropriate in some circumstances. If a sub-class is formed, then it will be necessary to appoint a sub-class representative plaintiff. In such a case, that person should have to meet the same test that applies to the representative plaintiff.

Litigation plan

1.99 Our Issues Paper noted that some jurisdictions require the representative plaintiff to have prepared a litigation plan as part of a certification test and asked whether this should be required in Aotearoa New Zealand (Q 25).[126] We received 14 submissions on this

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123 We discuss the obligations of the representative plaintiff in Chapter 3.

124 High Court Rules 2016, r 9.36.

125 Using its power under Te Ture Whenua Maori Act | Maori Land Act 1993, s 30.

126 Issues Paper at [10.65]–[10.67].

question.[127] There were four submitters who expressly said a representative plaintiff should have to provide a litigation plan as part of a certification test and two other submitters who appeared to support this.[128] Potential benefits of a litigation plan were said to include: protecting the defendant and class members from poorly-run cases, alerting the court to any issues at an early stage, allowing the parties to understand the likely scope and costs of the case, and providing the court with information necessary for certification.

1.100 Five submitters were opposed to a litigation plan being part of a certification test.[129] Some submitters commented that it could cause delay and that it was difficult to assess how litigation would be run at an early stage. Six submitters thought case management was the appropriate way to assess how the litigation would be run, including most of the submitters who opposed a litigation plan being part of certification.[130] Three submitters did not clearly state a view on having a litigation plan as part of certification.[131]

1.101 Ensuring that litigation is managed in an efficient way is in the interests of parties, class members and the court. A plaintiff will need to provide the court with some details as to how it intends to run the litigation to enable the court to assess whether the time and cost of the class action will be proportionate to the relief sought. However, we do not think it is necessary to require a litigation plan as part of a certification test. It may be difficult for a plaintiff to have a clear idea of how the litigation will be run at such an early stage. A mandatory litigation plan could require the court to determine too many detailed issues as part of certification, which could cause delay. If there are any significant concerns about whether the case can be efficiently run as a class action, these may be relevant to a court's assessment of whether a class action would be an appropriate procedure for the efficient resolution of class members' claims. We think detailed issues could be considered as part of case management.

Litigation funding arrangements

1.102 In the Issues Paper, we asked whether the court should consider litigation funding arrangements when a class action is commenced (Q 26). We have not yet formed a view on this. If we consider this is desirable, we anticipate it would be provided for separately rather than being part of a certification test.

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127 Barry Allan, Bell Gully, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson, Te Kāhui Inihua o Aotearoa | Insurance Council and Tom Weston QC.

128 Bell Gully, Carter Holt Harvey, Chapman Tripp and Te Kāhui Inihua o Aotearoa | Insurance Council expressly supported this. Claims Resolution Service and Barry Allan appeared to support it.

129 Nikki Chamberlain, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson.

130 BusinessNZ, Nikki Chamberlain, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway and Simpson Grierson.

131 BusinessNZ, Meredith Connell and Tom Weston QC.

Draft certification provision

4 Certification of class action

(1) A court may certify a proceeding as a class action proceeding if it is satisfied that—

(a) the statement of claim discloses a reasonably arguable cause of action; and

(b) the persons on whose behalf the proceeding was commenced have claims that all raise a common issue of fact or law of significance to the resolution of each claim; and

(c) the 1 or more representative plaintiffs are each suitable and will fairly and adequately represent class members; and

(d) the opt-in or opt-out mechanism proposed for the proceeding is an appropriate means of determining class membership in the circumstances of the proceeding; and

(e) a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members.

(2) The court may consider the following when assessing the suitability of a representative plaintiff and whether they will fairly and adequately represent class members:

(a) whether there is a conflict of interest that could prevent them from properly fulfilling the role as representative plaintiff:

(b) whether they have a reasonable understanding of the nature of the claims and the obligations of a representative plaintiff, including for costs:

(c) if they will be representing members of their hapū or iwi, the tikanga of the hapū or iwi as relevant to representation in the proceeding:

(d) any other factors it considers relevant.

(3) The court may consider the following when assessing whether a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members:

(a) the number or potential number of class members:

(b) the nature of the claims:

(c) the extent of the other issues that will need to be determined once the common issue is resolved:

(d) whether the likely time and cost of the proceeding is proportionate to the remedies sought:

(e) whether there is another procedure available to class members that would be a more appropriate means of dealing with their claims:

(f) any other factors it considers relevant.

QUESTION

Q2 Do you agree with our draft certification provision? If not, how should it be amended?

ADDITIONAL CERTIFICATION MATTERS

1.103 In this section we briefly discuss:

(a) When sub-classes should be allowed.

(b) What should be specified in a certification order.

Sub-classes

1.104 It may be necessary to have sub-classes in a class action, with groups represented by sub-class representative plaintiffs.

1.105 One situation where a sub-class may be desirable is where groups of class members have conflicting interests. In the United States, sub-classes and separate legal representation may be required where there are significant conflicts of interests.[132] In Canada, where separate representation is necessary to protect sub-class member interests, the court cannot certify a class action unless it appoints a plaintiff to represent the sub-class.[133]

1.106 Another situation is where all class members share a common issue, but there are additional issues which are not common to all class members. In this situation, sub-classes may assist to make litigation more efficient and manageable. An example of this is seen in the Australian regimes, which allow sub-groups as a technique for managing non-common issues.[134]

1.107 Sub-classes could also be allowed where there is no issue common to all class members, but there are several related sub-classes. It may be more accurate to describe this as multiple classes, rather than one class with several sub-classes. Courts in the United States have taken differing views as to whether this form of sub-class is permissible.[135] One consequence of this approach is allowing a case to be certified in circumstances where the broader class could not be certified because of insufficient commonality.[136]

1.108 We consider class members' claims should be required to raise a common issue, with sub-classes used to determine additional issues or where a conflict of interest arises. We think the benefits of class actions are more able to be realised where there is a common issue

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132 See William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 7:29 and § 7:31.

133 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 5(2).

134 See for example Federal Court of Australia Act 1976 (Cth), s 33Q(2).

135 See William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 7:29.

136 See Scott Dodson "Subclassing" (2006) 27 Cardozo L Rev 2351 at 2362 (discussing the "replacement theory" of sub-classes, where sub-classes are used when the larger class cannot be certified).

across all of the claims. We think it would be desirable for a class actions statute to provide for sub-classes.[137]

QUESTION

Q3 When should sub-classes be allowed? For example:

a. Where there is a conflict of interest among class members?

b. Where there is a common issue across all class members, as well as additional issues only shared by a sub-group?

c. Where there are sub-groups with related issues but no common issue applying to all claims?

Certification order

1.109 If the court decides to certify a proceeding as a class action, we propose that it would make a formal certification order.[138] The matters that must be specified in the certification order could include:

(a) A description of the class.

(b) The name of the representative plaintiff (or plaintiffs).

(c) The nature of the claims asserted on behalf of the class.

(d) The relief sought by the class.

(e) The common issues of law or fact.

(f) Whether the class action has been certified on an opt-in or opt-out basis.

1.110 The contents of a certification order could be provided for in statute.[139] We think having clarity on the class definition and the common issues to be determined in the proceeding is particularly important. Some submitters referred to the issues that can be created by a poorly-defined class or common issue.

1.111 We also propose in Chapter 5 that the binding effect of a judgment on common issues should be limited to common issues set out in the certification order.

QUESTION

Q4 Do you agree with our list of matters that should be included in the court's certification order?

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137 For simplicity, our draft legislation only refers to classes and not sub-classes.

138 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 8(1).

139 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 8(1).

LIMITATION PERIODS

1.112 In ordinary litigation, the act of commencing a proceeding stops the limitation period from running against the plaintiff. A class actions regime needs to provide some clarity on how limitation periods will apply to class members, who do not technically commence a proceeding themselves. In this section we discuss:

(a) The approach courts have taken to limitation under HCR 4.24.

(b) When limitation periods should be suspended.

(c) When limitation periods should start running again.

(d) Limitation and contribution claims.

Limitation under HCR 4.24

1.113 In *Credit Suisse Private Equity v Houghton,* the Supreme Court considered when a representative action was brought on behalf of shareholders for statutory limitation purposes. The Court was divided on this issue. The majority held that a representative action was brought when the statement of claim was filed, not only by the plaintiff but also on behalf of those represented.[140] The majority considered that the limitation period stopped running for the represented group on the date that the proceedings were filed and the representative order was made.[141] This case was slightly unusual in that the High Court had made a representation order on an ex parte basis on the same day that the claim was filed. The majority observed that it may be necessary to backdate a representative order if it is not made at the time the case is filed to ensure the court's process does not disqualify individuals where the limitation period ends between filing and the representative order being made.[142] The minority took the view that an action was not brought on behalf of a represented person until they gave consent by opting in.[143]

1.114 The subsequent case of *Cridge v Studorp* involved a situation where the limitation period expired in between the statement of claim being filed and the application for representation orders being heard. The Court of Appeal considered that the High Court was wrong to refuse to grant precautionary orders preserving group members' positions for limitation purposes in case the representation order was declined.[144] The Court took the view that when time stopped running under the Limitation Act 2010 for the representative plaintiff, it stopped for everyone they purported to sue on behalf of. This remained the case regardless of whether a representative order was later made or not.[145]

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140 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [127].

141 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [170].

142 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [128].

143 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [10] and [68].

144 *Cridge v Studorp* [2017] NZCA 376, (2017) 23 PRNZ 582 at [86]. Note, however, the issue was "academic" as the Court also upheld the representation order (which had been backdated to the date of the statements of claim): see [63].

145 *Cridge v Studorp* [2017] NZCA 376, (2017) 23 PRNZ 582 at [86].

When should a limitation period be suspended?

1.115 In Australia, where there is no certification requirement, the limitation period applying to class member claims is suspended when a class action is commenced.[146]

1.116 Where a regime has a certification requirement (as we have proposed for Aotearoa New Zealand), an issue arises as to who is entitled to the benefit of limitation suspension in the period between a class action being commenced and the court issuing its decision on certification.

1.117 One approach is for the limitation periods applying to all proposed class members to be suspended when a class action is filed, regardless of whether the class action is certified. In the United States, filing a federal class action will generally suspend the running of the limitation periods that apply to the individual claims of all proposed class members. This is known as the American Pipe doctrine.[147] Limitation periods will be suspended until the court denies certification, with some courts holding it continues through the process of appealing a certification decision.[148] Some Canadian provinces have taken the same approach, with the suspension of limitation periods applying to class members occurring whether or not the class action is certified.[149] This approach is also consistent with the approach taken by the Court of Appeal in *Cridge v Studorp*.

1.118 A narrower approach would only apply the suspension of limitation periods to certified class actions. This will mean that if the class action is not certified, none of the proposed class members will have the benefit of suspension of limitation periods. This was the approach taken in the British Columbia legislation,[150] although it was subsequently amended to provide for a situation where a person reasonably assumed they would be part of a class action, but this does not occur.[151] Several other Canadian provinces have an approach similar to British Columbia.[152]

1.119 We consider the suspension of limitation periods should apply to all class actions that are commenced, not just those which are ultimately certified. The latter approach would cause considerable uncertainty and may lead to individual class members filing their own claims as a precaution.[153] This may defeat the objective of managing multiple claims in an efficient way. There could be a considerable delay between a proceeding being

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146 See for example Federal Court of Australia Act 1976 (Cth), s 33ZE.

147 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 9:53. The doctrine was developed in the Supreme Court's decisions in *American Pipe & Const. Co v Utah* 414 US 538 and *Crown, Cork & Seal Co Inc v Parker* 462 US 345.

148 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 9:53.

149 Class Proceedings Act SO 1992 c 6 (Ontario), s 28(1); The Class Proceedings Act SM 2002 c C-130 (Manitoba), s 39(1) and 39(2); Class Proceedings Act SNS 2007 c 28 (Nova Scotia), s 42(1); and Class Proceedings Act RSNB 2011 c 125 (New Brunswick), s 41(1).

150 Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 39(1).

151 Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 38.1. This is because the certification application is dismissed or the court orders that the cause of action must not be asserted or the person is not part of the class.

152 See: Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 40; The Class Actions Act SS 2001 c C-12.01 (Saskatchewan), s 43; and Class Actions Act SNL 2001 c C-18.1 (Newfoundland and Labrador), s 39.

153 This happened in *Cridge v Studorp,* where 55 individual group members filed their own claims because the limitation period was due to expire prior to the application for a representation order being heard: *Cridge v Studorp* [2016] NZHC 2451, (2016) 23 PRNZ 281 at [2].

commenced and a court releasing its decision on certification and a class member will likely have little control over these timeframes.

1.120 A situation could arise where the class definition certified by the court is narrower than that proposed by the plaintiff. Individuals would fall within the class at commencement, but subsequently be excluded at certification. We think the suspension of limitation should apply to these individuals between commencement and certification. Once they are excluded from the class definition, limitation periods could begin to run again. Given that these individuals would have the benefit of the limitation protection if the class action was not certified, it would seem unfair to create an anomaly. While it could be argued this might incentivise plaintiffs to draw classes as wide as possible, the need to meet certification requirements should deter this. Alternatively, the class definition might be expanded after the class action is commenced.[154] In this situation, we think those who subsequently fall within the class definition should have the benefit of suspension of limitation periods once they become included in the class definition.[155]

When should a limitation period start running again?

1.121 A class actions regime should also specify when a limitation period will start running again for individual class members. The Australian regimes take a relatively general approach to this, specifying that the limitation periods will run again if: (a) a class member opts out of the proceeding; or (b) the proceedings and any appeals are determined without finally disposing of the class member's claim. The Canadian regimes provide a more detailed list of circumstances that will trigger a limitation period running again, as does the United Kingdom Competition Appeal Tribunal provision.[156]

1.122 We think it would be preferable to provide a detailed list of circumstances that would start a limitation period running again as this should provide greater certainty and clarity to class members and defendants. We consider a limitation period should start running again when:

(a) The court declines to certify a class action.

(b) The court makes an order that has the effect of removing or excluding a claim from the proceeding. An example would be where the court makes an order that narrows the class definition.

(c) In an opt-in proceeding, a class member decides not to opt into the class action. The relevant date would be the date specified in the opt-in notice as the last date for opting in.

(d) In an opt-out proceeding, a class member decides to opt out of the class action.

(e) The proceeding otherwise ends without an adjudication on the merits, for example if the plaintiff discontinues the claim.

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154 For example, if an amended statement of claim is filed or the certification order has a broader class definition.

155 So long as a limitation period applying to a class member has not already expired.

156 Competition Act 1998 (UK), s 47F and sch 8A cl 23(4).

1.123 If there is a right of appeal in any of these circumstances, we consider the suspension period should continue to run until the appeal period has expired or the appeal has been finally disposed of.

Limitation and contribution claims

1.124 A defendant in a class action may have claims against third parties for contribution or indemnity. It may be difficult for a defendant to identify all third party claims at an early stage of a class action if there is uncertainty about the scope of the class or the particulars of the claims. This will not normally be an issue because the Limitation Act 2010 allows a defendant to bring a contribution claim against another tortfeasor or joint obligor up to two years after the date on which its liability is quantified (by an agreement, award or judgment).[157] This means that ordinarily a defendant could bring a contribution claim following a judgment or settlement in a class action.

1.125 An issue may arise in relation to claims under the Building Act 2004 because of the requirement to bring claims within 10 years.[158] Case law has diverged on the issue of whether or not this 10-year longstop period applies to claims for contribution.[159] While this issue is not exclusive to class actions, a 10-year longstop period for contribution claims could be particularly problematic in class actions because the defendant does not have full particulars of all claims when the proceeding is filed. If reform or clarification is needed, we think amendment to section 394 of the Building Act may be the appropriate solution, rather than addressing it through class actions limitation provisions.

QUESTIONS

Q5 Do you agree that the limitation periods applying to all proposed class members should be suspended when a class action is commenced?

Q6 Do you agree with the events we propose should start the limitation period applying to a class member running again?

157 Limitation Act 2010, s 34(4).

158 Building Act 2004, s 393(2).

159 See for example *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058 at [69]; *Body Corporate 88863 v Pimento Holdings Ltd* [2012] NZHC 2225 at [19]–[25]; and *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 17 August 2010 at [41]–[45].

CHAPTER 2

Competing class actions

INTRODUCTION

In this chapter we discuss:

- The different approaches used in other jurisdictions for managing competing class actions.
- What should be included in the definition of competing class actions.
- Timing issues for managing competing class actions.
- The powers a court should have to manage competing class actions.
- What criteria the court should apply when deciding how to manage competing class actions.
- Whether the defendant should participate in hearings in relation to competing class actions

APPROACHES TO MANAGING COMPETING CLASS ACTIONS

2.1 Having competing class actions relating to the same dispute is generally undesirable as this leads to increased costs for all parties, inefficient use of court resources, increased burden on defendants, confusion for class members and the risk of inconsistent court rulings on common issues.[1]

2.2 Overseas jurisdictions have taken differing approaches to managing competing class actions including:

(a) Courts relying on their general case management powers (Australia).

(b) A 'carriage motion' to determine which class action can proceed (Ontario).

(c) A 'first to file' rule or presumption (Québec).

(d) Managing competing class actions through the court's power to appoint class counsel (United States).

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[1] For the purposes of this paper, we refer to 'competing' class actions, although they are sometimes referred to as overlapping, concurrent or multiple class actions, depending on how they intersect.

(e) Managing competing class actions through the court's power to appoint a representative plaintiff (United Kingdom Competition Appeal Tribunal).

2.3 We discuss these approaches below and then give our preliminary view as to which approach is likely to be most appropriate for Aotearoa New Zealand.

Australia

2.4 The Australian class actions regimes do not have an express provision for addressing competing class actions and instead courts must rely upon their case management powers.[2] The lack of an express provision has been criticised and both the Australian Law Reform Commission (ALRC) and the Australian Parliamentary Inquiry have recommended that the Federal Court should have an express statutory power for resolving competing class actions.[3]

2.5 In the absence of a statutory provision, courts have developed a range of mechanisms for managing competing class actions. The starting point is that multiplicity of proceedings should not be encouraged and that competing class actions may be "inimical to the administration of justice".[4] However, there is no "one size fits all" approach and multiple proceedings can be addressed by a variety of means including:[5]

(a) Staying one or more of the proceedings.

(b) Consolidating the proceedings.

(c) De-classing one or more of the proceedings.

(d) Holding a joint trial of all proceedings with each left as "open class" proceedings.

(e) Closing the class in one or more proceedings but leaving one of the proceedings as "open class" and having a joint trial of all the proceedings.

2.6 Australian courts have developed factors to guide a decision as to which proceeding should go ahead.[6] In its decision in *Wigmans v AMP Ltd*, the High Court of Australia said that where the defendant's interests are not differentially affected, the court must determine which proceeding going ahead would be in the best interests of class members.[7] The factors relevant to this cannot be exhaustively listed and will vary from case to case.[8]

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2 Some guidance on managing competing class actions in the Federal Court is provided in *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [8.1]–[8.6].

3 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 107; and Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at 82.

4 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [106] per Gageler, Gordon and Edelman JJ.

5 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [106] per Gageler, Gordon and Edelman JJ.

6 See for example *Perera v Getswift Ltd* [2018] FCA 732, (2018) 263 FCR 1 at [169]; *Perera v Getswift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [195]; and *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [71].

7 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [52] and [109] per Gageler, Gordon and Edelman JJ.

8 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [109] per Gageler, Gordon and Edelman JJ. We discuss the factors that Australian courts considered relevant later in this chapter.

Canada

2.7 In Canada, competing class actions are generally addressed through an application to determine which party will have "carriage" of a class action, known as a carriage motion. Only Ontario has specific statutory provisions for carriage motions, which were introduced in 2020 following recommendations of the Law Commission of Ontario (LCO).[9] According to the LCO, stakeholders were "universally critical" of the carriage process that had developed in the absence of specific provisions, pointing to uncertainty, cost, delay and unethical behaviour as concerns.[10]

2.8 Under the Ontario provisions, where there are two or more class actions involving "the same or similar subject matter and some or all of the same class members", the court may order that one or more of the proceedings be stayed, upon the application of a representative plaintiff.[11] The carriage motion must be made within 60 days of the first class action being commenced and the court will hear it as soon as practicable.[12] After 60 days has passed, a competing class action cannot be brought without the leave of the court.[13]

2.9 When determining a carriage motion, the court is to decide what proceeding "would best advance the claims of the class members in an efficient and cost-effective manner", by reference to four statutory criteria.[14]

2.10 When the court makes orders on a carriage motion, it will also bar any other class action involving the same or similar subject matter and some or all of the same class members from being commenced without the leave of the court.[15]

2.11 Québec differs from other Canadian provinces by using a "first to file" approach, where the first class action filed will generally be allowed to proceed. Subsequent class actions will be stayed and will only proceed if the initial class action is not certified. The court does have discretion to depart from the first-to-file rule if it would not be in the interests of the proposed class.[16]

United States

2.12 In the United States, competing federal class actions are managed through the requirement for the court to appoint class counsel.[17] In appointing class counsel, the court must consider: the work counsel has done in identifying or investigating potential claims in the class action; counsel's experience in handling class actions, complex litigation and

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9 Prior to this, Ontario courts relied on the general power to make orders in class actions and the power to stay a related proceeding: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 23.

10 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 24–25.

11 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(2).

12 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(3).

13 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(8).

14 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4). We outline the criteria later in this chapter.

15 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(6).

16 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 25.

17 United States Federal Rules of Civil Procedure, r 23(g).

the types of claim at issue; counsel's knowledge of the applicable law; and the resources counsel will commit to the case.[18] The court may also consider any other matter relevant to counsel's ability to fairly and adequately represent the interests of the class and may order potential class counsel to provide relevant information and to propose terms for fees and costs.[19]

2.13 If more than one adequate applicant seeks appointment as class counsel, "the court must appoint the applicant best able to represent the interests of the class".[20]

2.14 There are separate provisions that apply to securities class actions. These involve the court appointing a lead plaintiff at the outset of a class action, with the largest shareholder seeking the position presumed to be the best choice.[21] The lead plaintiff then selects counsel to represent the class, subject to court approval.[22]

United Kingdom Competition Appeal Tribunal

2.15 Where more than one person seeks approval to act as the class representative in respect of the same claims, the United Kingdom Competition Appeal Tribunal must consider who would be the most suitable applicant.[23] According to the Tribunal's *Guide to Proceedings,* relevant factors are likely to include the proposed class definition and scope of the claims, the quality of the litigation plan and the experience of the respective lawyers.[24] The Tribunal considered its first case of competing class actions in July 2021 and a decision is pending.[25]

How competing class actions should be managed

2.16 We think there should be a legislative provision setting out a process to determine how competing class actions should be managed. The experience of other jurisdictions indicates that without an express provision, the process of addressing competing class actions can be costly and drawn out.[26] We think such an approach is most similar to Ontario, where there is a statutory 'carriage motion' procedure. However, as we discuss below, it may be helpful to draw upon principles developed by Australian courts in managing competing class actions. Given that our proposed certification test does not include a requirement for the court to approve 'class counsel', we do not see the United States approach as suitable for Aotearoa New Zealand. Nor do we think competing class

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18 United States Federal Rules of Civil Procedure, r 23(g)(1)(A).

19 United States Federal Rules of Civil Procedure, r 23(g)(1)(B) and (C).

20 United States Federal Rules of Civil Procedure, r 23(g)(2).

21 Private Securities Litigation Reform Act of 1995 Pub L No 104-67, 109 Stat 737 (1995), § 77z-1(a)(3)(B).

22 Private Securities Litigation Reform Act of 1995 Pub L No 104-67, 109 Stat 737 (1995), § 77z-1(a)(3)(B)(v).

23 The Competition Appeal Tribunal Rules 2015 (UK), r 78(2)(c).

24 Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.32].

25 See: *Michael O'Higgins FX Class Representative Ltd v Barclays Bank PLC* [2020] CAT 9 (judgment declining to determine carriage as a preliminary issue). The Tribunal's website indicates that a combined carriage/certification hearing was held in July 2021 and a decision is pending: <www.catribunal.org.uk>

26 In Ontario (prior to legislative reform), stakeholders reported that carriage motions could add one year to the length of a class action or longer if it was appealed: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 24. In the Federal Court of Australia, it can take between two and 20 months to resolve competing class action issues: Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [7.14].

actions should be considered when approving a representative plaintiff. The fact that one representative plaintiff would be more suitable than another does not mean their case is more suitable to proceed.

2.17 We discuss below some of the issues that would need to be considered if a legislative provision for managing competing class actions was developed:

(a) What should be considered competing class actions.

(b) Timing issues, such as whether there should be a time period for lodging a competing class action.

(c) What powers the court should have to manage competing class actions.

(d) What criteria the court should apply when determining how to manage competing class actions.

(e) Whether the defendant may be involved in any hearing to determine which class action should proceed.

DEFINITION OF COMPETING CLASS ACTIONS

2.18 We think the legislation should define what is regarded as competing class actions. One approach would be to require some overlap in the class composition, so that at least some people are members of more than one class. This could occur where at least one of the class actions has class membership determined on an opt-out basis. The Ontario legislation takes this definitional approach, referring to "two or more proceedings… [which] involve the same or similar subject matter and some or all of the same class members".[27] The ALRC initially proposed defining a competing class actions as:[28]

> [T]wo or more class actions where there is a non-theoretical possibility that a person may be a class member of more than one class action and, as a result, would be seeking relief from the respondents for the same claim in multiple proceedings.

2.19 A wider definition would also include class actions with respect to the same legal dispute or subject matter where none of the class members overlap.[29] This could easily happen when multiple opt-in proceedings are brought. It could also occur when the class definition and/or common issue of an opt-out claim is carefully designed to avoid overlap. It has been argued that this wider category should also be considered competing class actions:[30]

> The fact that class actions with respect to the same dispute are filed on behalf of different claimants does not mean that they are not competing with, influencing, or having a

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27 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(2). When determining whether two or more proceedings involve "the same or similar subject matter", this must include consideration of whether the proceedings involve the same or similar causes of action and the same or affiliated defendants: Class Proceedings Act SO 1992 c 6 (Ontario), s 1.1.

28 Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [6.30].

29 These are sometimes categorised as "multiple" rather than competing class actions: see Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at 66.

30 Vince Morabito *An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (July 2018) at 12.

> significant effect on each other or that they do not pose problems such as "increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents.

2.20 In light of this argument, the ALRC expanded its definition of competing class actions to also include "two or more class actions with respect to the same dispute filed on behalf of different claimants". [31]

2.21 Our view is that a wide definition of competing class actions is appropriate, such as:

> Two or more class actions with respect to the same or substantially similar issues filed against the same defendant by different representative plaintiffs.

2.22 Having more than one class action about the same matter is likely to be inefficient and burdensome for the courts and the defendant. It may cause confusion for class members, even if there is no overlap in class membership. A wider definition would enable the court to manage multiple opt-in class actions, where the requirement to formally opt into the proceeding means that a person cannot inadvertently be a member of more than one class action.

QUESTION

Q7 Do you agree competing class actions should be defined as two or more class actions with respect to the same or substantially similar issues filed against the same defendant by different representative plaintiffs? If not, how should they be defined?

TIMING ISSUES FOR COMPETING CLASS ACTIONS

2.23 Timing issues need to be considered, such as whether to have a deadline for filing any competing class action and whether the court should consider competing class actions prior to certification.

Should there be a deadline for filing a competing class action?

2.24 The ALRC considered that competing class actions should be resolved as early in the litigation as possible. It proposed that when a class action is filed, any competing class action should have to be filed within a defined period of time, such as 90 days from when the first class action is commenced. [32] Under the ALRC's proposal, there would be a "standstill" during the 90-day period and the court could not take into account any book building that occurs during this period. [33] This is to discourage a 'race to the court'. Once the 90-day period is over, no class actions with respect to the issues in dispute could be

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31 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.79].

32 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.95], [4.97], and [4.101].

33 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.101], [4.104]. Note that the ALRC's proposal endorses the approach suggested in *Perera v GetSwift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [280].

initiated.[34] The ALRC's proposal has been criticised as imposing stricter time requirements than provided for in limitation statutes, as well as being likely to lead to unfair situations. For example, unfairness could arise where no competing class action is filed within the time period and the initial class action ends without a judicial determination on the merits.[35]

2.25 In Ontario, any competing class action must be commenced within 60 days of the initial class action being filed (or with the leave of the court). This requirement was based on a recommendation of the LCO, which was influenced by the ALRC proposal.[36]

2.26 We consider it would be desirable to have a time limit for filing any competing class actions, otherwise there is the possibility of competing actions being filed after the first class action has been certified. We propose that any competing class actions should be filed within 90 days of the first class action being commenced. After this date, we suggest that any class action on the same dispute should only be commenced with the leave of the court. There may be situations where it is appropriate for the court to allow a class action to be filed after this time, for example, where the class actions are only peripherally related. We also note that having a time limit would not prevent individual proceedings from being commenced on the same issue.

2.27 If there is a time limit, it is important that other lawyers and funders are aware of the first class action filed. We do not favour the ALRC approach of requiring litigants to provide notice to other potential claimants and lawyers of a class action, as it is unclear who would need to be informed.[37] This approach may be more workable in Australia, where there are established plaintiff class action law firms. One option would be to have a publicly available list of current class actions, such as on the Ngā Kōti o Aotearoa | Courts of New Zealand website, with an ability to sign up for email notifications of any new class actions. This would allow lawyers and litigation funders to stay abreast of current class actions and their status. It may be necessary for the statement of claim to be made publicly available so that other lawyers and funders can determine whether a competing class action is feasible or not.

2.28 We envisage that whether the parties are aware of any competing class actions could be a matter discussed at the initial case management conference for a class action. Under our proposed definition, the defendant at least should be aware of any competing actions

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34 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.97].

35 Vince Morabito *An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (July 2018) at 20–21. The ALRC considered that if a competing class action had been filed within the 90-day period and stayed and the chosen class action was later discontinued, a representative plaintiff could make an application to the court to lift the stay of the competing class action: Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.97].

36 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 25–26.

37 See Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.97]. The Law Commission of Ontario noted criticism of the proposed requirement to notify competitors of a class action and instead recommended that a party filing a class action must register the action with the Canadian Bar Association Class Action Registry: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 26, 29.

that have been filed and served. In the Federal Court of Australia, as soon as the parties become aware that a competing class action has been filed (or is proposed to be filed), the lawyers must advise the court. The competing class action will then be listed for a case management conference together with first class action.[38]

QUESTION

Q8 Do you agree that a competing class action should be filed within 90 days of the first class action being filed (or with the leave of the court)? How can information about new class actions be made available to lawyers and funders?

When should the court hold a competing class actions hearing?

2.29 Another issue is whether the court should consider how competing class actions should be managed before or after certification.[39] The Ontario legislation contemplates a carriage motion occurring prior to certification.[40] In the United States, competing class actions are considered at certification as part of the court's consideration of who should be appointed as class counsel. The United Kingdom Competition Appeal Tribunal has considered the issue of whether it should hear a 'carriage dispute' as a preliminary issue prior to certification. The Tribunal decided that, in the circumstances of the case, it would be preferable to hear the carriage dispute at the same time as it considered certification, because the criteria to be applied by the Tribunal may be interrelated.[41]

2.30 We think there are three options. The first is for the court to have a separate competing class actions hearing, prior to certification. This would have the advantage of preventing more than one party from incurring the cost of preparing for a certification hearing. There may also be competing class actions which are relatively straight-forward for a court to deal with, such as where the respective parties agree on the best way to proceed. However, this option may run the risk of a court having to consider the same issues at both a competing class actions hearing and at certification. It may also be difficult to assess the potential overlap of the class actions without deciding whether they are to proceed as opt-in or opt-out. There is also a risk of considerable delay, particularly if the losing party appeals the competing class actions decision. Finally, it could lead to a situation where a particular class action is allowed to proceed but then fails at certification.

2.31 A second option is for competing class actions to be considered at certification. While this would require multiple parties to incur the expense of a certification hearing, it would

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38 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [8.2]. The Practice Note also states that at the first case management conference, the parties should be in a position to address whether any competing class action has been filed or has been foreshadowed: see [7.8(f)].

39 This issue does not arise in Australia because of the lack of certification.

40 See Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(1) and 13.1(4)(b).

41 *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2020] CAT 9 at [69]–[73] and [75]–[79]. The Tribunal did not determine the issue of whether the criteria were inter-related or self-standing in this judgment. It declined to hear the carriage dispute as a preliminary issue, saying it could not be said at that point that the carriage dispute was, as a matter of law, a discrete matter being capable of being determined as a preliminary issue. The Tribunal heard the carriage dispute and certification applications in July 2021 and a decision is pending.

prevent the relitigation of issues at certification. It would also avoid the delay caused by having separate hearings, judgments and appeals.

2.32 A third option is for the court to have discretion as to whether it considers competing class actions at certification or prior. This would enable the court to consider what is likely to be most efficient in the particular case. However, this option could cause uncertainty and delay as the parties might have opposing views on when the court should consider competing class actions.

2.33 Our view is the court should consider the issue of competing class actions at the same time as certification. We think this is likely to be the most efficient option for the parties and the court, as it will avoid separate hearings and appeals which consider similar issues.

QUESTION

Q9 When should the court determine the issue of competing class actions?

a. Prior to certification.

b. At the same time as certification.

c. The court should have discretion to determine the issue of competing class actions prior to certification or at certification.

THE COURT'S POWERS TO MANAGE COMPETING CLASS ACTIONS

2.34 We have considered what powers the court should have to manage competing class actions. One option is that the court could select one class action to progress and stay the other proceeding(s). This is the approach taken in Canada. As discussed above, the carriage motion takes place prior to certification in Canada, so the class action which is allowed to progress must still succeed at a certification hearing.

2.35 Alternatively, the court could be empowered to make a wider range of orders when managing competing class actions, as in Australia.[42] For example:

(a) Consolidating the proceedings.

(b) Ordering the proceedings to be tried simultaneously or successively.

(c) Selecting one class action as a test case, with other proceedings temporarily stayed.

(d) Requiring one or more of the class actions to proceed on an opt-in basis.

(e) Requiring amendments to class definitions, for instance to avoid overlap.

2.36 A middle ground approach, as proposed by the ALRC, would be to have a presumption that only one class action will proceed with respect to a dispute, subject to the overriding discretion of the court to order otherwise where this would be inefficient or antithetical

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42 See *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [106] per Gageler, Gordon and Edelman JJ.

to the interests of justice.[43] The ALRC expected that situations where the court would allow more than one class action to proceed would be infrequent.[44]

2.37 We think that in most cases, it will be desirable for only one class action to proceed. Having multiple class actions concerning the same matter is likely to be inefficient for the court, cause increased cost for defendants and be confusing for class members. However, this may not always be the case, particularly if the class actions are managed and heard together. There may be situations where it is desirable to give class members a choice between two opt-in class actions, particularly where the proceedings take very different approaches.

QUESTION

Q10 What powers should the court have for managing competing class actions?

a. Should a court be required to select one class action to proceed and stay the other proceedings?

b. Or should the court have a broader range of powers available to it?

CRITERIA TO APPLY WHEN DETERMINING HOW TO MANAGE COMPETING CLASS ACTIONS

2.38 We think class actions legislation should provide an overarching test for courts to apply when determining how competing class actions should be managed. A list of relevant factors could also be provided for courts to consider when applying this test.

2.39 In both Canada and Australia, courts have developed lists of factors for choosing between competing class actions. Prior to the 2020 amendments to the relevant legislation, Ontario courts had identified up to 14 factors for determining which class action should proceed, which the LCO said was too complex and promoted uncertainty.[45] The LCO considered a limited number of statutory criteria should guide courts in their analysis of choosing between competing class actions.[46]

2.40 As recommended by the LCO, the Ontario legislation was amended in 2020 to require the court to determine "which proceeding would best advance the claims of the class

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43 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.63].

44 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.92].

45 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 23–24, 26–27.

46 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 27.

members in an efficient and cost-effective matter".[47] In doing so, the court must consider:[48]

(a) Each representative plaintiff's theory of the case, including the amount of work carried out to develop and support the theory.

(b) The relative likelihood of success in each proceeding, both as to certification and as a class action.

(c) The expertise, experience and previous results of each lawyer (in class actions litigation or in the substantive areas of law at issue).

(d) The funding of each proceeding, including the resources of the lawyer and any litigation funding arrangements.

2.41 Australian courts have also identified relevant factors to consider when deciding which proceeding should be stayed and which should proceed.[49] In *Wigmans v AMP Ltd*, the High Court of Australia said that where the defendant's interests are not differentially affected, the court must determine which proceeding going ahead would be in the best interests of class members.[50] The factors relevant to this cannot be exhaustively listed and will vary from case to case.[51] In *Wigmans v AMP Ltd,* the lower court judge had identified the following factors as relevant:[52]

(a) The competing funding proposals, costs estimates and net hypothetical return to class members.

(b) Proposals for security for costs.

(c) The nature and scope of the causes of action advanced and relevant case theories.

(d) The size of the respective classes.

(e) The extent of any book building.

(f) The experience of the legal practitioners (and any funders) and availability of resources.

(g) The progress of the proceedings.

(h) The conduct of the representative plaintiffs to date.

2.42 The ALRC favoured a principles-based approach rather than a long list of factors which it said could become unwieldy. It considered the court should choose the proceeding that

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47 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4).

48 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4).

49 See for example *Perera v Getswift Ltd* [2018] FCA 732, (2018) 263 FCR 1 at [169]; *Perera v Getswift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [195]; *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [71].

50 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [52] and [109] per Gageler, Gordon and Edelman JJ.

51 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [109] per Gageler, Gordon and Edelman JJ.

52 *Wigmans v AMP Ltd* [2019] NSWSC 603 at [126].

best advances the claims and interests of class members in an efficient and cost-effective manner, having regard to the stated preferences of group members. [53]

2.43 Our preliminary view is that when a court is determining how competing class actions should be managed, it should consider which approach would best allow class member claims to be resolved in a just and efficient way. This would reflect our proposed objectives for class actions as well as the objective of the civil procedure system in Aotearoa New Zealand (as set out in the High Court Rules). [54]

QUESTION

Q11 When a court considers how competing class actions should be managed, should it consider which approach would best allow class member claims to be resolved in a just and efficient way? If not, what test do you favour?

Relevant factors

2.44 While we think courts should have a broad discretion when determining which approach would best allow class member claims to be determined in a just and efficient way, it may be beneficial to set out some factors the courts may consider.

2.45 We consider the following factors may be appropriate for the court to consider when deciding between competing class actions (or exercising other powers to manage them):

(a) How the case has been formulated.

(b) Preferences of potential class members.

(c) Funding arrangements.

(d) Legal representation.

2.46 We discuss each of these below, as well as two factors that we do not see as relevant or appropriate for the court to consider: which class action was filed first and prospects of success.

Formulation of the case

2.47 In other jurisdictions, how each class action has been formulated is relevant. Ontario courts must consider each representative plaintiff's theory of the case. [55] Some Australian cases have identified the nature and scope of the respective causes of action and relevant case theories as relevant. [56]

2.48 We think the way in which each case is formulated will be an important aspect of comparing the class actions. This might include: the nature and scope of the causes of

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53 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.108].

54 High Court Rules 2016, r 1.2 ("The objective of these rules is to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application").

55 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4)(a).

56 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [6] listing the factors identified by the lower court in *Wigmans v AMP Ltd* [2019] NSWSC 603 at [126]; and *Perera v Getswift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [195].

action, what the common issues are, how manageable the individual issues will be to resolve once the common issues are determined, the relief sought, the class definition and likely class size, and whether the plaintiff proposes to bring the claim as an opt-in or opt-out class action. There is quite a degree of overlap between these issues and the certification criteria, which strengthens our view that competing class actions should be considered at the same time as certification.

2.49 Comparing the way in which the cases are formulated might indicate that one should proceed while the other class actions should be stayed. It might also indicate that there is very little overlap between the class actions and that it would be just and efficient to allow more than one to proceed.

Preferences of potential class members

2.50 We also see the preferences of potential class members as relevant, to the extent this can be ascertained. In many cases, potential class members will be unaware of the class actions or will not have views on which is preferable. However, there may be cases where potential class members are highly engaged and have a preference for one class action or consider that both should be allowed to proceed. This seems more likely in smaller class actions, opt-in class actions and those where individual claims are sizeable.

2.51 We note that in Australia, the extent of any 'book building' for each class action may be relevant (a process where class members are identified and signed up to particular litigation funding arrangements).[57] However, it will not necessarily be a significant consideration as book building may not indicate an informed choice to select one class action over another.[58] We think there may be less emphasis on early book building in Aotearoa New Zealand because of the uncertainty about whether a case will be certified. We do not think the number of class members signed up to each class action (and litigation funder) should be taken as a clear preference of class members for one class action over another. This could simply reflect which class action was commenced first or the method of advertising used.

Funding arrangements

2.52 Consideration of funding arrangements for a class action may be relevant. In Ontario, courts are required to consider the funding of each proceeding when assessing competing class actions, including any third-party funding agreements, and the sufficiency of that funding.[59]

2.53 The High Court of Australia has said that while litigation funding arrangements are not a mandatory consideration, they are not irrelevant.[60] It said there may be cases where the difference in funding arrangements "is so stark that to exclude it from consideration in determining whether to exercise the stay power would not be consistent with the court

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57 See *Perera v GetSwift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [178]; and *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [6] (listing factors identified in *Wigmans v AMP Ltd* [2019] NSWSC 603 at [126].

58 See *Perera v GetSwift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [178].

59 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4)(d).

60 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [111] per Gageler, Gordon and Edelman JJ.

seeking to act in accordance with the dictates of justice".[61] The Court also noted that litigation funding arrangements may affect the likely success of a class action and would directly affect the quantum of recovery, matters which the court considers in other contexts.[62] In Australia, a funder's proposed method of meeting security for costs may also be relevant when assessing competing class actions.[63]

2.54 We consider the funding arrangements for each class action are likely to be relevant, including whether litigation funding has been secured and on what basis. If there is insufficient funding in place for a class action, this could result in the proceeding being abandoned prior to a hearing. The proportion of a class member's compensation that would be deducted in litigation funding commission may also be relevant to whether claims will be resolved in a just and efficient manner. However, we note the caution expressed by the Full Federal Court of Australia that the size of a funding commission should not be given undue weight when assessing competing class actions, to prevent a race to the bottom.[64]

2.55 In Chapter 6, we ask whether the court should be able to appoint an expert at a settlement approval hearing to advise the court on particular aspects of the proposed settlement, such as the litigation funding commission. Similarly, it may be appropriate for the court to appoint an expert to advise on the merits of competing funding proposals when considering competing class actions. In Australia, the court may appoint a special referee to enquire into the litigation funding arrangements of competing class actions.[65]

Legal representation

2.56 The court could consider the respective legal representation of each class action. In Ontario, the court must consider the expertise, experience and previous results of each lawyer, either in class actions litigation or the substantive areas of law.[66] The LCO had recommended that experience should not be limited to class actions litigation as this could prevent new entrants to the plaintiff class action market.[67] Ontario courts have cautioned against consideration of lawyers at a carriage motion turning into a "beauty pageant",[68] with one judge commenting that "the court should not be placed in the uncomfortable position of grading the lawyers making an appearance".[69]

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61 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [111] per Gageler, Gordon and Edelman JJ.

62 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [112] per Gageler, Gordon and Edelman JJ.

63 For example, in *Wigmans v AMP*, a factor in favour of certain class proceedings over the others was that substantial security for costs would be paid into court, while others relied on after the event (ATE) insurance: *Wigmans v AMP Ltd* [2019] NSWSC 603 at [233].

64 *Perera v GetSwift Ltd* [2018] FCAFC 202, (2018) 263 FCR 92 at [276].

65 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [119] per Gageler, Gordon and Edelman JJ.

66 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4)(c).

67 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 27.

68 See *Quenneville v Audi AG* 2018 ONSC 1530 at [78]–[80]; and *Sharma v Timminco Ltd* 99 OR (3d) 260 at [18].

69 *Quenneville v Audi AG* 2018 ONSC 1530 at [80].

2.57 Australian courts have also considered legal representation to be relevant when assessing competing class actions. Considerations may include: [70]

(a) The lawyers' experience, although this may be limited to whether a lawyer has sufficient experience and competence to properly represent class members.

(b) The resources available to each law firm.

(c) The fees each lawyer expects to charge. [71]

2.58 In the United States, because competing class actions are determined through the court's power to appoint class counsel, legal representation is the critical factor. Courts must consider counsel's experience and resources and may consider legal fees. [72]

2.59 We think the experience, resources and fees of the proposed legal representation are likely to be relevant to assessing competing class actions, although at a relatively general level. We suggest the court could consider whether there is appropriate legal representation for each class action. In many cases, this factor would be neutral.

Which class action was filed first

2.60 A court could apply a rule or presumption that the first class action to be filed will be selected. Such a presumption applies in Québec, for example. The LCO considered this approach and said that while efficient, the rule could promote a "race to the courthouse" and poorly drafted claims. [73]

2.61 In Australia, there was said to be an issue with competing class actions being hastily filed once the initial class action is brought, particularly shareholder claims, because of the perception that the first class action filed may have an advantage. [74] The ALRC's proposed 90-day "standstill" period was intended to mitigate this. [75]

2.62 The High Court of Australia has held there is no rule or presumption that the class action commenced first in time should prevail. [76] The Court said that the order of filing would be a relevant consideration, although less relevant where the competing cases were

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70 See *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [71]; *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [6] (outlining factors identified by lower court in *Wigmans v AMP Ltd* [2019] NSWSC 603 at [126]); and *Perera v Getswift Ltd* [2018] FCA 732, (2018) 263 FCR 1 at [169].

71 Note, however, that in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [92], the court commented that it was not a "useful discriminant" to compare charge out rates or legal costs budgets for the purpose of selecting the proceeding with the lowest costs estimate, unless there was a "very major discrepancy".

72 The factors are outlined above. Court oversight of legal fees is necessary as lawyers generally act on a contingency basis on class actions in the United States.

73 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 25.

74 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [7.48].

75 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.100]–[4.101] and [4.104]. This approach was also endorsed in Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [7.69].

76 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [52] and [75]–[76] per Gageler, Gordon and Edelman JJ. The Court's decision related to proceedings commenced under Part 10 of the Civil Procedure Act 2005 (NSW).

commenced within a short time of each other.[77] Whether parties have been prompt in pursuing the proceeding may be relevant, including with respect to interlocutory matters.[78]

2.63 We do not think there should not be a 'first to file' rule or presumption as this may encourage hastily drafted claims, which are unlikely to be in the best interests of class members or defendants. The date of filing may be relevant, although less so if there is a set timeframe for bringing a competing class action.

Prospects of success

2.64 In some jurisdictions, the prospect of success of each class action is relevant. In Ontario, for example, courts must consider "the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding".[79] The respective merits of the cases may be a relevant factor in Australia.[80]

2.65 In our view, there is a risk of this factor turning into a burdensome preliminary merits test at an early stage, with each party filing evidence to establish the strength of its claims. As we have discussed in Chapter 1, we do not think there should be a preliminary merits test at an early stage and a class action should only have to disclose a reasonably arguable cause of action. We therefore do not think the prospects of success in the substantive proceeding should be relevant.

2.66 We suggest the court would first consider whether each class action meets the certification criteria. If only one case meets the certification criteria, then the issue of competing class actions would not need to be considered.

QUESTION

Q12 What factors should be relevant to the court's consideration of which approach would best allow class member claims to be resolved in a just and efficient way? For example, should the court consider:

a. How each case is formulated?

b. The preferences of potential class members?

c. Litigation funding arrangements?

d. Legal representation?

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77 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [107] per Gageler, Gordon and Edelman JJ.

78 *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [108] per Gageler, Gordon and Edelman JJ.

79 Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(4)(b).

80 *Perera v Getswift Ltd* [2018] FCA 732, (2018) 263 FCR 1 at [169].

INVOLVEMENT OF THE DEFENDANT

2.67 A hearing on competing class actions may include discussion of case strategy or funding arrangements that plaintiffs do not want disclosed to defendants. The ALRC recommended that a defendant should not be involved in any hearing to determine which competing class action should proceed, other than on the issue of security for costs.[81] This was because information revealed in a selection hearing might provide a defendant with a tactical advantage.[82]

2.68 The LCO said it did not believe defendants could or should be barred from a hearing to determine carriage of a class action as this would offend the open court principle. It considered that concerns about giving defendants an unfair preview of the plaintiff's strategy could be managed by redacting documents.[83]

2.69 We agree with the LCO's view and consider that courts have the necessary powers to manage any confidentiality issues that arise. Given our view that the court's powers should not be limited to staying proceedings, a defendant will likely want to submit on how competing class actions should be managed.

QUESTION

Q13 Do you have any concerns about defendants gaining a tactical advantage from a competing class action hearing? If so, how should they be managed?

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81 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.109]–[4.113].

82 Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018) at [6.53].

83 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 28.

CHAPTER 3

Relationships with class members

INTRODUCTION

In this chapter, we discuss:

- The role of the representative plaintiff and their relationship with class members.
- The relationship between the representative plaintiff's lawyer and class members.
- Whether the defendant and their lawyer can contact class members directly.

THE REPRESENTATIVE PLAINTIFF AND CLASS MEMBERS

3.1 The representative plaintiff is a party to the proceeding and has the important role of representing the other class members.[1] In this section we discuss the various sources of a representative plaintiff's obligations and explain what we think the obligations of the representative plaintiff should be. We also discuss how the representative plaintiff can be supported to carry out their role.

Sources of obligations

3.2 Sources of the representative plaintiff's obligations in a class action include:

(a) A representative plaintiff's status as a party to the proceeding.

(b) A representative plaintiff's role as the representative of class members, which may invoke fiduciary obligations.

(c) Any obligations on a representative plaintiff that are prescribed by a class actions regime.

(d) Obligations imposed by the court, as part of its supervisory jurisdiction.

3.3 We discuss each of these below, noting that these obligations will likely overlap and interact with each other.

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1 Issues Paper at [2.12].

Party to the proceeding

3.4 The representative plaintiff is a named party to the proceeding. Matters that often flow from being a named party to the proceeding include:

(a) Prosecuting (or defending) the proceeding. This includes meeting any evidential obligations, including discovery, giving evidence and answering interrogatories.

(b) Accepting service of documents (which in practice, will involve authorising lawyers to accept service).

(c) Liability for any award of adverse costs. In Aotearoa New Zealand, the losing party is generally liable for a portion of the successful party's legal costs. [2]

(d) Being party to any settlement.

3.5 If the party is represented in the proceeding by a lawyer, they must also enter into a retainer with that lawyer and provide instructions. [3]

Role as the class representative

3.6 The representative plaintiff in a class action represents all class members and needs to act on their behalf and in their interests. In some jurisdictions, this means the role of the representative plaintiff carries fiduciary obligations. [4]

3.7 In Aotearoa New Zealand, a relationship can be fiduciary either because it falls within one of the established categories of fiduciary relationship (such as trustee-beneficiary) [5] or because it has been recognised as such on a case-by-case basis. [6] Courts have not

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2 See High Court Rules 2016, r 14.2.

3 Rule 1.3 of the High Court Rules 2016 defines "party" as "any person who is a plaintiff or a defendant or a person added to a proceeding". Rule 5.36 provides no solicitor may file a document on behalf of a party unless authorised by or on behalf of the party. See also Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.3.

4 In Australia, see *Wigmans v AMP Ltd* [2021] HCA 7, (2021) 388 ALR 272 at [117]; *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [209] per Murphy and Colvin JJ; and *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, (2015) 256 CLR 507 at [40]. Note, however, that *Wigams* and *Dyczyski* rely on *Tomlinson* as authority for the fiduciary nature of the relationship but the analysis in *Tomlinson* is obiter and does not definitively say the relationship is fiduciary. See *Tomlinson* at [40]:

> To [the] traditional forms of representation can be added representation by a representative party in a modern class action. Each of those forms of representation is typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court (of which opt-in or opt-out procedures and approval of settlements in representative or class actions are examples), or of both…

The Australian Law Reform Commission has also suggested there is a fiduciary element to the role of the representative plaintiff which requires them to act in the interests of class members: see Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [176]. In the United States, see Joseph M McLaughlin *McLaughlin on Class Actions* (online ed, Thomson Reuters) at § 4:27. In Canada, see *Poulin v Ford Motor Co of Canada Ltd* (2008) 301 DLR (4th) 610 (ONSC) at [62] where the responsibilities of the lead plaintiff to class members were said to be "akin to that of a fiduciary".

5 The traditional categories of fiduciary relationship are not closed: see Andrew S Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [26.17.2.7].

6 No set criteria or principle has been established. Indeed, the Supreme Court has noted that "[n]o single formula or test has recieved universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind": *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [75].

directly considered whether there is a fiduciary relationship between a representative plaintiff and a group member in a representative action under HCR 4.24.[7]

3.8 We think it is likely the representative plaintiff's role in a class action has a fiduciary aspect to it. Class members, as non-parties, are reliant on the representative plaintiff to prosecute the action for them. As well, the representative plaintiff can affect class members' legal interests, given that a judgment on the common issues will bind class members and a representative plaintiff can settle a claim on behalf of the class. The High Court of Australia has noted that other representative roles (such as representation by an agent, trustee or guardian) typically involve the imposition of fiduciary duties on the representative, court oversight, or both.[8] The roles of agent and trustee are established categories of fiduciary relationship.[9]

3.9 If the representative plaintiff has fiduciary obligations to class members, the contents of those obligations needs consideration.[10] At a general level, core fiduciary duties are:[11]

(a) To avoid unauthorised personal profit or benefit from the relationship.

(b) To avoid conflict between personal interest and duty to the beneficiary.

(c) To avoid divided loyalties.

(d) To report to the beneficiary when a breach of fiduciary duty has been committed by the fiduciary.

3.10 Many of these duties fit with our proposed requirement that a representative plaintiff must fairly and adequately represent the class.[12] We also think the representative plaintiff could, in acting in the best interests of the class, take reasonable steps to ensure that legal fees incurred on their behalf are reasonable and appropriate.

Requirements of a class actions regime

3.11 Class actions legislation and rules could also impose obligations on the representative plaintiff. As we discuss in our Issues Paper, our main comparator jurisdictions require the representative plaintiff to provide adequate representation and avoid conflicts of interest.[13] The certification test we have proposed in Chapter 1 requires a representative plaintiff to fairly and adequately represent the class, which requires a court to consider whether there are any conflicts of interest which would prevent them from properly

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7 Although this was an issue raised in the defendant's submissions in *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [56]. The Court did not comment on whether the representative plaintiff owed fiduciary duties to the group.

8 *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, *(*2015) 256 CLR 507 at [40].

9 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [26.17.3]. In Aotearoa New Zealand, there are indications that fiduciary duties will be found in respect of the care of children (between guardian and child) but the scope of those duties is uncertain: see Andrew S Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [26.17.3.13]. A litigation guardian "attracts a duty to act in the litigant's best interests, and independently. These duties are fiduciary, or analogous to fiduciary ones": *Erwood v Holmes* [2019] NZHC 2049 at [56].

10 The Court of Appeal has said, "[i]t is not enough to say that parties are in a relationship which gives rise to fiduciary obligations; it is necessary to identify those obligations": *McLachlan v Mercury Geotherm Ltd (in receivership)* CA142/02, 28 August 2003 at [49] approved in *McLachlan v Mercury Geotherm Ltd (in receivership*) [2006] UKPC 27 at [25]–[26].

11 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thompson Reuters) at [26.17.2.2(1)].

12 We discuss this in more detail in Chapter 1.

13 See Issues Paper at [11.4]–[11.12].

fulfilling their role. Similarly, in Chapter 6, we propose that any settlement must be approved by a court. This means the representative plaintiff (along with the defendant) must apply to settle the proceeding.

Obligations imposed by the court

3.12 In appropriate circumstances, a court could use its inherent jurisdiction to require the representative plaintiff to act consistently with class member interests. For example, there is Canadian authority that a court can review a representative plaintiff's decision to change counsel in the middle of a class action.[14]

Our view on the representative plaintiff's obligations

3.13 We intend to develop recommendations on the representative plaintiff's obligations. In view of the various sources of the representative plaintiff's obligations, we consider the role of the representative plaintiff carries the following obligations:

(a) Acting in the best interests of class members, including by avoiding any conflicts of interest that may prevent them from properly fulfilling their role.

(b) Ensuring the case is properly prosecuted, which in practice is likely to mean retaining and instructing a lawyer[15] and meeting any evidential obligations, including discovery, giving evidence and answering interrogatories. We also think, as part of this, the representative plaintiff would be responsible for taking reasonable steps to ensure that the legal fees incurred are reasonable and appropriate.

(c) Being liable for adverse costs (or ensuring an indemnity is in place). In funded class actions, litigation funders usually indemnify representative plaintiffs against any adverse costs. Class members, as non-parties, will rarely be liable for adverse costs.[16]

(d) Making decisions on any settlement, including applying for court approval of settlement.[17]

3.14 We acknowledge these may sometimes be substantial obligations and we understand that presently representative plaintiffs may sometimes be selected on a more nominal basis. However, we think many of these obligations will already apply to a representative plaintiff and, to the extent they do not, the obligations are important to protect class member interests. We think the representative plaintiff's lawyer can help them to manage their obligations. There will also be circumstances where a litigation committee can assist the representative plaintiff to carry out their role, discussed in the next section. As well, a litigation funder will likely assist with payment of legal fees and adverse costs.

3.15 In cases involving a litigation funder, a representative plaintiff may have additional obligations imposed by the litigation funding agreement. If there is any conflict between

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14 *Singh v Glaxosmithkline Inc* [2021] ABQC 316 at [7]. See also *Fantl v Transamerica Life Canada* 2009 ONCA 377 at [47]. The Court will consider whether the plaintiff has chosen competent counsel, whether any improper considerations underlined the plaintiff's choice and whether there was any prejudice to the class as a result: see *Singh* at [26].

15 Vince Morabito has suggested that adequate representation by a representative plaintiff includes instructing a lawyer: Vince Morabito "Replacing Inadequate Class Representatives in Federal Class Actions" (2015) 38 UNSWLJ 146 at 165.

16 See Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at 14.09. A costs order against a non-party will only be made in exceptional circumstances.

17 The Supreme Court in *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 said "[i]t is also clear that the representative plaintiff can settle on behalf of the class": at [82]. We discuss court approval of a class action settlement further in Chapter 6.

contractual commitments and the obligations of the representative plaintiff, set out above, we think the latter should take priority.

3.16 At this stage, we have not formed a view on whether the representative plaintiff's obligations should be included in a class actions statute. We think the obligations exist independently of any statute. However, it could be helpful to compile them in one place. Including them in a statute could also ensure their priority over contractual commitments.

QUESTIONS

Q14 What obligations should the representative plaintiff have? For example:

a. Acting in the best interests of the class.

b. Ensuring the case is properly prosecuted.

c. Being liable for adverse costs (or ensuring an indemnity is in place).

d. Making decisions on any settlement, including applying for court approval of settlement

Q15 Should the representative plaintiff's obligations be set out in a class actions statute?

Supporting the representative plaintiff

3.17 One way a representative plaintiff may be able to manage their obligations to the class is through a litigation committee. Litigation committees have been used in some representative actions in Aotearoa New Zealand and are also known as plaintiff committees.[18] Litigation committees can help to ensure the interests of class members are protected and promoted and can assist the representative plaintiff to perform their role.[19]

3.18 In funded proceedings, the involvement of litigation committees may mitigate the risk of conflicts of interest, which can arise where a funder is able to exercise control over proceedings and a representative plaintiff has very little involvement in their case. However, we understand in some cases the litigation funder will be involved in appointing the litigation committee, which limits the independent role the committee can play.

3.19 Meredith Connell submitted there is an important distinction between the representative plaintiff (who should effectively represent the common factual and legal issues in dispute) and the governance arrangements of the class. It said a litigation committee was a highly effective means of protecting claimant interests and promoting the efficient conduct of a representative action. Members of the committee can be selected for particular skills and expertise, such as legal or accounting experience, risk management skills, and professional or personal experience of the facts giving rise to the dispute. Meredith

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18 See for example *Strathboss Kiwifruit v Attorney-General* [2019] NZHC 62 at [55]–[57]; *Houghton v Saunders* [2015] NZCA 141 at [21]; and *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906, [2020] 3 NZLR 145 at [32].

19 See for example *Strathboss Kiwifruit v Attorney-General* [2019] NZHC 62 at [56] where a litigation committee represented Strathboss, Seeka and over 200 represented claimants, and the committee attended the hearing to monitor the evidence and to contribute to the instructions to counsel.

Connell considered any class actions regime should distinguish between the role of the representative plaintiff and governance arrangements for the class and permit the responsibilities and risks of those two roles to be separated.

3.20 We acknowledge that a litigation committee can assist the representative plaintiff to carry out their role, particularly in giving instructions to lawyers. A litigation committee appointed for their expertise may be more able to act in a governance capacity than an individual representative plaintiff. However, we think it should be up to the representative plaintiff and their lawyers to decide whether a litigation committee is appropriate in each class action. Class members may not want to participate in a litigation committee, nor have the desired skill sets. As well, if a litigation committee is appointed, it will not remove a representative plaintiff's obligations. The committee is not a party to proceeding, nor is it the formal representative of the class members. As our view is a litigation committee should be permissible but not required, we do not think specific rules on litigation committees are needed in class actions legislation. However, we welcome submitters' feedback on this.

3.21 Another way of supporting a representative plaintiff is to ensure they are aware of the obligations of the role.[20] Our draft provision allows the court to consider whether a proposed representative plaintiff has a reasonable understanding of the obligations of the role. It might also be appropriate for a representative plaintiff to be paid an honorarium during the litigation to recognise the time spent on the duties of the role. However, in Chapter 6 we express the view this should not be a lump sum paid at settlement because of the risk this would cause a conflict of interest.

QUESTION

Q16 How can a representative plaintiff be supported to meet their obligations?

THE REPRESENTATIVE PLAINTIFF'S LAWYER AND CLASS MEMBERS

3.22 As the law stands in Aotearoa New Zealand, the representative plaintiff in a class action would be in a solicitor-client relationship with their lawyer. That lawyer would also have a solicitor-client relationship with any class members who enter into a retainer with them. However, the nature of the relationship between the lawyer and any unrepresented class members is unclear.[21] Several submissions indicated this was an issue that requires clarification.

3.23 This may be an issue in opt-out proceedings in particular. We understand that in opt-in representative actions to date, signing up to the retainer has been part of the opt-in

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20 See for example the Law Council of Australia and Federal Court of Australia *Case Management Handbook* (2014) at [13.22] which provides guidance for practitioners when advising a person on whether to be a representative plaintiff.

21 We note the High Court has said the relationship between unrepresented group members and the representative plaintiff's lawyer in a representative action is not a solicitor-client relationship: *Ross v Southern Response Ltd* [2021] NZHC 2451 (reasons judgment) at [159].

procedure. In an opt-out proceeding, it is not possible to get all class members to sign up to a retainer as some of them will be unknown. [22]

3.24 Our analysis of the relationship between the representative plaintiff's lawyer and class members is focussed on two issues:

(a) What is the relationship between a lawyer and class members where there is no express retainer agreement? This may include situations where the identity of all class members is unknown.

(b) Should the lawyer owe any obligations either to the class as a whole or to individual class members, irrespective of any retainer?

3.25 We first discuss the approaches taken in Aotearoa New Zealand and other jurisdictions to these issues.

Aotearoa New Zealand

3.26 In *Ross v Sothern Response Earthquake Services Ltd* the High Court considered the relationship between unrepresented group members and the representative plaintiff's counsel in an opt-out representative action. The High Court considered the requirement to obtain leave to bring a representative action under HCR 4.24 did not impose a solicitor-client relationship between the representative plaintiff's lawyer and any unrepresented group members. [23] In reaching this conclusion, the Court observed that case law in Canada and the United States indicated that a solicitor-client relationship was imposed on the entire class upon certification. [24] However, the Court did not think there was sufficient similarity between certification and the leave requirement under HCR 4.24 for those cases to apply by analogy. [25]

Comparator jurisdictions

3.27 Our main comparator jurisdictions have taken different approaches to the relationship between the representative plaintiff's lawyer and class members.

3.28 In Australia, the relationship between the representative plaintiff's lawyer and class members is unclear. In *Kelly v Willmott Forests Ltd* the Federal Court of Australia said the representative plaintiff's lawyer owed "duties" to unrepresented class members. These duties "may or may not be fiduciary in nature", but the representative plaintiff's lawyer "at least has a duty to act in class members' best interests". [26] In *Dyczynski v Gibson* the Federal Court found that the representative plaintiff's lawyer "was obliged to act consistently with the representative applicant's fiduciary obligations to class members". [27] However, it also reiterated that the scope of a lawyer's obligations to class members was

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22 It may also be possible to have an implied retainer with class members as a retainer can be express or implied and does not have to be in writing: see Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 1.2. However, a retainer is not easily implied: see *Lam v Mo* [2017] NZHC 997 at [195].

23 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [159].

24 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [153].

25 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [159].

26 *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323, (2016) 335 ALR 439 at [220].

27 *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [210].

unsettled.[28] Some commentators have argued, despite the absence of a retainer, there is a fiduciary relationship between class members and the representative plaintiff's lawyers.[29] They argue the class actions regime contemplates the lawyer will take a number of steps on behalf of class members.[30] As class members are bound by the outcome of the proceedings, but not present before the court, class members are vulnerable to the actions of the lawyer taken on their behalf.[31]

3.29 It has been suggested that it would be unusual for Australian lawyers acting for several class members to find their obligations conflict because class members will generally have the same or similar interests given the representative nature of a class action.[32] However, the Victorian Law Reform Commission has recommended that guidelines should be issued to lawyers on their duties and responsibilities when acting for a class, with specific direction on how to recognise, avoid and manage conflicts of interest, including between class members.[33]

3.30 In Canada, the relationship between a lawyer and class members prior to certification is largely undefined, although some courts consider the relationship prior to certification attracts some responsibilities on the part of counsel.[34]

3.31 Canadian courts have held that a solicitor-client relationship exists with class members once a class action is certified.[35] However, what this means is an "area under development".[36] Courts have said the lawyer owes duties and obligations that arise out of the solicitor-client relationship with class members, including that the rules of professional conduct apply.[37] The lawyer also has a duty to act in the best interests of

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28 *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [209].

29 Simone Degeling and Michael Legg "Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties" (2014) 37 UNSWLJ 914 at 923 and 926–928.

30 For example pre-trial procedure, discovery, drafting an application and statement of claim, deciding on trial strategy, examining and cross-examining witnesses: see Simone Degeling and Michael Legg "Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties" (2014) 37 UNSWLJ 914 at 924.

31 Simone Degeling and Michael Legg "Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties" (2014) 37 UNSWLJ 914 at 924-925.

32 Phil Finney McDonald Submission (Submission 15) to the Victorian Law Reform Commission, as cited in Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.127]. Contrast Simone Degeling and Michael Legg "Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties" (2014) 37 UNSWLJ 914 at 923 and 926–928.

33 Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at Recommendation 13.

34 Jasminka Kalajdzic "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall LJ 1 at 23 and *Fantl v Transamerica Life Canada* 2008 ONSC 377 at [78]. See also discussion in Paul Perell "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 Advoc Q 202 at 212.

35 See for example *Ward-Price v Mariners Haven Inc* (2004) 71 OR (3d) 664 (ONSC) at [7]; *Glover v Toronto (City)* [2009] 70 CPC (6th) 303 (ONSC) at [92]; and *Lundy v. VIA Rail Canada Inc* (2012) 111 OR (3d) 628 (ONSC) at [28]. See also *Ward-Price v Mariners Haven Inc* (2004) 71 OR (3d) 664 (ONSC) at [15].

36 See Jasminka Kalajdzic "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall LJ 1 at 24; and Paul Perell "Class Proceedings and Lawyers" Conflicts of Interest" (2009) 35 Advoc Q 202 at 213.

37 See *Richard v British Columbia* 2007 BCSC 1107, (2007) 284 DLR (4d) 481 at [42]; and *Durling v Sunrise Propane Energy Group Inc* 2012 ONSC 6328 at [57].

the class as a whole.[38] As well, the lawyer remains in a solicitor-client relationship with the representative plaintiff.[39]

3.32 The Ontario Law Reform Commission (OLRC) predicted these relationships could give rise to conflicts, for example where the representative plaintiff is prepared to settle but the settlement is not in the best interests of class members.[40] However, some commentary suggests that representing both the representative plaintiff and class members does not inherently create conflicts[41] and, to the extent conflicts do arise, there are various mechanisms within the class actions regime to manage them.[42]

3.33 In the United States, the court formally appoints 'class counsel' when it certifies a class action.[43] Class counsel "must fairly and adequately represent the interests of the class".[44] For purposes of managing conflicts of interest, class members are not clients in their individual capacity but they are as a class entity.[45] In other words, the conflicts between the lawyer and class members that are regulated are only those which could affect representation of the class as a whole.

3.34 Prior to certification, the lawyer acting for the proposed class must act in the best interests of the class as a whole.[46]

Options for reform

3.35 As we explained above, a lawyer will have a solicitor-client relationship with the representative plaintiff and any class members who have entered into a retainer agreement. However, there is uncertainty about whether lawyers owe any fiduciary or other obligations to class members who have not retained them. We consider it would be desirable to clarify this uncertainty and seek submitters' views on the extent to which lawyers should owe obligations to class members individually or to the class as a whole.

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38 See *Berry v Pulley* 2011 ONSC 1378, (2011) 106 OR (3d) 123 at [83]; and *Richard v British Columbia* 2007 BCSC 1107, (2007) 284 DLR (4d) 481 at [41].

39 See *Richard v British Columbia* 2007 BCSC 1107, (2007) 284 DLR (4d) 481 at [42]; and Paul Perell "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 Advoc Q 202 at 214.

40 Ontario Law Reform Commission *Report on Class Actions* (1982) vol I at 201. However, little more was said on the issue, as the Ontario Law Reform Commission considered reform was better dealt with by the Law Society: at 202. No reform occurred: see Jasminka Kalajdzic "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall LJ 1 at 3.

41 See discussion in Paul Perell "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 Advoc Q 202 at 223. In addition, counsel is required to ensure the representative plaintiff is properly advised about their duty to the class and the fact the prosecution of the class action must be carried out in a way that advances the interests of the class: see *Caputo v Imperial Tobacco* (2005) 74 OR (3d) 728 (ONSC) at [41].

42 For example, by creating subclasses and allowing for decertification: see Paul Perell "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 Advoc Q 202 at 223. It has also been suggested where conflicts cannot be resolved, an application for directions should be made to the court: see *Richard v British Columbia* 2007 BCSC 1107, (2007) 284 DLR (4d) 481 at [42].

43 United States Federal Rules of Civil Procedure, r 23(g).

44 United States Federal Rules of Civil Procedure, r 23(g)(4).

45 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 19:21. However, ethical rules vary from state to state: see William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 19:1.

46 See David F Herr Annotated *Manual for Complex Litigation* (online ed, Thomson Reuters) at § 21.12.

3.36 In the discussion below, we set out the main options with respect to the lawyer's relationship with class members who have not signed a retainer:

(a) Maintain the status quo. Under this option, the lawyer would only have a solicitor-client relationship with class members who have signed a retainer. The lawyer would likely owe lesser obligations to class members who have not signed a retainer.

(b) Create a solicitor-client relationship between the lawyer and all individual class members.

(c) Create obligations that lawyers owe to the class as a whole. The class could be viewed as the client of the representative plaintiff's lawyer upon certification.

3.37 Options (b) and (c) raise a more fundamental question as to whether duties should be owed to the class as a whole or to individual class members. One author has identified a tension in the Canadian cases between those where the courts recognise the peculiar dynamics of a class action, and cases where the courts rely on the traditional lawyer-client paradigm.[47] To begin any ethical reform, "definitional clarity on the identity of the client in class proceedings is needed as an organizing principle".[48] The OLRC has similarly noted "it is far from clear whether the lawyer's client in a class action is the representative plaintiff or the entire class".[49]

Maintain status-quo - no solicitor-client relationship with class members unless there is a retainer

3.38 This option would apply the status quo to a class action. A lawyer would not have a solicitor-client relationship with individual class members unless there was a retainer arrangement between them. This option would recognise the difficulty of fulfilling the usual obligations of the solicitor-client relationship where the lawyer may not know the identity of all class members.

3.39 We think that under this option a lawyer would still be regarded as having some obligations towards unrepresented class members. We consider that, as in Australia, the representative plaintiff's lawyer would be required to act in class members' best interests[50] and consistently with any fiduciary obligations the representative plaintiff owes to class members.[51] Lawyers also have an overriding duty as an officer to the court, which may require them to bring class member interests to the court's attention.[52]

3.40 However, the scope of these obligations and how to manage them would be uncertain, as it would be left to the courts to determine in each case. A lawyer would also owe

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47 Jasminka Kalajdzic "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall LJ 1 at 14.

48 Jasminka Kalajdzic "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis" (2011) 49 Osgoode Hall LJ 1 at 34.

49 Ontario Law Reform Commission *Report on Class Actions* (1982) vol I at 201.

50 *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323, (2016) 335 ALR 439 at [220].

51 *Dyczynski v Gibson* [2020] FCAFC 120, (2020) 381 ALR 1 at [210].

52 The overriding duty of a lawyer is as an officer of the court: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2.1. See also *Houghton v Saunders* [2020] NZCA 638 at [26].

different obligations to individuals in the same class if they have entered into a retainer with some class members but not others.

Solicitor-client relationship with all class members individually

3.41 Another option is for lawyers to be regarded as having a solicitor-client relationship with all class members individually. This relationship could arise at certification or at the point a class member opts in or does not opt out. We do not think it would be workable for a solicitor-client relationship to arise prior to certification because the scope of the class is unclear at this point.

3.42 This option would provide clarity on the obligations of a lawyer as, given the solicitor-client relationship, the *Rules of conduct and client care for lawyers* would apply.[53] It would also avoid lawyers owing different duties to class members in the same class action, where some class members have signed a retainer with the lawyer and others have not.

3.43 However, it would be difficult to manage hundreds or thousands of solicitor-client relationships in practice. It is also difficult to conceptualise what an individual solicitor-client relationship would look like between a lawyer and an unknown class member. Some of the professional rules, as currently drafted, will not be workable. For example, conflicts of interest may be hard to manage with unknown class members.[54] In such cases, conflicts may not be known and it would be impossible to get their informed consent to act despite a conflict.[55] It will also not be possible for the lawyer to disclose to all class members all information relevant to the case.[56]

Solicitor-client relationship with the class as a whole

3.44 The final option is to view the class as a client of the representative plaintiff's lawyer. This relationship could arise at certification or at the point a class member opts in or does not opt out.

3.45 If the class is regarded as a client of the representative plaintiff's lawyer, we think specific duties should be created. The duties owed to the class could be informed by the existing *Rules of conduct and client care for lawyers*. We think it would be appropriate for lawyer for the class to be required to act in the best interests of class members[57] and avoid conflicts of interests which affect representation of the class as a whole.[58] We also think, given the importance of protecting class member interests, communications between the defendant's counsel and class members should go through the representative plaintiff's

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53 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

54 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 5 and 5.4.

55 Note that where there is a conflict, "a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained": Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6.11.

56 See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 7.

57 Subject to their overriding duty as an officer to the court, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.

58 The rules deal with conflicts in multiple places. A conflict rule specific to this situation would need to be developed.

lawyer.[59] Conversely, other rules, such as the requirement for the lawyer to disclose to clients all information relevant to the case would not be workable and therefore should not apply to the relationship between the lawyer and the class.[60] It would also not be possible for the lawyer to take instructions from each individual class member.

3.46 This option recognises and reflects the unique nature of the relationship between the class (especially unknown class members) and the representative plaintiff's lawyer, rather than trying to apply a traditional lawyer-client model. We think if both the representative plaintiff and their lawyer are required to act in the best interests of class members, the potential for conflicts will reduce. It may also be possible to reflect the interests of class members in any retainer between the lawyer and the representative plaintiff.[61]

3.47 We also think there is benefit in the status of the relationship between the lawyer and the class being characterised as solicitor-client. This would mean, for example, communications between the representative plaintiff's lawyer and the class could attract solicitor-client privilege.

Our view on the relationship between the lawyer and the class

3.48 We consider the representative plaintiff's lawyer should be regarded as the lawyer for the class and should owe duties to the class as a whole. As the duties are owed to the class (as opposed to individual class members) we think it is appropriate they arise upon certification, rather than when a class member opts in or does not opt out.

3.49 Any duties a lawyer has to the class would be in addition to the solicitor-client duties owed to the representative plaintiff and any class member they have a retainer with. Consequently, it may be possible for a lawyer to owe different obligations to individuals in the same class. However, we see this is something that lawyers could manage on a case-by-case basis.

3.50 We think legislation would be required to create a solicitor-client relationship between the class and the representative plaintiff's lawyer.[62] In addition, we think it would be helpful to state the specific duties that flow from this relationship. Te Kāhui Ture o Aotearoa | The New Zealand Law Society could consider amending the *Rules of conduct and client care for lawyers* to set out specific rules and obligations.[63]

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59 Except as authorised by Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10. We discuss this issue in more detail later in this chapter.

60 See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Rule 7 provides that:

> A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

Rule 7.1 provides that:

> A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer.

61 See *Fantl v Transamerica Life Canada* 2008 ONSC 377 at [23]. There the retainer specified that the representative plaintiff was obliged to act in the best interests of the class and that their lawyer was not required to follow instructions which were not in the best interests of the class. If the lawyer believed the representative plaintiff was not acting in the best interests of the class, the representative plaintiff authorised their lawyer to seek directions from the court.

62 Especially as the High Court has declined to impose a solicitor-client relationship between the unrepresented group and representative plaintiff's lawyer in a representative action: *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [159].

63 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

3.51 Prior to certification we think the representative plaintiff's lawyer should still owe some obligations to the potential class. While we do not think there should be a solicitor-client relationship with the potential class prior to certification, we think a lawyer should still act in the interests of the potential class as a whole.

QUESTION

Q17 Do you agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class after certification?

a. If so, what duties should the lawyer owe to the class?

b. If not, what relationship should exist between the representative plaintiff's lawyer and the class?

THE DEFENDANT AND CLASS MEMBERS

3.52 In an ordinary proceeding, the plaintiff and the defendant can communicate with each other directly. If the parties are represented, a lawyer cannot contact the other party except through their representative.[64]

3.53 In a class action, we expect the parties will be represented and think the usual rules governing communications between lawyers and represented parties should apply. However, a question arises as to whether communications between a defendant (or their lawyer) and class members should be regulated. Some submitters raised concerns that it could inhibit settlement if the defendant was unable to communicate with class members directly.

3.54 Our discussion below focusses on two issues:

(a) Whether the defendant's lawyer should be able to communicate with class members directly.[65]

(b) Whether the court needs to approve any communications between the defendant or defendant's lawyer and class members.

3.55 We first discuss the approaches taken in Aotearoa New Zealand and other jurisdictions to these issues.

Aotearoa New Zealand

3.56 The issue of whether a defendant or their lawyer can communicate with the class has arisen in Aotearoa New Zealand under HCR 4.24.[66] In *Ross v Southern Response*

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64 Except as authorised by Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.

65 A lawyer may not generally communicate directly with another lawyer's client: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.4.

66 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 253 (results judgment); and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment). See also *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453, where the court reviewed the settlement communications.

Earthquake Services Ltd, the defendant sought two orders: that its lawyers could communicate directly with unrepresented group members and that the defendant could communicate with group members about individual settlement offers. [67] The representative plaintiffs objected primarily on two grounds. First, their lawyers should be regarded as representing all group members so direct communications between the defendant's lawyers and group members would breach the no contact rule. [68] Second, direct communication of a settlement package would bypass the exercise of the High Court's supervisory jurisdiction in a representative proceeding. [69]

3.57 The High Court declined to find a solicitor-client relationship existed between the representative plaintiff's lawyers and unrepresented group members. [70] However, the Court held that its supervisory jurisdiction can be exercised in relation to communications between a defendant (and their legal representatives) and group members. [71] The Court considered the particular timing of the settlement communication justified the court's review. [72] In particular, the representative plaintiffs were seeking review of the opt-out notice at the same time the defendant sought to communicate with group members about a settlement package. [73] The Court considered there was potential for confusion unless the defendant's communication was also independently scrutinised. [74]

3.58 In reviewing the settlement communication, the Court found it could not be "misleading, coercive or similarly unacceptable". [75] The communication must accurately explain the consequences of accepting (or not accepting) the offer, note the group member's entitlement to seek legal advice and allow sufficient time for them to do so. [76] As the settlement offer was to be sent out at essentially the same time as the opt-out notice, the Court thought the defendant's communication must be "reasonably tempered". [77]

Comparator jurisdictions

3.59 The Australian Federal Court's Class Actions Practice Note provides that if a class member is a client of the representative plaintiff's lawyer any communication must be

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67 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 253 (results judgment) and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [16]. See also *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 where the court reviewed the defendant's settlement communications.

68 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [19(d)–(e)].

69 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [19(f)–(k)].

70 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [159] Note the court said it was unnecessary to determine whether r 10.4 of the Conduct and Client Care Rules applied to the defendant's intended communications as it found the communication was reviewable under its inherent jurisdiction: at [150].

71 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 253 (results judgment) at [15(a)]; and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [172].

72 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [173]–[175].

73 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [175].

74 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [175].

75 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (review of defendant's communication) at [25].

76 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (review of defendant's communication) at [26] adopting the considerations set out in *Courtney v Medtel Pty Ltd* [2002] FCA 957, (2002) 122 FCR 168 at [64].

77 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (review of defendant's communication) at [28], noting that the purpose of an opt-out notice is to enable members of the class to make an informed decision as to opting out of the class action and that the purpose of the opt-out notice is "to inform, not to recruit": at [27].

through their lawyer, unless the court grants leave to communicate directly.[78] The court may make orders on communications with class members who are not clients of the representative plaintiff's lawyer, including establishing a protocol for communications.[79] Where a defendant or their lawyer communicates with a non-client class member suggesting they do or not do something, the communication should, in plain language, explain the consequences and encourage the class member to obtain legal advice.[80]

3.60 The Federal Court has also used its general power to make orders in class actions to intervene in communications between the defendant and the class.[81] The Court will only intervene if the communication with class members is misleading or otherwise unfair or infringes any other law or ethical constraint.[82] The Federal Court has said individual settlement offers will not be unlawful unless they effectively dispose of the entire class action.[83]

3.61 In Ontario the representative plaintiff's lawyer is considered the lawyer for class members after certification. Therefore, the Law Society of Ontario's Rules of Professional Conduct apply and the defendant's counsel cannot communicate with class members directly.[84] Before certification, the court will only intervene if a defendant's communication to class members "constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose undermining the process".[85]

3.62 In the United States the court may regulate communications with potential class members, even before certification.[86] The Manual for Complex Litigation explains that defendants and their counsel may communicate with potential class members in the ordinary course of business, including discussing settlement before certification,[87] although such communications may not be misleading or false.[88] It goes on to explain

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78 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [11.1].

79 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [11.2].

80 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [11.3].

81 Federal Court of Australia Act 1976 (Cth), s 33ZF; and *Courtney v Medtel Pty Ltd* [2002] FCA 957, (2002) 122 FCR 168, at [52].

82 *Courtney v Medtel Pty Ltd* [2002] FCA 957, 122 FCR 168 at [52], as quoted in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 984 at [11].

83 *Courtney v Medtel Pty Ltd* [2002] FCA 957, 122 FCR 168 at [45]. Compare *King v AG Australia Holdings* [2002] FCA 872, (2002) 191 ALR 697 at [42] where the Federal Court considered individual settlement offers could breach s 33V(1) if they were made to, and accepted by, all class members. This could effectively settle the representative proceeding without court involvement.

84 See *Durling v Sunrise Propane Energy Group Inc* [2012] ONSC 6328 at [54] and [57]; and Law Society of Ontario *Rules of Professional Conduct,* rr 7.2-6, 7.2-6A and 7.2-7.

85 *1176560 Ontario Ltd. V. Great Atlantic & Pacific Co. of Canada Ltd* (2002) 62 OR (3d) 535 at [77]. The power to intervene comes from Class Proceedings Act 1992, s 12. See also *Del Giudice v. Thompson* 2021 ONSC 2206 at [37]: a defendant is entitled to "communicate with putative class members as if they were non-parties" provided that this communication does not undermine the proceedings or have the potential to cause injustice.

86 David F Herr *Annotated Manual for Complex Litigation* (online ed, Thomson Reuters) at 247 citing *In re Sch. Asbestos Litigation* 842 F 2d 671, 680 (3d Cir 1998) ("Rule 23 specifically empowers district courts to issue orders to prevent abuse of the class action process").

87 David F Herr *Annotated Mannual for Complex Litigation* (online ed, Thomson Reuters) at 249 citing *Gulf Oil Co v Bernard* 452 US 89 (1981) (after a class action had been commenced but before certification, the defendant continued to deal directly with potential class members concerning an offer of settlement that had been earlier negotiated with the Equal Employment Opportunity Commission (EEOC)).

88 David F Herr *Annotated Manual for Complex Litigation* (online ed, Thomson Reuters) at 249.

that, "[o]nce a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel". [89]

Should communications from the defendant's lawyer to the class go through the representative plaintiff's lawyer?

3.63 As explained above, we consider the representative plaintiff's lawyer should be regarded as lawyer for the class upon certification. If this approach is adopted, we think that after certification the defendant's lawyer should not be able to contact class members directly. [90] If the approach of having a lawyer for the class is not adopted, we think that after certification the court could make directions setting out when it would be appropriate for the defendant's lawyer to contact class members. [91]

3.64 We do not think communications from the defendant's lawyer to class members need to go through the representative plaintiff's lawyer before certification. It seems unfair that by simply filing a class action a representative plaintiff can prevent the defendant's lawyer from communicating with potentially hundreds or thousands of people.

3.65 We note that communications to a potential class after the class action is filed, but before certification, will still be subject to the court's inherent jurisdiction.

Should the court review any communications between the defendant or defendant's lawyer and class members?

3.66 While it is important to encourage out of court settlements and the defendant's general freedom to communicate settlement offers, [92] we think that after certification, communications about individual settlement offers should be reviewed by the court. This will most likely arise during the opt-in/opt-out period as, once the class is finalised, a class member cannot leave the class action unless authorised by the court. [93]

3.67 As explained in Chapter 6, settlement of a class action is a stage where class member interests require particular protection. We think this is also the case during the opt-in/opt-out period, as an individual settlement will likely require the class member not to participate in the class action. [94] There are risks that at this stage the defendant may seek to unfairly settle a claim quickly and cheaply with uninformed class members. [95] A large number of individual settlements could also effectively dispose of the class action entirely,

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89 David F Herr *Annotated Manual for Complex Litigation* (online ed, Thomson Reuters) at 300.

90 Except as authorised by Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.4.

91 For example *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [11.2].

92 *Courtney v Medtel Pty Ltd* [2002] FCA 957, 122 FCR 168 at [52]. See also *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [170].

93 For example if a further opt-out period is provided at settlement, as discussed in Chapter 6.

94 In *Ross,* a condition of the individual settlement was that policy holders opt-out of the representative action: *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [28].

95 See for example William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 9.2. See also *Capic v Ford Motor Company of Australia Ltd* [2016] FCA 1020 at [20] where the Court noted that allowing defendants to settle directly with individual class members may result in a claim being compromised. In Ontario, the Superior Court of Justice has recognised communications could be used as a "tactic to thwart the class action": *Lundy v Via Rail Canada Inc* (2012) 111 OR (3d) 628 (ONSC) at [8].

without having gone through the settlement approval process.[96] As well, if a settlement offer goes to class members at the same time as an opt-in/opt-out notice, there is potential for confusion.[97]

3.68 If an opt-in/opt-out notice requires court approval, it seems fair that the court's supervisory power would also attach to communications of a similar nature between a defendant (or their legal representatives) and the class.[98] We think communications about individual settlements are similar to an opt-in/opt-out notice as they may seek to encourage a class member not to participate in a class action. We see such communications as effectively a counter to an opt-in/opt-out notice.

3.69 Accordingly, we think a class actions regime should specify that, after certification, communications with actual or potential class members about individual settlements require court review. The High Court in Aotearoa New Zealand has already been willing to supervise individual settlement communications prior to close of an opt-out date.[99] We anticipate the nature of any review would be to check the communication properly characterises the class action and is not otherwise unfair or misleading.[100]

3.70 We think communications about individual settlements before certification should not automatically require court approval. At this stage, as with communications between the defendant's lawyer and the class, it is not certain there will be a class action.

QUESTIONS

Q18 Do you agree communications between the defendant's lawyer and class members should be directed to the representative plaintiff's lawyer after certification? If not, how should the defendant's lawyer communicate with class members?

Q19 Do you agree the court should review defendant communications with class members about individual settlements after certification? If not, what, if any, defendant communications with class members should require court review?

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96 See *King v AG Australia Holdings Ltd*, where the Court noted that individual offers of settlement could breach s 33V (the settlement provision in the Federal Court of Australia Act 1976 (Cth)) if they were made out to, and accepted by, all class members: *King v AG Australia Holdings Ltd* [2002] FCA 872 at [42].

97 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment) at [175].

98 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (review of defendant's communication) at [87].

99 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 253 (results judgment); and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment).

100 See *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (review of defendant's communication) at [25]–[28].

CHAPTER 4

During a class action

INTRODUCTION

In this chapter, we discuss several issues that may arise during a class action:

- When notice of events in a class action ought to be given to class members.
- Case management of class actions.
- Managing individual issues.
- Discovery in class actions.
- Funding orders in class actions

NOTICE TO CLASS MEMBERS

4.1 Providing class members with adequate notice of events in the class action is an important way of ensuring that their interests are protected.[1] This section considers when notice should be required, how notice should be given and whether the defendant should have any obligations with respect to notice. We also consider the contents of the opt-in or opt-out notice.[2]

When should notice be required?

4.2 Our main comparator jurisdictions all specify that notice should be given at the beginning of a class action. This occurs after the class action is commenced in Australia and after certification in Canada, the United States and the United Kingdom Competition Appeal

1 Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 493.

2 The content of a notice of proposed or approved settlement is discussed in Chapter 6.

Tribunal.[3] In some jurisdictions, there are situations where notice at the commencement of a class action is not mandatory.[4]

4.3 Other events that may trigger notice include when:

(a) Additional causes of action are added.[5]

(b) Individual participation of a class member is required.[6]

(c) The representative plaintiff wants to withdraw as representative plaintiff.[7]

(d) The representative plaintiff wants to settle their individual claim.[8]

(e) The defendant applies to dismiss the proceedings.[9]

(f) A settlement is proposed[10] or approved.[11]

(g) The court determines the common issues[12] or awards aggregate damages.[13]

(h) A matter in the proceeding is appealed.[14]

4.4 Our comparator jurisdictions also contain a general power to order notice to class members at any other point in the proceeding.[15]

4.5 We consider the two most critical stages for notice in a class action are the opt-in/opt-out notice and any settlement notice, which are discussed below and in Chapter 6, respectively. However, we think notice should generally be required if an event affects

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3 See for example Federal Court of Australia Act 1976 (Cth), s 33X(1)(a); Class Proceedings Act SO 1992 c 6 (Ontario), s 17(2)–(3); United States Federal Rules of Civil Procedure, r 23(c)(2)(B); and The Competition Appeal Tribunal Rules 2015 (UK), r 81. Note Canada also requires notice of a certification application to be given to a representative plaintiff of any class proceeding or proposed class proceeding commenced in another provincial jurisdiction when it involves both the same or similar subject matter and contains some or all of the same class members: see for example Class Proceedings Act SO 1992 c 6 (Ontario), s 2(4).

4 In Australia and the United States, notice is mandatory for damages class actions but there is discretion to excuse notice when damages are not sought: see Federal Court of Australia Act 1976 (Cth), s 33X(2); and United States Federal Rules of Civil Procedure, r 23(c)(2)(B). In Canada, courts have a discretion to dispense with notice for any class action proceeding, having regard to certain factors. See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 17(2)–(3).

5 See for example Federal Court of Australia Act 1976 (Cth), s 33K(5).

6 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 18; and The Competition Appeal Tribunal Rules 2015 (UK), r 88(3).

7 See for example Federal Court of Australia Act 1976 (Cth), s 33X(1)(c); and The Competition Appeal Tribunal Rules 2015 (UK), r 87(1)–(2).

8 See for example Federal Court of Australia Act 1976 (Cth), s 33W(4)(a).

9 See for example Federal Court of Australia Act 1976 (Cth), s 33X(1)(b).

10 See for example United States Federal Rules of Civil Procedure, r 23(e)(1)(B); and The Competition Appeal Tribunal Rules 2015 (UK), r 94(6)(b).

11 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(12).

12 See for example The Competition Appeal Tribunal Rules 2015 (UK), r 91(2).

13 See for example Federal Court of Australia Act 1976 (Cth), s 33ZA(3); and The Competition Appeal Tribunal Rules 2015 (UK), r 92(1),(3).

14 See for example Federal Court of Australia Act 1976 (Cth), s 33ZC(7).

15 See for example Federal Court of Australia Act 1976 (Cth), s 33X(5); Class Proceedings Act SO 1992 c 6 (Ontario), s 19(1); United States Federal Rules of Civil Procedure, r 23(d)(1)(B)(i); and The Competition Appeal Tribunal Rules 2015 (UK), r 88(2)(d).

class members' interests.[16] Therefore, at a minimum, we think the following events should trigger notice:

(a) When a class action has been certified and a class member can elect whether to opt into or opt out of the class action.

(b) Where the representative plaintiff seeks to discontinue either the class action or an appeal against the judgment on common issues.

(c) Where the representative plaintiff applies to withdraw as the representative plaintiff.

(d) Where individual participation of class members is required.

(e) When the court issues a judgment determining the common issues.

(f) A proposed or approved settlement (we discuss this in more detail in Chapter 6).

4.6 We also think the court should have a general power to order notice in any other case.

QUESTION

Q20 Do you agree with our list of events that should require notice to class members?

How should notice be given?

4.7 In *Ross v Southern Response Earthquake Services Ltd*, the High Court observed that in giving notice to group members, the objective is "to find the most economical means of ensuring that [class members] are informed of the proceeding and their rights".[17] The Court directed notice be given several ways including publication in four newspapers, publication on Facebook, by post and by email.[18]

4.8 In our comparator jurisdictions, the court must direct how notice is to be given.[19] The tests to be applied when determining the means of notice vary across jurisdictions.

4.9 In Australia, the court may only order personal notice to each class member if "it is satisfied that it is reasonably practicable, and not unduly expensive, to do so".[20] In the United States, in the context of an opt-out notice in a damages claim, the court must direct "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort".[21] In Canada, the

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16 The Ontario Law Reform Commission thought the functions of notice were: to ensure class members are adequately represented, to enable them to opt out of the proceeding, and to inform class members what steps they will have to take following the judgment on the common issues: Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 493.

17 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [30] quoting *Femcare Ltd v Bright* [2000] FCA 512, (2000) 100 FCR 331 at [74] ("… to find the most economical means of ensuring that the group members are informed of the proceeding and their rights").

18 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [196(f)–(h)].

19 See for example Federal Court of Australia Act 1976 (Cth), s 33Y(3)(b); Class Proceedings Act SO 1992 c 6 (Ontario), ss 17(3), 18(2), 19(2); The Competition Appeal Tribunal Rules 2015 (UK), r 81; and United States Federal Rules of Civil Procedure, r 23(c)(2)(B), 23(e)(1)(B), 23(d)(1)(B).

20 See for example Federal Court of Australia Act 1976 (Cth), s 33Y(5).

21 United States Federal Rules of Civil Procedure, r 23(c)(2)(B).

court must consider: the cost of giving notice, the nature of the relief sought, the size of the individual claims of the class members, the number of class members, the presence of subclasses, whether some or all of the class members may opt out of the class proceeding, and where the class members reside.[22] Some jurisdictions also provide examples of how notice may be given, including personally or by mail, press advertisement, radio or television broadcast, electronic means or any other means the court considers appropriate.[23]

4.10 We consider the court should have a power to determine how notice to class members must be given. We do not think there should be a presumption for any particular method of notice. Rather, we think that the court should have a broad discretion to order any means of notice that it considers appropriate in the circumstances. The means of notice will likely depend on the nature of the class and the case. For example, where all class members are known, individual notice may be possible. However, in a large class with unknown class members, a broad advertising campaign may be appropriate.[24]

4.11 We think any specific guidance, such as matters the court should consider when determining the method of notice, would be best contained in the High Court Rules.

Defendant's obligations with respect to notice

4.12 In some circumstances the defendant will be in a better position than the representative plaintiff to identify and contact class members, for example where all class members are current customers of the defendant. In such a case, it may be appropriate for the defendant to facilitate notice to class members or to provide a list of class members to the representative plaintiff.

4.13 This has been considered in cases under HCR 4.24. In *Houghton v Saunders*, the High Court appeared to accept the defendant could be compelled to directly notify shareholders who were group members in the representative action.[25] In *Smith v Claims Resolution Service*, the defendants were required to supply the plaintiffs and the Court with a "spreadsheet list of 178 potentially eligible clients and customers" which was to include "their full names, addresses and contact details".[26] In *Ross v Southern Response Earthquake Services Ltd*, the defendant accepted in principle that it should assist with the communication of notices to group members.[27]

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22 Class Proceedings Act SO 1992 c 6 (Ontario), ss 17(3), 18(2) and 19(2).

23 See for example Federal Court of Australia Act 1976 (Cth), s 33Y(4); and Class Proceedings Act SO 1992 c 6 (Ontario), ss 17(4), 18(3) and 19(3).

24 See for example *Claims Resolution Service Ltd v Smith* [2020] NZCA 664 at [45] where the Court of Appeal accepted it was appropriate to use the defendant's Facebook page to publish the Court approved opt-in notice. Facebook was also used as a means of communication in *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [169]–[171] and [196(g)].

25 See *Houghton v Saunders* HC Christchurch CRI-2008-409-000348, 19 May 2010 at [70]: "I decided it would not be appropriate for me to issue an order, but indicated the Court expected the fourth and fifth defendants would use all reasonable endeavours to notify the shareholders in question".

26 *Smith v Claims Resolution Service Ltd* [2019] NZHC 1013 at [19].

27 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [174]. The High Court ordered the defendant to send notice to group members by post and email, and file and serve an affidavit setting out the delivery status of items, including identified names, but not other private details of policyholders: at [177] and [196(h)–(i)].

4.14 However, in *Southern Response Unresolved Claims Users Group v Southern Response,* the High Court declined the plaintiff's application for discovery of the names and addresses of policy holders who had unresolved claims with Southern Response.[28] This decision was upheld on appeal. The Court of Appeal considered that advertising being a less effective means of communicating with potential group members did not justify the intrusion on the privacy interest held by people with unresolved claims.[29] It said the issue might be resolved by requiring Southern Response to provide information about the proceedings to potential group members.[30]

4.15 In other jurisdictions, the defendant may be required to assist with notice to class members in appropriate cases. For example, the Federal Court of Australia has the power to make orders "directing a party to provide information relevant to the giving of the notice".[31] In Ontario, the court can order the defendant to give notice that would otherwise be provided by the representative plaintiff.[32] In the United States, the court (on application by the representative plaintiff) may require the defendant to publish notice as part of a routine mailout if class members overlap with the mailout recipients.[33]

4.16 We consider the court should have the power to order that the defendant provide relevant information or assist in giving notice to class members. This would allow a judge to consider the circumstances of a particular case and decide what, if any, defendant involvement is appropriate. We can imagine there would be some cases where it would be very distressing for a potential class member to have their details given to those running a class action or to be contacted directly by the defendant. However, there will be cases where defendant involvement is appropriate.[34] In some cases, the defendant may prefer to provide the notice rather than give the representative plaintiff class member contact details.[35]

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28 *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105 at [96]–[100].

29 *Southern Response Earthquake Services Ltd* v *Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [131].

30 *Southern Response Earthquake Services Ltd* v *Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [132].

31 Federal Court of Australia Act 1976 (Cth), s 33Y(3)(c). The Practice Note of the Federal Court states that the defendant should cooperate and allow access to their records in order to facilitate direct notice, and that any dispute over giving access to lists should be raised early and ideally resolved outside of court: *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [12.3]–[12.4].

32 Class Proceedings Act SO 1992 c 6 (Ontario), s 21: "the court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party".

33 See David F Herr *Annotated Manual for Complex Litigation* (online ed, Thompson Reuters) at § 21.311 citing, for example, *Oppenheimer Fund Inc v Sanders* 437 US 340 (1978) at 355 where the Supreme Court noted at that "a number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice".

34 For example, in *Claims Resolution Service Ltd v Smith* the Court of Appeal ordered that the opt-in notice be published on the defendant's Facebook page: *Claims Resolution Service Ltd v Smith* [2020] NZCA 664 at [45]. See also *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [169]–[171] and [196(g)].

35 The Court of Appeal has noted that a process where the defendant provides information about the proceedings to group members could deal with privacy concerns, and that other jurisdictions envisage processes such as this: *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [132].

QUESTION

Q21 Should the court have the power to order the defendant to:

a. Disclose the names and contact details of potential class members to the representative plaintiff?

b. Assist with giving notice directly to class members?

Contents of an opt-in/opt-out notice

4.17 We think the two most critical stages for notice in a class action are the opt-in/opt-out stage and settlement. Participation in the class action or any settlement will mean an outcome which is legally binding on class members.[36] This section addresses the content of the opt-in/opt-out notice, while the content of a settlement notice is addressed in Chapter 6.

4.18 The High Court has explained, in the context of a representative action, that the purpose of the opt-in/opt-out notice is to ensure group members can make an informed decision.[37] The notice document is there to "inform, not recruit" and it should not be a platform to allow defendants to deter prospective group members.[38]

4.19 The required content of an opt-in/opt-out notice varies across jurisdictions. However, at a minimum it must inform class members of their right to opt-in or opt-out (as relevant to the jurisdiction),[39] explain the binding effect of the judgment on the class,[40] and describe the claim.[41]

4.20 We think that relatively detailed requirements for opt-in/opt-out notices are important as class members need to receive sufficient information to make an informed decision about whether to participate in the class action. Our preliminary view is that an opt-in/opt-out notice should include:

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36 As explained by the Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 510: "After a class action is certified, it will either proceed to judgment or be settled with the approval of the court. In both cases, the absent class members will be bound by the result" (footnotes omitted). See Chapter 5 for a discussion on the binding nature of judgments and Chapter 6 for further discussion of settlement.

37 See *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [22] citing *King v GIO Australia Holdings Ltd* [2001] FCA 270 at [15] ("The principal purpose … is to ensure that group members can make an informed decision concerning their rights").

38 *Houghton v Saunders* HC Christchurch CRI-2008-409-000348, 19 May 2010 at [27]. See also *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 (opt-out notice requirements) at [26].

39 See for example Federal Court of Australia Act 1976 (Cth), s 33X(1)(a); Class Proceedings Act SO 1992 c6 (Ontario) s 17(5)(b); United States Federal Rules of Civil Procedure, r 23(c)(2)(B)(v)–(vi); The Competition Appeal Tribunal Rules 2015 (UK), r 81(2)(e).

40 See for example *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [12.2(b)]; Class Proceedings Act SO 1992 c6 (Ontario), s 17(5)(g); United States Federal Rules of Civil Procedure, r 23(c)(2)(B)(vii); and The Competition Appeal Tribunal Rules 2015 (UK), r 81(2)(d).

41 See for example at *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [12.2(a)]; Class Proceedings Act SO 1992 c6 (Ontario), s 17(5)(a); United States Federal Rules of Civil Procedure, r 23(c)(2)(B)(i) and (iii); and The Competition Appeal Tribunal Rules 2015 (UK), r 81(2)(c).

(a) The identity of the representative plaintiff, including a brief explanation of their role and obligations to the class.

(b) The identity of the lawyer acting for the representative plaintiff, including a brief explanation of their role and obligations to the class.

(c) A description of the class action, including a class description and the identity of the defendants.

(d) What a class member must do if they wish to opt into the claim or opt out of the class action (as appropriate) and the date by which they must do so.

(e) An explanation of the binding effect of a class actions judgment on class members.

(f) Who to contact if the class member would like any further information on the class action.

(g) Disclosure of any potential conflicts of interest.

(h) Anything else the court considers appropriate.

4.21 We think notice requirements should be set out in the High Court Rules. Consideration could be given to developing a standard opt-in/opt-out notice, which could be added to the forms in Schedule 1 of the High Court Rules. We think it is desirable for opt-in/opt-out notices to use clear language that class members can easily understand. [42]

QUESTION

Q22 Do you agree with our proposed requirements for an opt-in/opt-out notice?

CASE MANAGEMENT

4.22 Class actions will need close case management to ensure they proceed efficiently, and the interests of class members are protected. While the general case management provisions in the High Court Rules and the court's inherent jurisdiction should usually be able to respond to any case management issues that arise in class actions, there may be aspects of class actions that would benefit from tailored case management provisions. In this section, we discuss some options for promoting the efficient case management of class actions.

General power to manage class actions

4.23 Some overseas class actions regimes have a general power to make any orders necessary for the just and efficient conduct of a class action. For example, section 33ZF of the Federal Court of Australia Act 1976 provides: [43]

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42 Note that the *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) provides that the notice must use plain language: at [12.2].

43 Federal Court of Australia Act 1976 (Cth), s 33ZF(1).

> In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

4.24 This general power has been used for a wide range of purposes, including closing the class, ordering a class member to provide discovery, issuing a subpoena to obtain class member contact information and permitting various aspects of settlement.[44] The High Court of Australia has commented that while the power in section 33ZF is broad, it is "essentially supplementary" and the words of limitation in the provision cannot be ignored ("to ensure that justice is done in the proceeding").[45]

4.25 Another example of a general power is the following Ontario provision:[46]

> The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

4.26 This provision initially only allowed the court to make an order on the application of a party or a class member and not on the court's own initiative. However, this was amended in 2020 following a recommendation of the Law Commission of Ontario (LCO).[47]

4.27 We consider it is unnecessary to have a general power to manage class actions. We think it would be preferable to rely on specific provisions as much as possible, to provide certainty for parties. In Australia, there have been situations where courts have developed a practice of making certain orders under the general power (such as common fund orders and class closure orders) and later court decisions have indicated the general power does not allow this.[48] This creates significant uncertainty for parties. We also note that the court can rely on the broad range of powers available under the High Court Rules as well as the court's inherent jurisdiction.[49]

Case management conferences

4.28 The High Court Rules contain procedures for case management conferences and issues conferences.[50] We think it would be sufficient to rely on these for class actions, but we are interested to hear from submitters whether specific class actions rules are needed. For example, an additional schedule to the High Court Rules or a class actions part of the rules could contain matters to be addressed at a class actions case management conference.[51] In Australia, class actions practice notes specify the timing of case

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44 See Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [32.10].

45 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [46] per Kiefel CJ, Bell and Keane JJ and [123]–[125] per Nettle J.

46 Class Proceedings Act SO 1992 c 6 (Ontario), s 12. The other common law provinces in Canada have very similar provisions.

47 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 22.

48 We discuss common fund orders later in this chapter and discuss class closure orders in Chapter 6.

49 We also note that the High Court Rules includes a power to dispose of a case in a situation where no procedure has been prescribed: High Court Rules 2016, r 1.6.

50 High Court Rules 2016, Part 7, Subpart 1.

51 This could be in addition to, or instead of, the matters in Schedule 5 of the High Court Rules.

management conferences and matters to be addressed.[52] In most Canadian provinces, general case management conference procedures apply.[53] The LCO recommended that a dedicated practice direction or amendment to the Rules of Civil Procedure be developed for case management of class actions.[54]

Interlocutory applications

4.29 In most class actions, it will be necessary to make interlocutory applications to determine preliminary issues. While this is an inevitable aspect of complex litigation, it can add significant cost and delay to proceedings.

4.30 There may be ways of streamlining the process of determining interlocutory issues in class actions. For example:

(a) In Australia, the Federal Court Practice Note provides that the court will endeavour to deal with interlocutory applications in class actions on an expedited basis.[55]

(b) In Victoria, lawyers in class actions must confer and attempt to resolve disputes in good faith before making any interlocutory application.[56]

(c) The Rules Committee's 2008 draft Class Actions Bill provided that the court could make an order prohibiting a defendant from making specified kinds of interlocutory applications if they would unnecessarily delay the conduct of the class action or would be an abuse of the court's process.[57]

4.31 We note that the Rules Committee's consultation document, *Improving Access to Justice,* proposes a presumption that interlocutory applications will be disposed of on the papers. Oral hearings would only occur if this would be proportionate to the complexity and importance of the interlocutory dispute and the proceeding as a whole.[58] If this proposal is adopted, we do not think it would be necessary to have a provision in a class actions regime to streamline interlocutory applications that are filed after certification.

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52 See *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [7.1]–[7.8] and [9.1]–[9.2]; *Conduct of Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [7.2]–[7.6]; *Supreme Court Representative Proceedings* (Supreme Court of New South Wales, Practice Note SC GEN-17, July 2017) at [5.2], [6.2], [7.1]–[7.2], and [8.1]–[8.2]; and *Representative Proceedings* (Supreme Court of Queensland, Practice Direction 2/2017, February 2017) at [8.1]–[8.2], [9.1]–[9.2]. Less prescriptive requirements are contained in *Representative Proceedings* (Supreme Court of Tasmania Practice Direction 2/2019, September 2019).

53 In Saskatchewan, the general rules relating to pre-trial conferences do not apply to class actions, unless the judge orders otherwise: Queen's Bench Rules 2013 (Saskatchewan), r 3-91. See also Rules of the Supreme Court 1986 (Newfoundland and Labrador), r 7A.03(5), which sets out matters to be considered at a class actions case management meeting.

54 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 22.

55 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [7.9]. It states that ordinarily, the court will not give reasons for determining matters of practice and procedure. However, where a party seeks reasons, the court will endeavour to give judgment and reasons within six weeks of a contested interlocutory hearing.

56 *Conduct of Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [9.1].

57 Class Actions Bill (Parliamentary Counsel Office, PCO 8247/2.14, 2008), cl 15(2).

58 Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at [74].

Dismissal for delay

4.32 The LCO noted that virtually everyone they consulted cited delay as a significant issue in class action litigation and that delay can harm both class members and defendants. It discussed the issue of dormant class action cases, including lawyers commencing cases they had insufficient resources to pursue.[59] The LCO recommended a one-year deadline for a certification timetable to be set and the plaintiff's certification material filed, with automatic dismissal otherwise.[60] The Ontario legislation was subsequently amended to include a mandatory dismissal for delay provision, based on the LCO's recommendations.[61]

4.33 Our preliminary view is that a similar provision is not necessary in Aotearoa New Zealand. We think usual timetabling and case management procedures, along with the power to dismiss or stay a proceeding for want of prosecution are likely to be sufficient to prevent cases being commenced and not progressed.[62]

QUESTION

Q23 Do you agree that the High Court Rules and the court's inherent jurisdiction are adequate to ensure the efficient case management of class actions? If not, what specific provisions are needed? For example:

a. A general power for the court to make any orders necessary in a class action?

b. Specific provisions for class actions case management conferences?

c. Restrictions on filing interlocutory applications in class actions or procedures for dealing with interlocutory applications in an expedited way?

d. Automatic dismissal of a class action proceeding that is not progressed within a certain time frame?

MANAGING INDIVIDUAL ISSUES

4.34 There will always be at least one common issue to determine in a class action, due to the commonality requirement. There will generally also be non-common issues that need to be determined to ascertain a defendant's liability to individual class members. In this section we seek views on how individual issues should be managed in a class actions regime. We discuss whether the court should be able to award damages on an aggregate basis in Chapter 5.

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59 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 18.

60 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 22.

61 Class Proceedings Act SO 1992 c 6 (Ontario), s 29.1.

62 High Court Rules 2016, r 15.2.

Staged hearings

4.35 A common method of managing a class action or representative action that has both common and individual issues is to have staged hearings (also known as split trials).

4.36 In Aotearoa New Zealand, representative actions will often be heard in two stages, with the stage one hearing covering common issues (and sometimes also the entirety of the representative plaintiff's claim) and a stage two hearing to address individual issues.[63] However, a staged approach to representative actions is not mandatory.[64]

4.37 While the need for staged hearings is often agreed by the parties, there is sometimes disagreement as to which issues should be considered at each stage. For example:

(a) Whether a stage one hearing can include issues that relate to some class members but not the representative plaintiff.[65]

(b) Whether the entire claims of a representative or sample group of class members should be heard at stage one.[66]

4.38 Applications for staged hearings in representative actions have relied on the court's power to order the separate decision of questions in HCR 10.15.[67] One option would be for parties in class actions to rely on this rule and the criteria that has developed through case law.[68] However, the starting point of this rule is the presumption that all matters are to be determined in one trial and the party seeking a split trial has to displace this presumption.[69] It may be appropriate to have a presumption in favour of split trials in class actions, or at least a recognition that a split trial may be an appropriate procedure, rather than requiring the parties to displace the presumption each time.

4.39 Some class actions regimes have specific provisions relating to separate determination of questions in class actions. For example, the Ontario regime provides that common issues are to be determined together, common issues for a subclass are to be determined together and individual issues that require the participation of individual class members are to be determined individually. This is subject to the court's general power to determine the conduct of class action proceedings.[70] The United Kingdom Competition Appeal Tribunal's case management powers in class actions include ordering the common

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63 Cases where there has been a stage one hearing include *Strathboss Kiwifruit Ltd v Attorney-General* [2018] NZHC 1559; and *Houghton v Saunders* [2014] NZHC 2229, [2015] 2 NZLR 74. No case has yet proceeded to a stage two hearing.

64 See *LDC Finance Ltd v Miller* [2016] NZHC 567 at [30].

65 See *Houghton v Saunders* [2012] NZHC 1828, [2012] NZCCLR 31 at [4], [10]–[11].

66 See *Strathboss Kiwifruit v Attorney-General* [2016] NZHC 206 at [12]–[13]; and *Ministry of Education v James Hardie* [2018] NZHC 1481 at [5]–[8].

67 High Court Rules 2016, r 10.15. There is also a power to order separate trials of causes of actions in r 10.4, but we are unaware of this provision being relied upon in representative proceedings.

68 See *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [11].

69 Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at 10.15.05. The commentary notes that the burden of displacing this presumption has been variously described as "not insignificant", "moderate" and "heavy".

70 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 11. There are similar provisions in the class actions legislation of the other Canadian common law provinces.

issues for a class or sub-class be determined together and the individual issues be determined in separate hearings. [71]

4.40 In Australia, the court may consider the appropriateness of a split trial at a case management hearing. [72] For example, the Federal Court class actions practice note states: [73]

> 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.

4.41 Our preliminary view is that a class actions regime should have a provision on staged hearings, with a presumption that this will be appropriate. We think this is preferable to relying on HCR 10.15 so the parties do not have to displace the presumption in favour of a single trial each time. However, we think that courts should have flexibility as to whether a staged trial is appropriate as there may be cases where it will be feasible to determine all issues at a single hearing. If there are staged hearings, we envisage the first hearing would normally include any common issues as well as any individual issues relating to the representative plaintiff. Again, we favour the court having some flexibility to determine which issues should be determined at the respective hearings.

QUESTION

Q24 Do you agree that:

a. There should be a presumption in favour of staged hearings in class actions?

b. The court should have flexibility as to which issues are determined at stage one and stage two hearings?

Determining individual issues

4.42 If the representative plaintiff obtains a successful judgment on the common issues in a class action, the individual issues in the proceeding will need to be determined. Individual issues might include: proof of purchase, reliance on a misrepresentation or establishing the loss suffered. Determining individual issues may pose a challenging exercise if the class is of a considerable size. It has been noted that if a class action will result in a long

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71 The Competition Appeal Tribunal Rules 2015 (UK), r 88(2).

72 See *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [9.2(l)]; and *Conduct of Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [11.1].

73 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [13.1]. See also [3.2] and [9.2(l)].

series of individual trials, then any potential judicial efficiency will be lost.[74] It is therefore important to consider how stage two issues can be resolved in a just and efficient way.

4.43 There is yet to be a 'stage two' hearing in a representative action under HCR 4.24 and so there is no established process in Aotearoa New Zealand for determining individual issues.[75] Overseas jurisdictions have developed a variety of approaches, and methods for determining individual issues are expressly referred to in the Australian and Canadian regimes.[76]

Hearing(s) to determine individual issues

4.44 Non-common issues could be determined through a separate hearing or hearings, as occurs in some other jurisdictions.[77] This could involve:

(a) Establishing sub-classes and hearing issues common to sub-class members.[78]

(b) A hearing to determine a range of issues, with individual class members allowed to participate in the hearing for the purpose of determining issues that relate to their claims.[79]

(c) Discontinuing the case as a class action, with individual class members required to file a statement of claim to pursue individual issues.[80] Individual claims could be consolidated or joined as appropriate.

Approaches to evidence when individual issues are determined

4.45 It would be difficult for a court to hold a hearing where evidence from hundreds or thousands of individual class members is required. A class actions regime could allow for some alternative approaches to evidence on individual questions, such as:

(a) Class members providing documentary evidence, such as affidavits or standardised claim forms.

(b) Individual issues being proved through expert evidence.

(c) The court hearing evidence from a representative sample of class members.

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74 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 260.

75 In *Houghton v Saunders,* the Court gave some initial directions as to how the stage two hearing should proceed: *Houghton v Saunders* [2019] NZHC 142 at [20]–[22] and [25]. However, the case was struck out prior to the stage two hearing due to a failure to pay security for costs.

76 See for example Federal Court of Australia Act 1976 (Cth), ss 33Q and 33R; and Class Proceedings Act SO 1992 c 6 (Ontario), s 25.

77 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 25(a) (the court may determine indivdual issues in further hearings presided over by the judge who determined the common issues or another judge).

78 See for example Federal Court of Australia Act 1976 (Cth), s 33Q(2).

79 See for example Federal Court of Australia Act 1976 (Cth), s 33R.

80 This approach has sometimes been taken in Australia: see Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [17.3]. For an example, see *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11)* [2013] FCA 241 at [66]–[67]. See also *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [13.3], noting that following an initial trial it will be necessary to decide whether individual class member claims will be determined within the existing proceeding or in separate proceedings.

4.46 In Canada, when a court is determining individual issues, it may also authorise any rules relating to admission of evidence and means of proof that it considers appropriate.[81] Courts in the United States have also allowed alternative approaches to evidence when individual damages are determined. For example, an expert witness can give evidence that applies to an average class member, which can then be used as the basis for individual damages awards.[82] In some cases, a formula for calculating damages can be developed by an expert or based on the defendant's records.[83] Courts have been less willing to allow evidence from a representative sample of the class which is extrapolated to other class members, because of concerns about the representativeness of the sample and constitutional issues.[84]

4.47 In *Houghton v Saunders,* a representative action under HCR 4.24, the plaintiff proposed to run the stage two hearing by bringing evidence from a sample of the claimants in each of four sub-groups of investors. The plaintiff intended to bring additional evidence (including expert evidence) to show that the court's findings on the evidence of those investors could properly be applied to others in the sub-group.[85] The Court, while not ruling this approach out, expressed a provisional view that "the prospects of making out this novel proposition in the context of these claims are extremely forlorn".[86] A more likely outcome was that findings in relation to individual claimants would provide a basis for settlement discussions with the defendants.[87]

Determining individual issues without a court hearing

4.48 Individual issues could also be determined without a court hearing. For example, the Canadian regimes enable the court to appoint a person to enquire into the issues and report back to the court or direct the issues to be determined in another manner (with the consent of the parties).[88]

4.49 Examples of mechanisms that have been used in different jurisdictions to consider individual issues include:[89]

(a) Mini-hearings which use a mediation-arbitration approach.[90]

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81 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 25(3)(b).

82 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:5. In *Tyson Foods, Inc v Bouaphakeo* 577 US 442 (2016) the defendant employer had failed to keep records of time employees spent "donning and doffing" protective gear used in a pork processing plant and so the plaintiff relied primarily on a study by an industrial relations expert. The Supreme Court refused the defendant's request to create a broad rule against the use of representative evidence in class actions.

83 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:5.

84 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:5. See also at § 11:21, noting that few courts continue to embrace the "trial by extrapolation" approach.

85 *Houghton v Saunders* [2019] NZHC 142 at [14].

86 *Houghton v Saunders* [2019] NZHC 142 at [22].

87 *Houghton v Saunders* [2019] NZHC 142 at [22].

88 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 25(1)(b) and (c).

89 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 267-268.

90 Arbitrators and mediators have different duties, which can be difficult to reconcile in a combined arbitration-mediation procedure. See David Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at 17-20.

(b) Standardised sworn claim forms which are assessed by a panel of barristers.[91]

(c) Class members being required to file individual claims with supporting documentation and affidavits, followed by a settlement conference. Under this process, if claims cannot be settled, referees may be appointed to investigate individual circumstances and report back to the court.[92]

(d) Assessment of damages being delegated to a court-appointed registrar, special master or referee.

4.50 We consider it would be desirable for the court to have some flexibility as to how individual issues should be determined. Where there is a large number of class members, it is unlikely to be feasible for each of them to give evidence on individual issues. We suggest the court's powers could include:

(a) Appointing a court expert who can report back to the court on particular issues. We do not think the court expert would necessarily determine individual issues, but they may be able to simplify the court's task, for example by categorising individual claims into groups.

(b) Directing individual issues to be determined through a non-judicial procedure, where the parties agree (for example, a determination process run by a former judge or a senior lawyer).

(c) Giving directions with respect to the form or way in which evidence on individual issues may be given. It is possible that the parties will agree to a particular form of evidence, such as standardised forms.[93]

QUESTION

Q25 How can individual issues in a class action be determined in an efficient way? For example, should the court have the power to:

a. Appoint an expert to enquire into individual issues.

b. Order individual issues to be determined through a non-judicial process, where the parties agree to that.

c. Give directions as to the form or way in which evidence on individual issues may be given.

DISCOVERY AND OTHER REQUIREMENTS TO PROVIDE INFORMATION

4.51 We envisage that the general High Court Rules relating to discovery and inspection, interrogatories and notice to admit facts would apply to class actions, as with other civil

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91 This invites a question as to who would appoint and pay the panel.

92 Again, this raises the issue of who would appoint and pay the referee.

93 Evidence Act 2006, s 9(1)(b) provides that in any proceeding, the judge may admit evidence offered in any form or way agreed by all parties.

litigation.[94] In this section, we discuss the issue of discovery by individual class members and how to ensure the defendant has sufficient information about claims.

Discovery by individual class members

4.52 The representative plaintiff is a party to the proceeding and will have an obligation to meet discovery requirements. The situation of class members differs as they are not parties to the proceeding, so an order for non-party discovery would be necessary.[95] Information held by individual class members will be most relevant at stage two of the proceeding. However, depending on how the stage two hearing is managed, it may not be necessary for all class members to provide discovery.[96]

4.53 A class actions regime could specify a procedure for obtaining discovery against class members. The Canadian regimes provide that after the representative plaintiff has provided discovery, a party may apply for discovery against other class members. The court must consider the following matters when deciding whether to grant the application for discovery:[97]

(a) The stage of the class action and the issues to be determined at that stage.

(b) Whether there are sub-classes.

(c) Whether the discovery is necessary given the claims or defences of the party seeking it.

(d) The monetary value of individual claims.

(e) Whether discovery would be oppressive or result in undue annoyance, burden or expense for class members.

(f) Any other matter the court considers relevant.

4.54 In the United Kingdom Competition Appeal Tribunal, disclosure is not automatic and must follow an order or direction of the Tribunal.[98] The Tribunal relies on its general powers to order disclosure as well as its specific powers relating to disclosure in class actions. These include the power to order disclosure to be given by a class member to another other class member, the representative plaintiff or the defendant.[99]

4.55 The Australian and United States regimes do not contain an express provision relating to discovery against class members.

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94 High Court Rules 2016, Part 8. We note that the Rules Committee has proposed replacing the rules of discovery with disclosure rules: Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at [69].

95 High Court Rules 2016, r 8.21.

96 For example in *Houghton v Saunders* it appears that only the sub-set of group members who were to give evidence at stage two were to provide discovery prior to the stage two hearing: see *Houghton v Saunders* [2019] NZHC 1061 at [56], [59].

97 Class Proceedings Act SO 1992 c 6 (Ontario), s 15(3). There are similar provisions in most other Canadian class actions regimes.

98 Competition Appeal Tribunal Guide to Proceedings (2015) at [5.86]. An exception is that a party may request disclosure of any document referred to in the pleadings or in witness statements, affidavits or an expert report. We understand disclosure is the equivalent of discovery.

99 The Competition Appeal Tribunal Rules 2015 (UK), r 89(1). The Tribunal may also order disclosure to be given by any party to the class action to another party or by the representative plaintiff to any or all represented persons.

4.56 Our view is that it is not necessary for a class actions regime to have a specific provision on obtaining discovery from class members, given that the court already has the power to make an order for non-party discovery.

Ensuring the defendant has sufficient information about class member claims

4.57 If a defendant does not know the identity of all class members or have sufficient details of the circumstances of individual claims, this can make it difficult to assess the merits of a class action and to work out how to respond. This might include identifying any third-party claims and deciding whether to initiate settlement discussions.

4.58 This issue will be exacerbated with an opt-out class action as there will often be many unknown class members prior to individual issues being determined. In an opt-in claim, the identity of all class members will be known to the representative plaintiff at the end of the opt-in period. We are aware of representative actions where a defendant has successfully sought discovery of the forms submitted by individuals to opt into the proceeding.[100]

4.59 There are a variety of mechanisms in the High Court Rules which allow a defendant to seek further information from the representative plaintiff. As well as the ability to seek discovery, a defendant can seek further particulars from a plaintiff or file a notice to answer interrogatories or a notice to admit facts.[101] There are several cases where defendants have sought further particulars from plaintiffs in representative actions under HCR 4.24.[102]

4.60 We are interested to hear from submitters whether these mechanisms are sufficient to enable defendants to obtain adequate information about individual claims or whether specific class action rules are needed. For example, there could be a requirement to establish a register of class members who have opted in or out and make this available to the defendant if requested, as required in the United Kingdom Competition Appeal Tribunal.[103] A plaintiff could also have to provide an estimate of the size of the class as part of certification, as required in Canada and the United Kingdom Competition Appeal Tribunal.[104]

4.61 We propose that a representative plaintiff should be required to keep a list of class members who have opted into or opted out of a class action (as appropriate). The defendant should be able to request a list of persons who have opted into the class action

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100 Discovery of opt-in forms was ordered in *Houghton v Saunders* [2013] NZHC 1824 at [11] and *Strathboss v Attorney-General* [2016] NZHC 206 at [45].

101 High Court Rules 2016, rr 5.21, 8.34-8.35 and 8.47.

102 See for example *Paine v Carter Holt Harvey* [2019] NZHC 478 at [5]–[69]; *Minister of Education v James Hardie* [2014] NZHC 2432; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [92]; and *Houghton v Saunders* [2013] NZHC 1824 at [52]–[88].

103 See for example The Competition Appeal Tribunal Rules 2015 (UK), r 83.

104 In Ontario, each party to an application for certification must provide affidavit evidence of their best information on the number of class members: Class Proceedings Act SO 1992 c 6 (Ontario), s 5(3). In the United Kingdom Competition Appeal Tribunal, a class action claim form must include an estimate of the number of class members and sub-class members and the basis for that estimate: The Competition Appeal Tribunal Rules 2015 (UK), r 75(3)(c).

or the number of persons who have opted out of the class action.[105] While we do not think there should be an express requirement to provide information on the estimated size of the class, we note that the number or potential number of class members is a factor the court may consider as part of our proposed certification test.[106] Therefore, it is likely that the plaintiff would provide this information in their application for certification.

QUESTION

Q26 Are current rules for discovery and information provision adequate for class actions or are specific rules required? For example:

a. Should there be a specific rule permitting discovery by class members?

b. Should the defendant be entitled to any information about class member claims such as a list of class members who have opted in or the number of class members who have opted out?

FUNDING ORDERS

4.62 In an opt-in class action, signing an agreement with a litigation funder can be a condition of joining the class action. However, in an opt-out class action a class member does not need to take any steps to become part of the class action. While the initial group of claimants who decide to commence a class action will often have signed an agreement with a litigation funder, there will be many class members who have not. This may lead to unfairness since all class members could benefit from any settlement or award of damages, while only some are bound to pay a percentage of that to the funder to cover the costs of the litigation.[107]

4.63 In Australia, several mechanisms have been developed to manage this 'free-rider' problem. One option is 'closed classes', where the class is defined so that it only includes claimants who have entered into an agreement with the litigation funder.[108] This is very similar in effect to an opt-in class action. Because we have proposed that opt-in class actions should be available, we do not discuss this option further.

4.64 Other mechanisms are funding equalisation orders and common fund orders. Both options provide a way of sharing the costs of bringing a class action with all class members, regardless of whether they have signed a funding agreement. A common fund order also makes class actions more economic for litigation funders, by entitling them to a proportion of the proceeds of all class members, not just those who have signed a funding agreement.

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105 We think privacy concerns would make it less appropriate for the representative plaintiff to disclose the identities of those who have opted out.

106 See our draft legislation, cl 4(3)(a).

107 We briefly discuss this issue in our Issues Paper at [12.49]–[12.51].

108 The Full Federal Court first allowed a closed opt-out class action in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200, (2007) 164 FCR 275. See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.35].

Funding Equalisation Orders

4.65 A funding equalisation order addresses the situation where there are both funded and unfunded class members in an opt-out class action. This order deducts an amount from the settlement or award paid to non-funded class members that is equivalent to the funding commission deducted from funded class members' payments. This ensures class members are treated the same, regardless of whether they signed the funding agreement. The amount deducted from non-funded members is pooled and distributed back (pro rata) to all class members.[109] In Australia, the first funding equalisation order was made in 2009.[110]

4.66 A funding equalisation order has the benefit of ensuring that class members are treated equally. However, it does not have the benefit of making a class action more viable for a litigation funder because the amount deducted from non-funded class members is redistributed to the class rather than being paid to the litigation funder.[111] The funder is only entitled to be paid a litigation funding commission from class members it has entered into an agreement with. This means that a funder will need to engage in a process of book building to ensure that a class action has sufficient funded class members to be economically viable. This is a process which involves identifying and communicating with class members and signing them up to the litigation funding agreement.[112]

4.67 Another feature of Australian funding equalisation orders is that the court does not assess the reasonableness of the litigation funding commission.[113] This disadvantage was highlighted by one of the dissenting judges in *BMW v Brewster*:[114]

> …the fund equalisation solution suffers from the difficulty that it involves no necessary assessment by the court of the reasonableness of the remuneration costs incurred by the group members who enter into contracts with a litigation funder. Without such assessment, the group members who did not enter contracts might have unreasonable and excessive remuneration costs imposed upon them in the process of equalisation with those members who might have entered contracts in a "compliant" manner.

Common Fund Orders

4.68 A common fund order requires all class members to contribute a proportion of their proceeds from a settlement or judgment to the costs of the litigation, including the litigation funder's commission, even if they have not signed up to the litigation funding

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109 See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [5].

110 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

111 However, there have been some instances of a funder obtaining a percentage of the amount added back to the recoveries of funded group members: see Vince Morabito and Michael Duffy *An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions* [2020] NZ Law Rev 377 at fn 103.

112 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.35]. See also *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [133] per Gordon J.

113 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [185] per Edelman J. See also *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia (No 3)* [2020] FCA 461 at [20] (commenting that judges who have applied funding equalisation mechanisms "appear to have assumed they lack the power to modify" the litigation funding commission or its payment as part of approving the settlement).

114 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [185] per Edelman J.

agreement.[115] An application for a common fund order is often made at an early stage of proceedings but can also be made at settlement. A key feature of a common fund order is that the court will approve the funding commission that can be deducted. Where the court makes a common fund order at an early stage, it may defer setting the funding commission until later in the proceedings, such as when approving settlement or when damages are distributed.[116] The court may also indicate a maximum commission that the funder may be paid, for example:

> An amount equal to 30% of the aggregate Resolution Sums or such lower percentage as the Court considers reasonable at the time the claims are settled or judgment is given in respect of them.[117]
>
> A percentage proportion, to be determined by the Court at a future date, of the amount for which the claims are settled or judgment is given, but group members shall be informed such percentage will be no more than 28%.[118]

4.69 In Australia, a common fund order was first made by the Federal Court in 2016 in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*.[119] There are many subsequent examples of courts making common fund orders in funded class actions.[120] However, in *BMW v Brewster*, a majority of the High Court of Australia held that the Federal Court does not have jurisdiction to make a common fund order under its general power in section 33ZF.[121] In some subsequent cases, the Federal Court has expressed the view that the High Court's decision does not preclude common fund orders at the settlement stage or

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115 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.6]. See also *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [1], [135] and [178].

116 For instance at settlement or at the point of distribution of damages: see *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [79]. An early-stage common fund order has been described as a "slight misnomer", because the court gives an indication that it will make a common fund order with a particular funding commission at the conclusion of proceedings, but reserves the right to amend that rate: Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.8], quoting the submission from Clayton Utz (Clayton Utz *Submission to the Parliamentary Joint Committee on Corporations and Financial Services on Litigation Funding and Regulation of the Class Action Industry* (11 June 2020) at [41]). See also Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.7].

117 This example is taken from the common fund order made in *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd*: see Vince Morabito *An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments* (January 2019) at 17-18.

118 This example is taken from the common fund order made in *Kuterba v Sirtex Medical Ltd*: See Vince Morabito *An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments* (January 2019) at 18.

119 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.13]. See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191.

120 See Vince Morabito *An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments* (January 2019) at 15-20 (detailing 17 cases where the Federal Court made a common fund order between November 2016 and December 2018).

121 Nor does the Supreme Court of New South Wales have jurisdiction under s 183 of the Civil Procedure Act 2005 (NSW). See *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [3] per Kiefel CJ, Bell and Keane JJ. See also [125]–[128] per Nettle J and [135] and [146] per Gordon J.

following judgment, relying instead on the court's power to make orders with respect to the distribution of any money paid under a settlement.[122]

4.70 A common fund order has been sought in *Ross v Southern Response,* but the application was adjourned while the issue of whether the case could proceed on an opt-out basis was determined.[123] The Court of Appeal commented that it would be inappropriate to comment on the availability of a common fund order under HCR 4.24 given that the application remained to be determined in the High Court. However, it was confident that the High Court had the necessary tools to address any real unfairness that arose in this context, whether under the High Court Rules or through exercising its inherent powers.[124] The High Court declined an application by plaintiffs for the defendant to set aside 15 per cent of any settlement reached with an individual group member until their application for a common fund order was determined.[125]

4.71 Common fund orders are likely to have three key effects:

(a) Improving the economics of opt-out class actions for litigation funders.

(b) Court supervision of litigation funding commissions, which can directly lower funding commissions as well as incentivise competitive rates more generally.

(c) Fairness as between class members.

4.72 We discuss each of these below.

Improving the economics of opt-out class actions for funders

4.73 An opt-out class action may not be economic for a litigation funder without a mechanism such as a common fund order. A litigation funder will otherwise need to engage in book building to sign up class members to the litigation funding agreement.[126] Book building may be an expensive process, although this is not inevitably so.[127] In Australia, prior to common fund orders, the requirement to book build made it challenging to bring a funded class action where there were a large number of smaller value claims or it was difficult to ascertain the identities of class members.[128] It may be easier to book build in shareholder

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122 Federal Court of Australia Act 1976 (Cth), s 33V(2). See for example *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 at [49], *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 at [50]–[53], *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* [2020] FCA 461 at [31]. There have been some divergent decisions on this point: see *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [418]–[421].

123 See *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2454 (set-aside application) at [3], [10] and[23]–[24]. It appears the representative plaintiffs may now intend to seek a common fund order at the end of the proceeding and may also seek a funding equalisation order in the alternative: *Ross v Southern Response Earthquake Services Ltd* at [2021] NZHC 2454 (set-aside application) at [27]–[29].

124 *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [110].

125 *Ross v Southern Response Earthquake Services Ltd* at [2021] NZHC 2454 (set-aside application) at [4], [63] and [92]. The representative plaintiffs proposed that the funds set aside would be put into an interest-bearing escrow account, with no payment being made from the account unless and until approved by the Court following determination of the plaintiffs' common fund application.

126 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.39].

127 See *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [160]–[164] per Gordon J.

128 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.40].

class actions because class members can be identified through shareholder registries.[129] In Aotearoa New Zealand, our small population size may assist with identifying potential class members and alerting them to the litigation.

4.74 There is little incentive for class members to sign up to a litigation funding arrangement under an opt-out class action because it is not a prerequisite to participating in the class action and benefitting from the proceeds. Therefore, absent a mechanism such as a common fund order, we would expect litigation funders to prefer opt-in class actions, where signing up to litigation funding arrangements can be a requirement of the opt-in process.

4.75 Common fund orders will make opt-out class actions more economic for litigation funders because they will be paid a funding fee from all class members without having to incur the costs of book building.[130] The majority in *BMW v Brewster* did not see improving the economics of class actions for litigation funders as the Court's role:[131]

> To the extent that a CFO may allow a litigation funder to avoid the burden of the process of book building by enlisting the court's aid, there is no warrant to supplement the legislative scheme by judicial involvement to ease the commercial anxieties of litigation funders or to relieve them of the need to make their decisions as to whether a class action should be supported based on their own analysis of risk and reward.

4.76 The suggestion that book building was "wasted costs" was said to ignore the reality that class members would have to take action at some stage to obtain any payment they were entitled to.[132] In other words, an opt-out class action almost always has to convert to an opt-in class action at some point, because individual class members need to establish their individual entitlement to relief.[133]

4.77 A consequence of making opt-out class actions more economic for litigation funders is that more opt-out class actions will be brought, although there may still be circumstances where a litigation funder will prefer to bring a class action on an opt-in basis.[134] In Australia, the availability of common fund orders has led to an increase in 'open class actions' and a decrease in 'closed class actions'.[135] An increase in opt-out class actions may lead to a greater variety of class actions being brought, improving access to justice. Our Issues Paper discusses the ways in which opt-out class actions may facilitate access to justice.[136]

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129 See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.40] and [9.54].

130 See *Perera v GetSwift Ltd* [2018] FCA 732, (2018) 263 FCR 1 at [25] ("Rather than the economics of a class action being dictated by the size of sign-up, a common fund order allows an open class representative proceeding to be commenced without the necessity to build a book of group members who have bargained away part of the proceeds of their claim").

131 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [94] per Kiefel CJ, Bell and Keane JJ. See also at [126] per Nettle J and at [153]–[154] and [164] per Gordon J.

132 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [94] per Kiefel CJ, Bell and Keane JJ.

133 On this point, see the Issues Paper at [12.29].

134 An example might be a case with relatively small number of high value claims, where the identities of class members are readily known (for example, through a register of shareholders) and a high proportion of class members can be readily signed up. Bringing an opt-in proceeding would allow the time, expense and uncertainty of a common fund order to be avoided.

135 See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.38] and [9.111].

136 Issues Paper at [12.30]–[12.32].

Some submitters to the Australian Parliamentary Inquiry asserted that common fund orders had made consumer class actions viable as well as class actions on behalf of superannuation fund members.[137]

4.78 Removing the requirement for a litigation funder to book build could also encourage class actions to be commenced without sufficient investigation of whether there is interest among class members or full consideration of the merits and viability of a case.[138] It has also been argued that common fund orders may result in "windfall profits" for litigation funders, despite very few class members having signed up to the litigation funding arrangements.[139] The increased profitability of class actions due to common fund orders may also lead to an increase in competing class actions.[140]

Court supervision of litigation funding commission

4.79 A key feature of a common fund order is that the court will approve the litigation funding commission. This is important because a common fund order incurs obligations on class members who are not party to the funding agreement and may not even be aware of the class action. In *Money Max,* where the Federal Court first made a common fund order, the fact that class members' interests would be protected by judicial oversight of the funding commission was central to the Court's decision.[141] The Court provided a list of factors that were likely to be relevant when approving a reasonable funding rate but said these were ultimately a matter for the judge hearing the approval application.[142]

4.80 This feature of a common fund order raises the question of whether approving litigation funding commissions is within the court's institutional competence.[143] This is part of a much larger discussion about the role of the courts in regulating litigation funding, outlined in our Issues Paper.[144] To the extent courts have allowed common fund orders, this indicates an acceptance that it falls within their expertise.

4.81 Court approval of litigation funding rates through common fund orders can directly lead to lower commissions in opt-out class actions. In Australia, commission rates approved by courts at the settlement stage under a common fund order have ranged from 8.3 per cent to 30 per cent of the gross settlement sum, with a median rate of 21.9 per cent.[145]

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137 See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.47]–[9.48].

138 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.112].

139 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.82]–[9.86].

140 See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.93]–[9.95] and [9.113].

141 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [11], [79], [167].

142 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [80].

143 In *BMW Australia Ltd v Brewster,* one of the dissenting judges specifically rejected the argument that making a common fund order required the Court to embark on an enquiry which was beyond its institutional competence: *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [115] per Gageler J.

144 See Issues Paper, Chapter 23.

145 Vince Morabito *Submission to the Parliamentary Joint Committee on Corporations and Financial Services on Litigation Funding and Regulation of the Class Action Industry* (10 June 2020) at 2. This data is based on all of the common fund

This can be compared with a median commission of 30 per cent in funded class actions between 2013 and 2018.[146] Court oversight of litigation funding rates through common fund orders has been said to result in "heightened transparency" of funding fees and commissions.[147] There may also be an indirect effect on funding commissions if the availability of common fund orders leads to increased competition in the litigation funding market. In Australia, it has been suggested that common fund orders have incentivised more litigation funders to enter the litigation market, putting downwards pressure on commissions.[148]

Fairness between class members

4.82 A common fund order ensures fairness between class members and prevents class members from benefitting from a class action without contributing to the costs or 'free riding'. However, a funding equalisation order also provides this benefit and the plurality judgment in *BMW v Brewster* saw this as the preferable option:[149]

> The equitable spreading of the cost is, in fact, better achieved by the making of a FEO, which takes, as its starting point, the actual cost incurred in funding the litigation. While it must be accepted that the burden of the amounts that funded group members have agreed to pay to the funder under their agreements with the funder must be distributed fairly, a FEO is apt equitably to distribute those amounts whereas a CFO seeks to impose an additional cost by imposing new obligations on the unfunded group members.

4.83 The plurality judgment described a common fund order as ordering a "complex relationship" between class members and a litigation funder to be established in circumstances where class members would otherwise have had no relationship at all.[150]

Common fund orders for Aotearoa New Zealand?

4.84 We have not formed a preliminary view as to whether common fund orders and/or funding equalisation orders should be allowed in Aotearoa New Zealand. We think it would be desirable to have one of these options available to prevent the unfairness of only some class members having to fund the costs of an opt-out class action beneficial to all. It could also be possible to have both options available, although this may lead to unnecessary litigation and delay.[151] Our eventual recommendation on this issue will be informed by submitters' feedback, as well as our broader conclusions on litigation funding.

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orders made in federal class actions at the settlement stage from 27 October 2016 (the day after the *Money Max* decision) to 3 December 2019 (the day before the *BMW v Brewster* decision).

146 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 3.49 (table 3.7).

147 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.114]. It said this heightened transparency illustrated that "their returns are often unreasonable compared to the costs incurred or risks assumed".

148 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.61]–[9.64].

149 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [88] per Kiefel CJ, Bell and Keane JJ.

150 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [66] per Kiefel CJ, Bell and Keane JJ. See also [166] per Gordon J.

151 The Court envisaged that funding equalisation orders would be available as well as common fund orders in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [128]–[129].

4.85 If a common fund order or funding equalisation order is available, we think it should be expressly provided for in the legislative regime. The Australian experience shows that considerable uncertainty can result from relying on a court's general powers to provide for common fund orders. The Australian Parliamentary Inquiry and the Australian Law Reform Commission have recommended legislative clarity in this area.[152]

QUESTION

Q27 Do you support?

a. The court having an express power to make common fund orders; and/or

b. The court having an express power to make funding equalisation orders.

Appropriate stage for a common fund order

4.86 If common fund orders are allowed, there are several points in a proceeding at which they could be made. The issue of when an order should be made also applies to funding equalisation orders (although to a lesser extent since these orders are less likely to affect the viability of a class action).

Early stage of proceedings

4.87 A common fund order could be made at an early stage of the proceeding such as at certification, or shortly afterwards. The court could set the litigation funding commission at this stage, provide a provisional or maximum rate with the rate to be confirmed at a later point, or leave the rate entirely to a later stage of proceedings.

4.88 Making a common fund order at an early stage has the benefit of providing a litigation funder with more certainty as to funding arrangements, particularly if a rate or provisional rate is set. It also means that class members can be informed of the common fund order in the opt-out notice and can consider this when deciding whether to opt out of proceedings.[153] There is also an argument that litigation risk is more accurately assessed at the start of a proceeding, without the risk of hindsight bias.[154]

4.89 However, it may be difficult for the court to assess a fair rate of remuneration at the outset of proceedings, when the total legal costs of bringing the proceeding and the amount recouped by class members is unknown. In *BMW v Brewster,* the plurality commented that if the court attempts to fix a rate of remuneration at the outset of proceedings, even provisionally, this necessarily engages the court in a "speculative exercise".[155] Their judgment cites an earlier authority that asking whether the bargain

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152 See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.119]–[9.123] (Recommendation 7); and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.35].

153 See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [13].

154 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [115] per Gageler J and [221]–[222] per Edelman J.

155 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [67].

struck between a litigation funder and a litigant is "fair" involves an unfounded assumption that "there is some ascertainable objective standard against which fairness is to be measured".[156] The plurality therefore considered that the conclusion of the proceeding was the appropriate stage to make orders regarding sharing the cost burden of the litigation.[157]

4.90 In *Money Max,* the Court noted that concerns about making a common fund order at an early stage were dealt with by the Court approving the rate at a later stage when it had better information. The Court also noted that other possible ways of addressing this issue were allowing a commission rate on a sliding scale or setting a cap on the aggregate commission.[158]

4.91 If a common fund order can be made at an early stage, we think it would be important for the court to have some flexibility to ensure that the funding commission is fair and reasonable to both class members and the litigation funder, in light of the legal costs spent and the amount recovered by class members.

After the common issues have been determined

4.92 In *Ross v Southern Response*, the Court of Appeal made obiter comments that there was merit in leaving the question of whether a common fund order was desirable until after stage one had been determined. This would avoid the time and cost of litigating about a common fund order if the proceeding was unsuccessful at stage one. If the proceedings were successful at stage one, the issue could be dealt with on a more informed basis.[159]

4.93 We note also that a class action may need to convert to opt-in at stage two so that individual class members can establish their entitlement to a remedy. If this stage two opt-in process included a requirement to sign up to litigation funding arrangements, a common fund order would not be necessary.

At a late stage of proceedings

4.94 A final option is for a common fund order to be made at a late stage of proceedings, such as at settlement or before damages are to be distributed. At this stage, the cost of the litigation as well as the benefit to class members is clear.[160]

4.95 A disadvantage is that it does not provide litigation funders or class members with an early indication of whether a common fund order will be made and what the rate is likely to be. A class member who had this information earlier in the process may have exercised their right to opt out of the proceeding (although as we discuss in Chapter 6, one option would be to provide another opportunity to opt out at settlement.)

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156 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [67] citing *Campbells Cash and Carry Pty v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [92].

157 *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [67]–[68] per Kiefel CJ, Bell and Keane JJ.

158 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [146]–[147].

159 *Ross v Southern Response* [2019] NZCA 431, (2019) 25 PRNZ 33 at [118].

160 See *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [68] per Kiefel CJ, Bell and Keane JJ.

QUESTION

Q28 If common fund orders are available, when in the proceeding should they be made?

a. At an early stage of the proceeding, with the rate set at this stage.

b. At an early stage of the proceeding, with the court providing a provisional or maximum rate at this stage and setting the final rate at a later stage.

c. After the common issues are determined.

d. At a late stage of proceedings, such as at settlement or before damages are distributed.

e. The court should have discretion in an individual case.

CHAPTER 5

Judgments, damages and appeals

IN THIS CHAPTER, WE CONSIDER:

In this chapter, we discuss several issues associated with court judgments in class actions:

- The binding effect of class action judgments on class members.
- What powers the court should have to order damages in a class action.
- The appeal rights that should exist in a class action context.

CLASS ACTION JUDGMENTS

5.1 Generally, judgments are only binding between the parties.[1] However, a key feature of a class action is that the court's decision on the common issues is also binding on class members.[2]

5.2 We think it is important for a class actions regime to provide clarity on the extent to which a court's judgment in a class action will bind class members and preclude them from bringing subsequent proceedings. A key issue is whether the binding effect should be limited to the common issues and relief determined or whether it should also preclude a class member from bringing later proceedings on an issue that could have been raised in the common issues hearing but was not.

5.3 In considering these issues, we set out:

(a) The general principles governing the binding effect of judgments.

(b) How these principles have been applied to group litigation in Aotearoa New Zealand and overseas.

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1 *Cridge v Studorp Ltd* [2016] NZHC 2451 at [32].

2 See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 3 drawing on reports by the Australian Law Reform Commission, the South African Law Reform Commission, the Ontario Law Reform Commission and the Alberta Law Reform Commission. See also the Issues Paper at [2.17].

(c) Our view on the extent to which a class action judgment should bind class members, including a draft provision.

The binding effect of a judgment – general principles

5.4 Several doctrines are relevant to the binding effect of judgments.

5.5 First, there is the doctrine of *res judicata* (which means a matter judged). This doctrine precludes access to the courts where a litigant seeks to reopen a dispute that has already been determined.[3] It "serves the public interest in finality in litigation and upholds the principle that a party should not be vexed twice in the same matter".[4] It only applies between the parties.[5]

5.6 The courts also have a general and inherent power to stay a proceeding if it is an abuse of process.[6] The power is to protect against conduct that, left unchecked, "would strike at the public confidence in the Court's processes".[7] Abuse of process can take a number of forms, but it is generally concerned with frivolous claims brought for an improper purpose or claims which improperly relitigate matters already determined.[8] Accordingly, as with *res judicata*, the principles of finality of litigation can underlie abuse of process.[9]

5.7 Finally, there is the rule in *Henderson v Henderson*.[10] Under this rule, unless there are special circumstances, parties are required to bring forward their whole case and will be prevented from litigating issues that should have been raised in previous litigation.[11] There is some English authority for the proposition that the *Henderson v Henderson* rule is not concerned with what should have been *raised* in earlier proceedings, but what should have been *dealt with* in earlier proceedings.[12] However this interpretation has attracted criticism and its application has been narrowed in other cases.[13]

5.8 The application of both r*es judicata* and the rule in *Henderson v Henderson* to class members, who are not parties to the litigation, requires consideration. We discuss below

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3 *Craig v Stringer* [2020] NZCA 260 at [16] and [23]. There are two 'species' of *res judicata*: it prevents a party from re-litigating the same cause of action in a subsequent proceeding (cause of action estoppel); and prevents a party from relitigating an issue that was essential to the determination of the claim, such that the earlier judgment could not stand without it (issue estoppel).

4 *Craig v Stringer* [2020] NZCA 260 at [16] citing *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [58].

5 *Cridge v Studorp Ltd* [2016] NZHC 2451 at [32]: "judgments are binding only between the parties to them".

6 See Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.1.05]; and High Court Rules 2016, r 15.1.

7 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J.

8 *Craig v Stringer* [2020] NZCA 260 at [31]. See also Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.1.05(2)(a)] citing *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC) at 586 (bringing substantively the same proceeding "in a different garb").

9 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [59].

10 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) at 115. For its application in Aotearoa New Zealand, see for example *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 434, (2017) 15 NZELR 398 at [49]–[50]; and *Craig v Stringer* [2020] NZCA 260 at [17]. See also *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [59].

11 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [59]. See also *Craig v Stringer* [2020] NZCA 260 at [17].

12 *Barrow v Bankside Members Agency* [1996] 1 WLR 257 (CA) at 268.

13 See Rachael Mulheron "Some Comparative Observations on *Res Judicata* for Canada's Newest Class Actions Regime" (2004) 30 Man LJ 171 at 187–190, referring at 188 to analysis in P R Barnett *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, Oxford 2001) at 207. See also *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365 (CA) at 374: "Barrow's case was unusual because the Lloyd's litigation with its initial group action was itself unusual".

the rationale for applying the doctrine of *res judicata* to class members and whether the rule in *Henderson v Henderson* should apply to class members.[14] We do not further consider abuse of process, as its application is not limited to the parties, and we think the court should retain its inherent power to stay a subsequent claim of a class member if it considers the claim to be an abuse of process.

Res judicata and class members

5.9 In a representative action, class members are bound by the judgment on the common issues. The High Court has observed that one benefit of a representative action is the creation of formal estoppels on class members.[15] In *Saunders v Houghton*, the Court of Appeal considered that when a representative action involving a damages claim was brought, it was proper to obtain a declaration of liability, "thus establishing *res judicata* on the common issue", followed by individual claims to establish individual damage.[16]

5.10 In other jurisdictions, legislation provides that class action judgments are binding on class members.[17] The Ontario Law Reform Commission (OLRC) also gave in depth consideration to *res judicata* in its 1982 report on class actions. It considered the arguments in favour of applying *res judicata* to class members were persuasive, observing that the "very merit or utility of a class action lies in the *res judicata* effect of its judgment on the common questions".[18] If a class judgment did not bind class members, the objective of efficiency would not be achieved.[19]

The rule in *Henderson v Henderson* and class members

5.11 A key issue to consider is whether the rule in *Henderson v Henderson* should apply to class members. In other words, should a class member be precluded from bringing a subsequent proceeding on a point which could have been raised in the class action? It does not appear that this issue has been considered in Aotearoa New Zealand with

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14 There is some uncertainty as to whether the rule in *Henderson v Henderson* is better characterised as an abuse of process or part of *res judicata*: see *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 [59]; and *Craig v Stringer* [2020] NZCA 260 at [17]–[19]. We do not attempt to resolve this uncertainty, as it is the application of the principle underpinning the rule (rather than its characterisation) that needs to be considered in a class actions regime.

15 *Cridge v Studorp Ltd* [2016] NZHC 2451 at [71]. The decision granting the representative order was upheld on appeal. The Court of Appeal commented "[a] test case would involve the same work and judicial resources as a lead representative case, but without the tangible benefit of generating findings that are binding on all": *Cridge v Studorp Ltd* [2017] NZCA 376 at [39]. More recently, see *Cridge v Studorp Ltd* [2021] NZHC 2077 at [5(b)] where the High Court observed group members must accept the benefits of any applicable findings or any adverse consequences if unsuccessful.

16 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [14], approving a statement from *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442 (HC) at 446.

17 See for example Class Proceeding Act SO 1992 c 6, s 27(3). Similar provisions exist elsewhere in Canada. In Australia, see s 33ZB of the Supreme Court Act 1986 (Vic) which provides a judgment "binds all persons who are such group members at the time the time the judgment is given". The judgment provisions in New South Wales, Queensland, Tasmania and the Federal Court are similar. We have not addressed the United States. While their *res judicata* equivalents (claim preclusion and issue preclusion) are based on similar policy objectives as *res judicata* they do not appear to be sufficiently similar.

18 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 766.

19 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 766.

respect to group members in representative actions under HCR 4.24. However, the issue has arisen in Ontario and Australia.

Ontario

5.12 The OLRC concluded that the binding effect of a class action judgment on the common issues should be restricted to the relief that was actually sought and determined.[20] It did not consider that class members should be precluded from bringing subsequent individual litigation which claimed relief that might have been granted in the class action, but was not sought by the representative plaintiff.[21] Accordingly, the OLRC recommended a statutory provision to the effect that a class action judgment should bind class members "to the extent only that the judgment determines the questions common to the class that are defined in the order certifying the actions as a class action and that relate to the claim described and the relief specified in the order".[22]

5.13 Section 27(3) of Ontario's Class Proceedings Act 1992 reflects this recommendation and has the effect that the rule in *Henderson v Henderson* does not apply to class members. The section was applied by the Ontario Court of Justice in *Allan v CIBC Trust Corporation*.[23] In that case, there were two consecutive class actions relating to the same set of facts and with overlapping class members. In the second class action, the defendant argued unsuccessfully that the claim should have been brought in the first class action. The Court explained that section 27(3) "clearly limits the binding effect of the judgment on the common issues to the common issues described in the certification order".[24]

Australia

5.14 In Australia, it has also been held that a class actions judgment is only binding with respect to the common issues raised. In *Timbercorp Finance Pty Ltd (in liq) v Collins*, the High Court of Australia considered the application of section 33ZB of the Supreme Court Act 1986 (Vic) to class members.[25] This section provides that a class action judgment "binds all persons who are such group members at the time the judgment is given". Unlike Ontario, section 33ZB does not specify that the class action judgment only binds class members on the common issues and relief.

5.15 Timbercorp Finance had argued the defendants (who were class members in an earlier proceeding) were precluded from bringing certain defences because they should have

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20 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 766.

21 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 767. In reaching this conclusion, it was primarily concerned with the effect of the "rule against splitting" at 755. However, see Rachael Mulheron "Some Comparative Observations on *Res Judicata* for Canada's Newest Class Actions Regime" (2004) 30 Man LJ 171 at 185–186, where she argues that the rule against splitting is different to *Henderson v Henderson* as splitting can cover recovery for different types of damages, where as *Henderson v Henderson* can cover a different theory of liability in respect of the *same* damages in the previous claim.

22 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 767.

23 *Allan v CIBC Trust Corporation* (1998) 39 OR (3d) 675 (ONCJ).

24 *Allan v CIBC Trust Corporation* (1998) 39 OR (3d) 675 (ONCJ) at 684.

25 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44.

been raised in the earlier class action.[26] This was rejected by the Court, which concluded that the statute created its own kind of statutory estoppel and that the representative plaintiff only represents the group members with respect to the common interests.[27] Therefore, class members are bound only with respect to the common claims that are the subject of the representative proceeding, but not with respect to their individual claims.[28] This is so "regardless of whether they should have been raised in the group proceeding".[29] The Court further observed that "[i]t would be quite unjust for a person whose legal interests stood to benefit by making a legal claim to be precluded if they did not have some measure of control of the proceedings in question".[30]

What should the binding effect of a class actions judgment be on class members?

5.16 We think some form of *res judicata* should apply to class members. If a class actions judgment did not bind class members, the common issues would not be resolved, and the efficiencies of a class action would not be achieved.[31] We also think any class actions regime should seek to uphold, to the extent possible, the policy objective that "there should be finality in litigation".[32]

5.17 At the same time, we think that any provision needs to safeguard the interests of class members, who have little control over the class action and may not even be aware of it (in an opt-out class action).

5.18 Accordingly, we consider a class actions judgment on the common issues should only bind class members with respect to those common issues (including relief). A class member should not be precluded from bringing subsequent proceedings about issues which were not raised in the class action, even if they could have been. We acknowledge this means the defendant, despite likely facing a large and complex claim, may not always know the full extent of their liability in one proceeding.[33] However, given class members' lack of control over the way a class action is run, we think it would be unfair for a class member to be bound by the rule in *Henderson v Henderson*. This largely aligns with the approach taken in Ontario and Australia, which we discussed above.

5.19 Our view is reflected in the draft provision below. In developing the provision, we have considered the provisions in Ontario, British Columbia and Victoria.[34] We think the

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26 The argument was based on (in the alternative) *Ashun* estoppel and abuse of process. *Ashun* estoppel is the Australian equivalent of *Henderson v Henderson*. The High Court in *Timbercorp* explained that an "*Ashun* estoppel" is also referred to as "the extended principle" in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) and will preclude the assertion of a claim or of an issue of law or fact if the claim or issue was so connected to the subject matter of the first proceeding as to make it unreasonable, in the context of the first proceeding, for the claim or issue not to have been made or raised in it: *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 at [27] and fn 13.

27 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 at [49] and [52].

28 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 at [53].

29 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 at [53].

30 *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 at [54].

31 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 766.

32 *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 434, (2017) 15 NZELR 398 at [50] quoting *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at 31 per Lord Bingham.

33 See discussion in Rachael Mulheron "Some Comparative Observations on *Res Judicata* for Canada's Newest Class Actions Regime" (2004) 30 Man LJ 171 at 187–194.

34 Class Proceedings Act SO 1992 c 6 (Ontario), s 27; Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 26; and Supreme Court Act 1986 (Vic), s 33ZB.

provisions in Ontario and British Columbia provide a clearer model than Victoria, as these sections expressly state the binding effect of the judgment is limited to the common issues and relief.

Draft provision on the binding effect of judgments in class actions

5 Effect of judgment on common issue

(1) A judgment on a common issue binds every class member, but only to the extent that the judgment determines a common issue that—

(a) is set out in the certification order; and

(b) relates to a claim described in the certification order; and

(c) relates to relief sought by class members as stated in the certification order.

(2) A judgment on a common issue is not binding between a party to the class action proceeding and—

(a) a person who was eligible to opt in to the proceeding but did not do so:

(b) a person who has opted out of the proceeding.

QUESTION

Q29 Do you agree with our draft provision on the binding effect of a class actions judgment? If not, how should it be amended?

DAMAGES IN CLASS ACTIONS

5.20 There are several potential ways of assessing damages in a class action. The court could determine the amount due to each class member on an individual basis, as it does in ordinary litigation. Because awarding damages on an individual basis to class members may be a lengthy and difficult exercise, particularly if the class is large, overseas class actions regimes have developed alternative means of assessing damages. One method is to award damages on an aggregate basis, with a formula or other method to allocate individual entitlements. Another method is to award the damages to an organisation closely associated with the claim, which is known as a cy-près award.[35] We discuss each of these forms of damages below and also provide a draft provision.

[35] A cy-près damages order involves money being paid to an organisation or charity associated with the claim in a situation where distributing compensation to individual class members is impossible or impracticable.

Individual Damages

5.21 Individual assessment of damages is likely to be appropriate where the class is small and/or there is a simple method available for calculating damages. Individual assessment of damages may also be necessary where individual issues must be determined to address quantum, including contributory negligence, mitigation, and the extent of the damage.[36] Courts have a power to award individual damages to class members in the United States,[37] Australia[38] and Canada,[39] and in the United Kingdom Competition Appeal Tribunal.[40]

5.22 We consider the class actions regime should expressly empower the courts to make individual awards of damages. As this is the usual basis for awarding damages, we have not developed a draft provision for consultation.

5.23 As we discuss in Chapter 4, there are various approaches which could make it practical for the court to determine individual issues, including damages.[41]

Aggregate damages

5.24 An alternative to individual damages is to enable the court to assess damages payable to the class on an aggregate basis. This may occur by a global or lump sum award against the defendant, or by applying a formula to class members' claims to determine individual entitlements. In either scenario, class members are not required to individually prove their loss or damage.[42] Aggregate damages are available in class action proceedings in

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36 Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 94.

37 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:4.

38 Federal Court of Australia Act 1976 (Cth), s 33Z(1)(e). See equivalent provisions in other Australian jurisdictions: Civil Procedure Act 2005 (NSW), s 177; Supreme Court Act 1986 (Vic), s 33Z; Civil Proceedings Act 2011 (Qld), s 103V; and Supreme Court Civil Procedure Act 1932 (Tas), s 86. Note the Rules Committee also proposed a similar term in its Class Actions Bill, cl 12(2)(d): Class Action Bill (Parliamentary Counsel Office, PCO 8247/2.13).

39 Class Proceedings Act SO 1992 c 6, s 25.

40 The United Kingdom Competition Appeal Tribunal may direct quantification of individual damages to proceed as individual issues where determination by sub-class is not possible: The Competition Appeal Tribunal Rules 2015 (UK), r 88(2)(c).

41 The assessment of individual damages may require powers to permit an individual to appear and take control of a particular issue: See Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at 75 and 94. These recommendations can be seen in Federal Court of Australia Act 1976 (Cth), ss 33Q and 33R and equivalent provisions. The Rules Committee proposed a provision allowing the court to "direct how class members are to establish their entitlements and resolve any disputes": Class Actions Bill (Parliamentary Counsel Office, PCO 8247/2.13), cl 12(2)(f).

42 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 407–408.

Australia,[43] Canada,[44] the United States,[45] and the United Kingdom Competition Appeal Tribunal.[46] However, jurisdictions differ as to the basis on which they may be awarded.

5.25 In Australia the court can award aggregate damages if "a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment".[47] Case law indicates this should not allow orders which would be insufficient to enable group members to recover their full damages.[48]

5.26 Aggregate damages are available in Canada where the entitlement to damages is asserted on behalf of some or all of the class members, no further issues must be determined to establish the amount of the defendant's liability,[49] and the aggregate damages can be reasonably determined without proof by individual class members.[50] In Canada, most of the common law provinces allow statistical evidence to be admitted for the purposes of determining issues relating to the amount or distribution of a damages in a class action.[51]

5.27 In the United States, courts generally allow representative plaintiffs to use an aggregate assessment of damages where the assessment is based on a reasonable methodology

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43 Federal Court of Australia Act 1976 (Cth), s 33Z(1)(f).

44 See Federal Courts Rules SOR/98-106, r 334.28(1); Class Proceedings Act SO 1992 c 6 (Ontario), s 24; Code of Civil Procedure RSQ c C-25.01 (Quebec), art 595; Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 29; Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 30; The Class Proceedings Act SM 2002 c C-130 (Manitoba), s 29; Class Actions Act SNL 2001 c C-18.1 (Newfoundland and Labrador), s 29; Class Proceedings Act SNS 2007 c 28 (Nova Scotia), s 32; Class Proceedings Act 2011 RSNB c 125 (New Brunswick), s 31.

45 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:2.

46 "Aggregate award of damages" is defined as an award of damages made by the Tribunal in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of each represented person: The Competition Appeal Tribunal Rules 2015 (UK), s 73(2) and Competition Act 1998 (UK), s 47C(2).

47 Federal Court of Australia Act 1976 (Cth), s 33Z(3). Note this section is subject to section 33V which provides that a class action may only be settled with court approval and subject to any orders "as are just with respect to the distribution of any money paid under a settlement or paid into the Court". We note also that the Rules Committee's Class Actions Bill would permit the court to "award damages in an aggregate amount, without specifying the amounts to be allocated to individuals (but only if it is satisfied that a reasonably accurate assessment can be made of the total amount to which class members will be entitled under the judgment)": Class Actions Bill (Parliamentary Counsel Office, PCO 8247/2.13), cl 12(2)(e).

48 *Schutt Flying Academy (Australia Pty Ltd) v Mobil Oil Australia Ltd* [2000] VSCA 103, (2000) 1 VR 545 at [36] (per Ormiston JA).

49 The Ontario Court of Appeal stated this requirement can be satisfied by showing that "potential liability" can be determined on a class-wide basis: *Markson v MBNA Canada Bank* [2007] ONCA 334, (2007) 282 DLR (4th) 385 at [48]. Potential liability will exist where the common issues are "capable of establishing the defendant's monetary liability to at least some members of the class": *Fulawka v Bank of Nova Scotia* [2012] ONCA 443, (2012) 325 DLR (4th) 1 at [124].

50 Class Proceedings Act 1992 SO c 6 (Ontario), s 24(1)(c); Code of Civil Procedure RSQ c C-25.01 (Quebec), art 595 ; Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 29(1)(c); Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 30(1)(c); Class Proceedings Act SM 2002 c C-130 (Manitoba), s 29(1)(c); The Class Actions Act SNL 2001 c C-18 (Newfoundland and Labrador), s 29(1)(c); Class Proceedings Act SNS 2007 c 28 (Nova Scotia), s 32(1)(c); Class Proceedings Act 2011 NSNB c 125 (New Brunswick), s 31(1)(c).

51 See for example Class Proceedings Act SO 1992 c 6 (Ontario), s 23(1). Note the a party seeking to introduce statistical evidence must give reasonable notice to the other parties. The person who supervised the preparation of the statistical information may be required to be available for cross-examination and documents relied upon may need to be produced: Class Proceedings Act SO 1992 c 6 (Ontario), s 23(3)–(4).

and the individual damage calculations that follow can be made according to a common methodology.[52]

5.28 There is no specific threshold for determining whether aggregate damages are available in the United Kingdom Competition Appeal Tribunal, but aggregate damages are "likely to be more suitable where its calculation can be made without information from class members".[53] The United Kingdom Supreme Court has noted that "[a] central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss".[54] Where it is not possible to make an aggregate award of damages for the entire class, the Tribunal may order aggregate damages on a sub-class basis.[55]

5.29 Our view is that aggregate damages should be available for class actions in Aotearoa New Zealand. We think this would be consistent with the objectives of improving access to justice and managing multiple claims in an efficient way. While assessing damages on an individual basis may be feasible in some cases, in other cases it could be slow and inefficient.[56] An aggregate award of damages can also ensure that a class action achieves finality for all parties, as after such an award the defendant's liability will have been fully and finally determined.[57]

5.30 We consider that, as in Australia, an award of aggregate damages should only be permitted where "a reasonably accurate assessment" of the total amount of damages owed to class members can be made. This is the approach taken in Australia and was the approach preferred by the Rules Committee in its 2009 draft Class Actions Bill.[58] The reference to a "reasonably accurate" assessment acknowledges that absolute precision may be impossible, particularly in an opt-out class action if an aggregate award is made without knowing the number and identity of all class members.[59] While a precise assessment of damages owed to class members may not be possible, the court would still need to be satisfied there is a sufficient basis for calculating aggregate damages.

5.31 We think aggregate damages should only be available where no further issues must be determined to establish the amount of the defendant's liability.[60] If proof of harm is

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52 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12.2.

53 Competition Appeal Tribunal *Guide to Proceedings* 2015 at [6.78]. For instance, "where the defendant's records are sufficient, or where there is a large class with largely identical individual claims".

54 *Mastercard v Merricks* [2020] UKSC 51, [2021] 3 All ER 285 at [77] per Lord Briggs SCJ.

55 Competition Appeal Tribunal *Guide to Proceedings* 2015 at [6.79].

56 See Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [227]; and Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 411.

57 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 412.

58 Federal Court of Australia Act 1976 (Cth), s 33Z(3); Class Actions Bill (Parliamentary Counsel Office, PCO 8247/2.13), cl 12(2)(e).

59 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 412-413.

60 See Class Proceedings Act SO 1992 c6 (Ontario), s 24(1)(b).

required to make out a particular cause of action, class members should not be able to avoid this element by relying on aggregate damages.[61]

5.32 Our draft provision on aggregate damages incorporates these two requirements by specifying that an aggregate damages award may only be made if:[62]

(a) The court is satisfied it can make a reasonably accurate assessment of the total amount to which class members will be entitled under the judgment; and

(b) No question of fact or law remains to be determined to establish the amount of the defendant's liability other than questions relating to assessment of monetary relief.

Distribution of damages

5.33 After making an aggregate damages award, the court will have to determine how this award will be distributed to class members. In other class actions regimes, courts generally have a wide discretion to determine the appropriate method of distribution. For instance, there is a general requirement for Australian courts to "make provision for the payment or distribution of money to [class] members".[63] Similarly, Canadian courts are empowered to make any order they consider "appropriate" for distribution.[64] The United Kingdom Competition Appeal Tribunal is required to make an order for any damages to be paid to a class representative or "any other person as the Tribunal thinks fit".[65]

5.34 There are a number of possible methods for distributing awards of damages in class actions, including:

(a) Defendant distribution: In certain circumstances it may be appropriate for the court to order the defendant to distribute damages to class members directly. An example is where the defendant can ascertain the identity and entitlement of class members from its records.[66] Direct distribution can take place in Australia,[67] Canada,[68] and the United States.[69]

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61 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 418-419. See also Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 555.

62 See our draft legislation, cl 11(1).

63 Federal Court of Australia Act 1976 (Cth), s 33Z(2). Note s 33ZA which permits the creation of a fund for this purpose clarifies it does not limit the operation of s 33Z(2): see s 33ZA(1).

64 See for example Class Proceedings Act 1992 SO c 6 (Ontario), s 26.

65 The Competition Appeal Tribunal Rules 2015 (UK), r 93.

66 See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 423-424. The ALRC noted that where restitution of overcharges is required, it will not be necessary to establish a fund: Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988), at [225].

67 See for example Federal Court of Australia Act 1976 (Cth), s 33Z(2). See also Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 423.

68 See for example Class Proceedings Act 1992 SO c 6 (Ontario), s 26(2)(a).

69 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:15.

(b) **Use of a fund:** In Australia,[70] Canada[71] and the United States,[72] the court can direct that a fund be established for the purposes of distributing damages to class members.

(c) **Distribution by a third party:** Canadian common law regimes also permit a non-party, such as an administrator, to distribute any damages to class members.[73] The United Kingdom Competition Appeal Tribunal may also order distribution through a third party.[74] The Australian regimes do not expressly provide for such distribution by a third party.

5.35 We consider that ensuring court oversight of the distribution process is an important safeguard to ensure proceedings are effectively concluded. Our draft provision on aggregate monetary relief therefore includes powers relating to distribution.

5.36 Like our comparator jurisdictions, we consider that the court should have a wide discretion as to the appropriate method of distributing damages to class members. In some cases, distribution will be relatively straightforward, for example, if there is a share register or customer database that can be used to facilitate distribution. Distribution in other cases will be more complex. Because appropriate distribution methods will depend on the circumstances of the particular case, we have proposed that the court should be able to make any orders it considers appropriate with respect to distribution.[75] Our draft provision provides some examples of orders that may be appropriate, such as orders as to how a class member must establish their entitlement to relief and orders as to who will pay the costs of distribution.

Unclaimed damages

5.37 It may not always be possible to distribute the entire sum of an aggregate award of damages to class members. In some cases, not all class members will take part in a claims process, leaving unclaimed damages.

5.38 Overseas jurisdictions use a variety of different approaches for distributing unclaimed damages:

(a) **Pro-rata distribution to class members:** Unclaimed damages could be redistributed between the class members who successfully make a claim for damages. This is possible in the United States.[76]

(b) **Contribution to legal costs.** Unclaimed damages could be used to cover some of the legal costs incurred by the representative plaintiff in bringing the proceeding. For instance, the United Kingdom Competition Appeal Tribunal can order unclaimed

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70 See for example Federal Court of Australia Act 1976 (Cth), s 33ZA. Note the Rules Committee also made a similar proposal in its Class Actions Bill and Rules: see Class Actions Bill (Parliamentary Counsel Office, PCO 8247/2.13), schedule 1, r 34.22(2).

71 See for example Class Proceedings Act 1992 SO c 6 (Ontario), s 26(2)(b).

72 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:16.

73 See for example Class Proceeding Act 1992 SO c6, s 26(2)(c).

74 The Competition Appeal Tribunal Rules 2015 (UK), r 93(1)(b).

75 See our draft legislation, cl 11(3).

76 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:30.

damages be paid to the representative plaintiff to cover costs incurred.[77] In funded class actions, however, those costs would usually be met by the litigation funder.

(c) **Cy-près distribution:**[78] In most Canadian common law provinces, courts may make cy-près orders in respect of unclaimed aggregate damages.[79] The United Kingdom Competition Appeal Tribunal may order unclaimed damages to be paid to a designated charity, currently the Access to Justice Foundation.[80]

(d) **Reversion to the defendant:** Unclaimed damages could revert to the defendant. This is the default approach in Ontario,[81] and is also permitted in the United States.[82]

(e) **Forfeit to the Government**: In one Canadian province the court may order unclaimed damages to be forfeited to the Government.[83] This is also possible in the United States.[84]

5.39 As with distribution generally, we think the court should retain discretion to make any orders it considers appropriate for managing unclaimed damages. We have therefore proposed that the court's power to make orders with respect to distribution should include making orders on the distribution of unclaimed damages.[85] We think approaches which are consistent with the objective of access to justice for class members are preferable and so we think pro-rata distribution to class members will generally be preferable to damages reverting to the defendant.

QUESTION

Q30 Do you agree that aggregate damages should be allowed in class actions?

Cy-près damages

5.40 In some jurisdictions, damages may be ordered on a 'cy-près' basis. Cy-près is an abbreviation of the French *cy près comme* which means 'as near as possible'.[86] A cy-près damages order involves money being paid to an organisation or charity associated with the claim in a situation where distributing compensation to individual class members is impossible or impracticable. This could be because it is difficult to identify class members,

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77 The Competition Appeal Tribunal Rules 2015 (UK), r 93(4). Note where exercising this discretion the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session: r 93(5).

78 We discuss cy-près damages later in this chapter.

79 See for example Class Proceedings Act 2002 SNL c C-18.1 (Newfoundland and Labrador), s 34.

80 A charity may be designated by the Lord Chancellor, Competition Act 1998 (UK), s 47C(5).

81 Class Proceedings Act 1992 SO c 6 (Ontario), s 26(10).

82 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:28.

83 Class Actions Act 2004 SNL c C-18.1 (Newfoundland and Labrador), s 34(5)(b).

84 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:31.

85 See our draft legislation, cl 11(3)(d).

86 See Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood 2018) at [26.10].

or the small size of individual damages awards means the costs of distribution would be disproportionate. Cy-près damages therefore attempt to achieve a result 'as near as possible' to directly compensating the plaintiffs.[87] Full cy-près damages involve the entire sum of damages being paid to an organisation rather than to individual class members. Alternatively, a cy-près order could be limited to distributing unclaimed damages.

5.41 Full cy-près damages are not universally available in overseas class actions regimes. There is no express power to award full cy-près damages in Australian class actions legislation,[88] or in the United Kingdom Competition Appeal Tribunal.

5.42 In Canada, the courts may order cy-près distribution of aggregate damages where the award cannot be economically distributed to individual class members.[89] In the United States, courts have allowed damages to be awarded on a cy-près basis where "it is difficult or impossible to identify the persons to whom damages should be assigned or distributed".[90] Jurisdictions have been more willing to allow cy-près distribution of unclaimed damages, as we discuss below.

Should full cy-près damages be available?

5.43 A key rationale for cy-près damages is to fulfil the objective of deterrence by ensuring the defendant pays the full cost of any harm they have caused. Both Canada and the United States, which allow full cy-près damages, have deterrence as an objective of their class actions regimes. As we explain in the Introduction, we consider that deterrence is not an appropriate objective for class actions in Aotearoa New Zealand. Therefore, if full cy-près damages are to be allowed, they would need to be justified on the basis of the objectives of improving access to justice or manage multiple claims in an efficient way. The Australian Law Reform Commission (ALRC) recommended against measures that redirect unclaimed aggregate damages in alternative ways (including cy-près), noting that the Australian class action procedure was not intended "to penalise … or to deter behaviour to any greater extent than provided for under the existing law".[91]

5.44 In our Issues Paper we explained that substantive access to justice includes the extent to which class members are compensated through class actions.[92] We think that cy-près awards can provide indirect benefits to class members if there is a close nexus between

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87 For instance, in a consumer class action, a cy-près damages award might be used to distribute unclaimed money to a consumer rights organisation.

88 Federal Court of Australia Act 1976 (Cth), s 33M (and equivalent provisions) provides a significant hurdle as it enables decertification where "the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts". Some have called for an express power, see Peter Kenneth Cashman and Amelia Simpson Class Action Remedies: Cy-près; 'An Imperfect Solution to an Impossible Problem' (University of New South Wales Law Research Series, Research Paper #6, November 2020).

89 Class Proceedings Act 1992 SO c 6 (Ontario), s 27.2. See also the discussion in Jasminka Kalajdzic *Class Actions In Canada: The Promise and Reality of Access to Justice* (2018, UBC Press, Vancouver) at 120.

90 *Mace v Van Ru Credit Corp* 109 F3d 338 (7th Cir 1997) at 345. At least six circuits have approved such 'full' cy-près outcomes and no court has definitely rejected such an approach: William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:26.

91 Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988), at [239], [236]–[240].

92 Issues Paper at [5.24].

the beneficiary of the funds and the class claims.[93] However, the access to justice objectives of a class actions regime would be better met by direct compensation of class members. Accordingly, we have reached the view that cy-près orders should be available, but only where direct compensation of class members is not feasible. Our draft provision would only allow a cy-près award where it is not practicable or possible for monetary relief to be distributed to individual class members.[94] This will ensure that while such awards are expressly permitted, they are only used where strictly necessary.[95]

5.45 It will also be important to identify how effectively any cy-près award will indirectly compensate class members. Our draft provision requires a cy-près award to be paid to an eligible charity or organisation, which will usually be an organisation whose activities are related to the class action and are likely to directly or indirectly benefit class members.[96] For instance, in a successful class action for misleading advertising in relation to a consumer product, it may be appropriate to award the money to a consumer advocacy organisation. We recognise that in some cases, it will be difficult to find a charity or organisation whose activities align with the class action claims. Therefore, we think a particular organisation could be specified in regulations as an eligible charity or organisation.[97] We envisage this would be a charity or organisation that is associated with improving access to justice.[98]

QUESTION

Q31 Should the court be able to order cy-près damages and if so, under what circumstances?

Draft provisions on aggregate and cy-près damages

5.46 We set out below our draft provisions on aggregate damages and cy-près damages. As we note above, we have not included a draft provision on individual damages since this is the conventional approach to damages.

5.47 Our draft provision on aggregate awards uses the term "monetary relief" rather than "damages".[99] One academic has observed that while Australian statutes refer to courts making an award of "damages", the Canadian common law statutes refer to class

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93 See Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 65.

94 See our draft legislation, cl 12(1).

95 Note we expect this provision to be used infrequently because of our proposal that the court assess whether the time and expense of a class action is proportionate to the remedies sought as part of certification: see our draft legislation, cl 4(3)(d). This requirement may screen class actions that otherwise might necessitate the court making an order for indirect monetary relief (for example where individual claim levels are very small).

96 See our draft legislation, cl 12(3)(a).

97 See our draft legislation, cl 12(3)(b).

98 In Ontario, cy-près payments may be made to Legal Aid Ontario: Class Proceedings Act 1992 SO c 6 (Ontario), s 27.2(3)(b). The United Kingdom Competition Appeal Tribunal may order unclaimed damages to be paid to a charity designated by the Lord Chancellor: Competition Act 1998 (UK), s 47C(5). Currently this is the Access to Justice Foundation.

99 See our draft legislation, cl 11(1).

members' entitlement to "monetary relief".[100] While the ALRC appeared to treat the two terms interchangeably, the OLRC distinguished between damages and other forms of monetary relief.[101] The difference in wording is potentially significant as monetary relief, while including damages, may also include claims for compensation that are not ordinarily considered 'damages'.[102]

5.48 We consider that a provision empowering a court to award "damages" could therefore cast doubt on whether the court would be able to award aggregate monetary relief in claims where technically "damages" are not available. We have therefore used the term "monetary relief" to ensure that all forms of relief are available in a class action.

5.49 Rather than use the French term 'cy-près', we have used the phrase "alternative distribution".[103]

11 Aggregate monetary relief

(1) A court may award monetary relief to class members on an aggregate basis if—

(a) it is satisfied that it can make a reasonably accurate assessment of the total amount to which class members are entitled (the **award**); and

(b) no question of fact or law remains to be determined to establish the amount of the defendant's liability other than questions relating to the assessment of monetary relief.

(2) For the purpose of the court's assessment of the award, it is not necessary for any individual class member to establish the amount of loss or damage suffered by them.

(3) The court may make any orders for the distribution of the award that it considers appropriate, and these may include an order—

(a) that the defendant must distribute the award directly to class members:

(b) appointing a person as the administrator to distribute the award to class members:

(c) directing the manner in which a class member is to establish their entitlement to a share of the award:

(d) directing how any unclaimed portion of the award is to be distributed:

(e) directing how the costs of the distribution are to be met.

(4) An administrator or the parties (if the court has not appointed an administrator) must file a report with information about the process and outcome of the distribution of the award within 60 days of the distribution process being completed.

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100 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 409.

101 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 409 citing the Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 520-521.

102 Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 521. For example, the OLRC noted that while an action for breach of contract may seek damages, an action seeking enforcement of a contract would not technically seek "damages". It also noted an action asserting a right to money under a statute, where the right created by statute does not involve a tort or contract would not be a "damages" claim.

103 See our draft legislation, cl 12.

12 Alternative distribution

(1) This section applies if it is not practical or possible for an award made under **section 11** or any portion of it to be distributed to individual class members.

(2) The court may order that the award be paid instead to an eligible charity or organisation.

(3) In this section, **eligible charity or organisation** means—

(a) an entity whose activities are related to claims in the class action proceeding and whose activities are likely to directly or indirectly benefit some or all class members:

(b) an entity prescribed by regulations as an eligible charity or organisation for the purposes of this section.

QUESTION

Q32 Do you agree with our draft provisions on monetary relief? If not, how should they be amended?

APPEALS IN CLASS ACTIONS

5.50 In this section we discuss what appeal rights parties and class members should have in a class action.

5.51 The ability to appeal is "fundamental to our system of justice".[104] However, it is a legitimate policy question to ask when there should be a right to appeal, when leave should be required and when no appeal rights should exist.[105]

5.52 We consider that, to the extent possible, existing appeal rules should be applied in class actions.[106] Many decisions in a class action proceeding will not be materially different to those in an ordinary proceeding. We therefore think the usual appeal rules should apply for most interlocutory decisions, common issues judgments, and decisions on individual

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104 Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 111.

105 The requirement to seek leave to appeal is a filtering mechanism to avoid unmeritorious appeals that would otherwise cause unnecessary delay: *Paine v Carter Holt Harvey Ltd* [2019] NZHC 2477 at [3] citing *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [13]. See also Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, March 2004) at 111 citing Brian Opeskin *Appellate Courts and the Management of Appeals in Australia* (Australian Institute of Judical Administration, Sydney, 2001) at [51].

106 We note that the Australian Law Reform Commission also took this view: Australia Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [242].

issues. However, some aspects of a class action proceeding are unique, and it may not be appropriate to apply the existing appeal rules to them. These areas are:

(a) Parties' rights of appeal against a certification decision.

(b) Parties' rights of appeal against a court's decision on whether to approve settlement.

(c) The appeal rights, if any, of class members.

5.53 We discuss each of these below.

Parties' appeal rights against a certification decision

5.54 Parties appeal rights against a certification decision has been considered twice by Ontario law reform bodies. In 1982, the OLRC recommended a statutory right to appeal certification, because it was unclear whether it was an interlocutory decision.[107] The OLRC considered there should be a right of appeal from a certification decision because there are potentially serious consequences in not granting certification.[108] The OLRC's recommendations were not enacted exactly: while the representative plaintiff was given a direct right of appeal, the defendant required leave. This asymmetrical appeal right was unique in Canadian common law jurisdictions.[109]

5.55 In 2019 the Law Commission of Ontario (LCO) reconsidered the appeal rights from a certification decision.[110] The LCO did not see a principled reason for the asymmetrical appeal rights, saying there was "no question certification is important to both plaintiffs and defendants".[111] It considered a direct appeal right was appropriate because the interests of the parties at certification are significant.[112] Further, requiring leave would "impede access to justice, add delay and expense, and be inefficient".[113] This recommendation was accepted by the Government and the appeal provision was amended in 2020.[114]

5.56 Practice in other jurisdictions varies. Jurisdictions that allow for appeals against certification decisions as of right include British Columbia, Alberta and the Canadian Federal Court,[115] the United States,[116] and the United Kingdom Competition Appeal

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107 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 811 and 821.

108 Ontario Law Reform Commission *Report on Class Actions* (1982) vol III at 821.

109 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 93.

110 The Law Commission of Ontario is the successor of the Ontario Law Reform Commission.

111 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 94.

112 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 94.

113 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 94.

114 Class Proceedings Act SO 1992 c 6 (Ontario), s 30(1).

115 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 93.

116 United States Federal Rules of Civil Procedure, r 23(f) provides that a party may appeal an order granting or denying class action certification. This rule was amended in 1998 to allow immediate appeals of class action decisions. Prior to that, the party needed to wait for the substantive judgment before appealing the certification decision: William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 14:1 and § 14:9.

Tribunal.[117] The Federal Court of Australia allows an appeal against a decision to decertify a class action with leave.[118]

5.57 Several other Canadian class actions regimes require leave to appeal a certification decision (Saskatchewan, Nova Scotia, Newfoundland, New Brunswick and Manitoba).[119] We note that, under Rules Committee's 2009 draft Class Actions Bill, the parties would also have required leave to appeal a certification decision in Aotearoa New Zealand.[120]

5.58 Our view is that the plaintiff and defendant should be able to appeal a certification decision as of right. The implications of a certification decision will be significant. For example, the representative plaintiff and class members may be unable, practically, to proceed further with their claims if certification is denied. As well, if certification is approved, the defendant will likely face a large and complex claim.

Parties' appeal rights against a court's decision on settlement

5.59 As we discuss in Chapter 6, we consider a class action should only be settled with court approval. This raises the question of whether any appeal rights should follow the court's decision of whether to approve a settlement.

5.60 Our comparator jurisdictions do not expressly provide an appeal right against a decision on whether to approve settlement in their class actions regimes. However, appeal rights against a court's decision on settlement are covered by general statutes conferring appellate jurisdiction.[121]

5.61 Our view is that the parties should have the right to appeal a court's decision declining to approve a settlement as this decision will have a significant impact for the parties. However, we consider this appeal should require leave. As we explain in Chapter 6, where a court declines to approve a settlement, it may indicate the areas of the settlement that have caused it to decline approval. Therefore, an alternative to appealing would be to renegotiate the settlement to address these matters and submit an amended settlement for court approval. However, if there is an appealable error of fact or law in the decision,[122]

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117 Initially the Tribunal suggested that appeals against decisions on whether to grant certification could only be made by way of judicial review: Competition Appeal Tribunal *Guide to Proceedings* at [6.92]. See also *Merricks v Mastercard* [2017] CAT 21 at [3]–[15]. However, the Court of Appeal overturned the Tribunal's decision on this point and confirmed there is a direct right of appeal from CPO decisions: *Merricks CBE v Mastercard* [2018] EWCA Civ 2527 at [27]–[28]. The appeal right arises under s 49(1B) of the Competition Act 1998 (UK).

118 Federal Court of Australia Act 1976 (Cth), s 24(1A); *Bright v Femcare Ltd* [2002] FCAFC 243, (2002) 195 ALR 574 at [2].

119 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 93.

120 Class Actions Bill (Parliamentary Counsel Office, PCO 8247/2.14, 2008), cl 13(5).

121 For example, in Ontario, s 30 of the Class Proceedings Act SO 1992 c 6 (Ontario) sets out certain appeal rights but does not expressly address settlement. However, it appears appeal routes against orders or judgments not addressed in s 30 are dealt with under s 6(1)(b) of the Courts of Justice Act SO 1990 c C.43: *Bancroft-Snell v Visa Canada Corprotation* 2019 ONCA 822 at [16]. Similar approaches are taken in British Columbia and Alberta. See *Macaronies Hair Club and Laser Centre Inv v Bank of Montreal* 2021 ABCA 40; *Coburn and Watson's Metropolitan Home v BMO Financial Group* 2019 BCCA 308; and *Hello Baby Equipment v BofA Canada Bank* 2020 SKCA 7. In the United States, a decision approving settlement is considered a "final decision" which means that it is appealable under the United States Code: see William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 14:5 and r 28 USCA § 1291. In the Federal Court of Australia, see Federal Court of Australia Act 1976 (Cth), s 24(1)(a); and *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89.

122 The test for leave to appeal is well established. See *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413:

> The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of further appeal.

a party should be able to seek leave to appeal the decision and not have to renegotiate the settlement. The leave requirement would also protect class member interests by preventing unnecessary appeals.

5.62 As we have proposed that an application to approve a settlement is made by both parties, we do not envisage a situation would arise where a party would seek to appeal a decision to approve a settlement.

QUESTION

Q33 Do you agree that parties to a class action proceeding should be able to appeal:

a. A decision on certification as of right?

b. A decision on settlement approval with leave of the High Court?

Class member appeal rights

5.63 As class members are not parties to the proceedings, it is not clear whether they would be entitled under general law to appeal decisions.[123] Therefore, we think any class member rights of appeal should be expressly provided for in statute.

5.64 Some jurisdictions allow class members to appeal a decision in specified circumstances. In the Federal Court of Australia, if the representative plaintiff does not appeal, a class member may bring an appeal against aspects of the judgment that relate to common issues.[124]

5.65 Similarly, in Ontario a class member may appeal a certification decision if the representative plaintiff does not appeal or abandons the appeal.[125] A class member may also appeal a judgment on common issues or aggregate assessment of monetary relief if the representative plaintiff does not appeal or abandons the appeal.[126] In such appeals, the class member applies to the court to act as the representative plaintiff for the

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123 Court of Appeal (Civil) Rules 2005, r 29(1AA) ("a *party* must bring an appeal"). See also *Fairfax New Zealand Ltd v C* [2008] NZCA 39, [2008] 2 NZLR 368 at [29] (emphasis added):

> [T]he status of the media in a case like the present [a suppression order] is more analogous to that of an intervener … who is *not party in terms of appeal rights*.

See also *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZCA 60, [2009] NZAR 523 at [27] (emphasis added):

> Although in New Zealand (compare Australia and the United States) an intervener is *still not a party and cannot therefore exercise appeal rights* any more than an amicus can.

However, see *Guiness Peat Group International and Anderson v Tower Corporation* [1999] 1 NZLR 153 at 162: while the appellants were not party to the proceeding in the High Court, the Court of Appeal accepted they had a right of appeal. They were heard before the High Court, and they had discontinued their own proceeding in the Commercial List. While they were not formally parties, they seem to have been treated as such. See also *A v S* [1982] 1 NZLR 726 at 731–2.

124 Federal Court of Australia Act 1976 (Cth), ss 33Z(1) and (6). The appeal provisions in New South Wales, Victoria, Queensland and Tasmania are similar.

125 Either certifying, refusing to certify or decertifying: Class Proceedings Act SO 1992 c 6 (Ontario), s 30(1).

126 Class Proceedings Act SO 1992 c 6 (Ontario), s 30(5).

purposes of the appeal.[127] The other Canadian common law provinces have similar provisions.[128] It appears that class member appeal rights are limited to those provided in statute. For example, some Canadian decisions have found class members do not have a right to appeal settlement.[129]

5.66 In the United States, if a class member formally intervenes in a proceeding, they generally have a right of appeal. This is different to Aotearoa New Zealand, as interveners do not have appeal rights.[130] Class members can be permitted to intervene for the purposes of appealing a decision declining certification, if no appeal is brought by the representative plaintiff.[131] As well, if a class member intervenes in the hearing on the common issues, they may appeal the substantive judgment.[132] Appeal rights against settlement do not require formal intervention. Class members can appeal against decisions approving settlement provided they objected during the settlement hearing.[133] Commentary explains that the majority of appeals in class actions are brought by class members against settlement.[134]

5.67 We consider class members should be able to appeal the substantive judgment on the common issues if the representative plaintiff does not appeal or abandons an appeal. As discussed earlier in this chapter, the substantive judgment on the common issues is binding on class members. We therefore consider it is appropriate for them to have the ability to appeal if the representative plaintiff does not.

5.68 In our view, class members should require leave to appeal the decision on common issues. This would enable the court to decline leave to appeal where there appear insufficient grounds for it or it is improperly motivated. This will help to protect the parties (and other class members) from unnecessary appeals and reduce delay. We also think the class member should be required to apply to the court to act as the representative plaintiff for the purposes of the appeal (and the court would need to consider their suitability for the role in terms of the test we propose in Chapter 1, adapted to the circumstances of an appeal). Given an appeal would be binding on all class members, we think it is important

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127 Class Proceedings Act SO 1992 c 6 (Ontario), ss 30(4)–(5).

128 Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 36; Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 36; The Class Proceedings Act SM 2002 c C-130 (Manitoba), s 36; The Class Actions Act SS 2001 c C-12.01 (Saskatchewan), s 39; Class Proceedings Act SNS 2007 c 28 (Nova Scotia), s 39; Class Proceedings Act RSNB 2011 c 125 (New Brunswick), s 38; and Class Actions Act SNL 2001 c C-18.1 (Newfoundland and Labrador), s 36.

129 See *Bancroft-Snell v Visa Canada Corprotation* [2019] ONCA 822, (2019) 439 DLR (4th) 449 at [8] and [20]; *Macaronies Hair Club and Laser Centre Inv v Bank of Montreal* [2021] ABCA 40 at [35], [40] and [41]; *Coburn v Watson's Metropolitan Home v BMO Financial Group* [2019] BCCA 308, (2019) DLR (4th) 533 at [16], [40], [82] and [84]; and *Home Depot of Canada Ltd v Hello Baby Equipment Inc* [2020] SKCA 7, (2020) 444 DLR (4th) 145 at [15], [20], [25], and [28].

130 *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZCA 60, [2009] NZAR 523 at [27]: "in New Zealand (compare Australia and the United States) an intervener is still not a party and cannot therefore exercise appeal rights".

131 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 14:09.

132 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 14:11. Otherwise, if the representative plaintiff fails to appeal, class members may be able to argue, for example, in a subsequent proceeding, that they were not adequately represented and therefore not bound by the class action judgment.

133 It is not necessary for a class member to formally intervene in a settlement hearing as they must be given the opportunity to object (and in many cases to opt out) of the settlement. Accordingly, if a class member objected during the settlement hearing, they have standing to appeal: William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 14:11.

134 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) § 14:10.

the class member acts in a representative capacity. This will also prevent simultaneous appeals being brought by different class members.

5.69 However, we do not consider class members should be able to appeal a decision on certification or settlement approval. We acknowledge that class members can appeal a certification decision in Canada and (to an extent) in the United States. However, in practice we are unsure when it would be appropriate for a class member to appeal a certification decision. For example, if certification was declined because the representative plaintiff was unsuitable, it may be more appropriate to bring a further certification application with a different representative plaintiff. Similarly, it does not seem appropriate to allow a class member to appeal a successful certification decision when the class member could simply opt out of the proceeding (or decide not to opt in). One scenario where it might be appropriate for a class member to appeal is if the representative plaintiff abandons an appeal against a decision to decline certification. However, we think this scenario would be better managed by a power to substitute the representative plaintiff rather than an expanded right of appeal.

5.70 We do not think that class members should be able to appeal a court's decision to approve a settlement, given the delay this would cause for parties wanting to proceed with an approved settlement. We acknowledge it is very unlikely the representative plaintiff or defendant will appeal, given they will have proposed the settlement to the court. However, as discussed in Chapter 6, we propose that class members should be able to file an objection to a proposed settlement and opt out of any approved settlement. Further, we propose that the court can only approve a settlement if satisfied that it is fair, reasonable and in the interests of the class as a whole. If these measures are implemented, they should sufficiently safeguard the interests of class members during the settlement approval process.

QUESTION

Q34 Do you agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court?

Q35 Do you think there are any other decisions in a class action that class members should be able to appeal, with or without leave?

CHAPTER 6

Settlement of a class action

INTRODUCTION

In this chapter, we discuss:

- Court approval of class actions settlements.
- The process for court approval of a settlement.
- The test the court should apply when deciding whether to approve a settlement.
- Finalising the class for settlement.
- Settlement distribution and administration.

COURT APPROVAL OF SETTLEMENTS IN CLASS ACTIONS

6.1 Class actions are often resolved through a settlement negotiated between the representative plaintiff and defendant.[1] The high transaction costs of class actions and the litigation risks for both parties may mean that both a representative plaintiff and defendant prefer to reach a settlement rather than allowing the litigation to continue.

6.2 In our main comparator jurisdictions, court approval of a class action settlement is required.[2] This is one of the key features that sets class actions apart from other civil litigation.[3]

6.3 Courts have an important supervisory role to ensure that the interests of class members are protected, and settlement is a stage where class member interests require particular protection. One reason is that there is an 'adversarial void' because both the plaintiff and the defendant are advocating for the settlement to be approved. Another reason is the

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1 See our Issues Paper at [6.17], noting the settlement rates in other jurisdictions.

2 See for example Federal Court of Australia Act 1976 (Cth), s 33V; Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(1); United States Federal Rules of Civil Procedure, r 23(e); and The Competition Appeal Tribunal Rules 2015 (UK), r 94(1) (opt-out proceedings only).

3 Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 390.

risk of conflicts of interest arising at settlement because the representative plaintiff and litigation funder may financially benefit from any settlement, and this could be at the expense of class members, who do not usually have a role in settlement negotiations. For example, there is a risk of a representative plaintiff agreeing to settle class members' claims cheaply in return for their own claim being settled for a higher amount. Or a litigation funder could apply pressure to settle a class action at a substantial discount because it needs the funds to commit to another case in its portfolio. It is therefore important that courts scrutinise proposed settlements to ensure the terms are fair to class members.

6.4 Recognising these concerns, the Supreme Court has said that courts have the power to approve settlements in representative actions under HCR 4.24.[4] In *Southern Response v Ross,* the Court said that court approval to settle or discontinue a proceeding should be a condition of granting leave to bring a representative action on an opt-out basis. The court should also consider whether this should be a requirement of granting leave to bring an opt-in representative action.[5] The Court said that when approving a settlement, courts could consider the extent to which a settlement prejudices individual group members and could draw on the assistance of independent experts.[6] There are several examples of the High Court having approved settlements of representative actions.[7]

Court approval of settlements in opt-in and opt-out class actions

6.5 Court approval of a settlement is particularly important in opt-out class actions because of the risk that some class members will not be aware of the class action or the proposed settlement. In an opt-in proceeding, all class members have actively consented to being part of the class action and can be kept updated of any developments. In the United Kingdom Competition Appeal Tribunal, where both opt-in and opt-out proceedings are possible, judicial approval of settlements in opt-in proceedings is not required.[8]

6.6 While the case for judicial approval of settlements is strongest in opt-out class actions, there are good reasons for requiring judicial approval in opt-in class actions as well. The court still has an important supervisory role to ensure that the interests of class members are protected. Class members do not have the status of parties and may have little contact with the lawyers acting for the class and no role in settlement negotiations. The adversarial void and risk of conflicts of interest at settlement are still present. For these reasons, we consider that judicial approval of a settlement should be required in both

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4 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82].

5 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [83] and [101].

6 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82].

7 See *Eaton v LDC Finance Ltd* [2013] NZHC 728 and *Stirling v Attorney-General* HC Wellington CP161/96, 29 September 2004 (sealed judgment of Miller J). Another possible example is *Mawson v Auckland Area Health Board* HC Auckland CP2018/87, 8 July 1993 (it is unclear whether this was a representative action under HCR 4.24). See also *Ranchhod v Auckland Healthcare Services Ltd (No 2)* [2001] ERNZ 771 (NZEmpC) where the Employment Court approved the settlement of a representative action. We also understand that court approval is being sought of a settlement in the *Scott v ANZ Bank* representative action: see "ANZ settles class action claim on Ross Fraud" (23 August 2021) National Business Review <www.nbr.co.nz>.

8 The Competition Appeal Tribunal Rules 2015 (UK), rr 94-95. Note that in an opt-in proceeding the representative plaintiff may not settle proceedings before the opt-in period has finished, except with the Tribunal's permission. See also Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.6].

opt-in and opt-out class actions. This is reflected in our draft provision which requires court approval of a settlement of a class action proceeding. [9]

QUESTION

Q36 Should the court be required to approve class action settlements in both opt-in and opt-out proceedings?

Court approval prior to certification

6.7 In some cases, the representative plaintiff and defendant may reach a settlement prior to certification. This raises the issue of whether court approval of such a settlement should be required. In both the United States and the United Kingdom Competition Appeal Tribunal there is a process for approving settlements reached prior to certification, which we discuss later in this chapter. Some of the Canadian regimes specifically require court approval in a "proceeding that is subject to an application for certification". [10] However, other provinces do not use this wording and commentary suggests it may be possible to settle a class action prior to certification without court approval in those jurisdictions. [11]

6.8 We think the concerns outlined in [6.3] can equally apply to settlements reached prior to certification and so we think the court should also be required to approve the settlement in such cases. Later in this chapter we set out a process for certifying a class for the purposes of settlement.

Court approval of discontinuance

6.9 Both Australian and Canadian class actions statutes require court approval to discontinue a class action. [12] In Aotearoa New Zealand, the Supreme Court has said that court approval to discontinue proceedings should be a condition of giving leave to bring a representative proceeding, at least in opt-out proceedings. [13]

6.10 We consider that court approval should be required to discontinue both opt-in and opt-out class actions as this will bring the proceeding to an end for class members. As our draft settlement provisions include detailed procedures for court approval of settlements that will not be applicable to discontinuance, we think it would be preferable to have a separate provision requiring court approval to discontinue a class action. [14]

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9 See our draft legislation, cl 6(1).

10 See for example Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 35(1)–(2).

11 Christopher Naudie and Éric Préfontaine "Class/collective actions in Canada: overview" Thomson Reuters Practical Law (1 December 2016) <content.next.westlaw.com> at [21].

12 See for example Federal Court of Australia Act 1976 (Cth), s 33V(1); and Class Proceedings Act SO 1992 c 6 (Ontario), 29(1).

13 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [83].

14 An example of a separate discontinuance provision is Class Proceedings Act SO 1992 c 6 (Ontario), s 29(1). Note we have not provided a draft provision for consultation as we envisage this would be uncontroversial.

QUESTION

Q37 Should the court be required to approve the discontinuance of a class action?

PROCESS FOR COURT APPROVAL OF SETTLEMENT

6.11 In our comparator jurisdictions, the process for court approval of a settlement generally involves the parties filing an application for approval of the settlement and a hearing for the court to determine whether the court should approve the settlement. This hearing is sometimes known as a 'fairness hearing'. The United States also has a preliminary approval stage, where the court decides whether notice of the proposed settlement should be given to the class.[15] Courts will sometimes hold a preliminary approval hearing, but this is not always required.[16]

6.12 Our proposed approach is that the parties would file an application to have the settlement approved and the court would usually hold a hearing to decide whether to approve it.[17] We do not think a preliminary approval stage is necessary, although it may be necessary to hold a hearing to consider certification for the purposes of settlement, as we discuss later in this chapter.

6.13 In this section we consider and seek feedback on the following procedural issues:

(a) The contents of an application for settlement approval.

(b) Giving notice to class members about the settlement.

(c) Class members' ability to object to a proposed settlement.

(d) Other participants in the settlement approval process.

Contents of an application for settlement approval

6.14 Under our proposed approach, the parties will need to file an application seeking approval of a settlement of a class action.[18]

6.15 Some jurisdictions provide guidance on the material that must be filed in support of an application to approve a class action settlement. In Ontario, when a party makes an application for approval of a settlement, they must make "full and frank disclosure of all material facts" and there is a list of information that must be provided in affidavit

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15 United States Federal Rules of Civil Procedure, r 23(e)(1)(B). At this preliminary approval stage, the court must give notice if justified by the parties having shown that final approval of the settlement is likely to be given. If settlement approval is sought prior to certification, the court will also need to consider whether it will likely be able to certify the class for the purposes of settlement.

16 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:12.

17 We do not rule out the possibility that an application could be determined on the papers in some cases, although we think a hearing would usually be required.

18 See our draft legislation, cl 6(2), 6(3).

evidence.[19] The United Kingdom Competition Appeal Tribunal also has a list of information that must be provided.[20]

6.16 While the Australian statutes do not contain a list of requirements, the Federal Court and Supreme Court of Victoria class actions practice notes set out matters that should be addressed in an application for settlement approval.[21] In the United States, the relevant rule simply refers to the requirement to provide the court with "information sufficient to enable it to determine whether to give notice of the proposal to the class", although the accompanying Advisory Committee notes provide some guidance on the information that could be provided to the court.[22]

6.17 In our view, it would be desirable to provide some guidance on the information that should be included in an application. This will help to ensure the court has sufficient information to assess the proposed settlement. We have considered the information required in other jurisdictions. We suggest that, at minimum, information should be provided on:

(a) The terms of the proposed settlement.

(b) Any legal fees or litigation funding fees that would be deducted from the relief paid to class members.

(c) How the settlement meets the test for court approval of a class action settlement.[23]

(d) The intended method of notifying class members of the proposed settlement.

(e) The likely cost and duration of the class action if the litigation continues.

(f) Any risks associated with continuing with the litigation.

(g) The potential relief that could be awarded if the case was successful.

(h) The proposed method of settlement distribution and administration, including any proposal for unclaimed damages.

6.18 We think this information will assist the court to apply the test we have proposed for approval of a settlement.[24] While the application is made jointly by the representative plaintiff and defendant, we anticipate that the supporting information would primarily be provided by the representative plaintiff. It could include an affidavit by the representative plaintiff's lawyer and any independent advice received on the settlement, such as an independent valuation or the advice of an independent lawyer. We think it should be possible for each party to provide information to the court on a confidential basis where appropriate, particularly where it relates to the prospects of the litigation.

6.19 We have not included our proposed requirements for an application for settlement approval in our draft provisions as we think it would be more appropriate in the High Court Rules.

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19 Class Proceedings Act SO 1992 c 6 (Ontario), 27.1(7).

20 The Competition Appeal Tribunal Rules 2015 (UK), r 94(4). For further explanation of these requirements, see Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.98].

21 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.5]; *Conduct of Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [16.7].

22 United States Federal Rules of Civil Procedure, r 23(e)(1)(A); Committee Notes on Rules – 2018 Amendment.

23 We discuss our proposed test later in this chapter.

24 See our draft legislation, cl 6(5).

QUESTION

Q38 Do you agree with our list of the information that should be provided in support of an application to approve a class action settlement?

Notices to class members

6.20 In this section we discuss whether class members should be given notice of a proposed settlement and/or of any approved settlement, and what should be included in these notices.

When should notice be required?

6.21 In the United States, class members must be given notice of a proposed settlement before the court can consider whether to give final approval.[25] Notice is also mandatory in the Canadian Federal Court, with a requirement to notify class members of an offer to settle a class action or an approved settlement.[26]

6.22 In other jurisdictions, the court has discretion as to whether notice must be given to class members. In Ontario, the court must consider whether class members should be given notice of a hearing to consider a proposed settlement.[27] If the court approves a settlement, it will also consider whether class members should be given notice of the approved settlement.[28] An application for settlement approval must include a plan for giving notice of the approved settlement, in the event the court orders this.[29] Other common law provinces only require the court to consider whether notice should be given of an approved settlement, not whether notice of a hearing to consider settlement should be given.[30] However, notice could be ordered under general provisions in these provinces.

6.23 While notice of a proposed settlement will normally be necessary in Australia, a court can order that notice is not required where it considers it just.[31] It appears relatively unusual for a court to order that notice of a proposed settlement is not required.[32] The United Kingdom Competition Appeal Tribunal will usually order notice of a proposed settlement

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25 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:12. See also United States Federal Rules of Civil Procedure, r 23(e)(1).

26 Federal Courts Rules SOR/98-106, r 334.34.

27 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(8).

28 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(12).

29 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(7).

30 See for example Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 35(5); and Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 35(7).

31 Federal Court of Australia Act 1976 (Cth), s 33X(4).

32 See Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [24.9].

so that class members have an opportunity to support or oppose the settlement, although it does have discretion as to whether to order notice. [33]

6.24 We consider that class members should be given notice of a proposed settlement. [34] Class members' legal rights will be affected by the settlement and so they should have an opportunity to consider the proposed terms of the settlement and express any objection or support for the proposal.

6.25 Later in this chapter, we propose that class members should have the right to opt out of a settlement once it has been approved. Because of this, we think that class members should also be given a notice explaining that a class action settlement has been approved and their rights to opt out of the settlement. [35] The notice of approved settlement should also provide information on the process for submitting a claim to receive payment from a settlement (if this is required).

QUESTION

Q39 Should there be a requirement to give notice to class members of:

a. A proposed class action settlement?

b. An approved class action settlement?

Contents of settlement notices

6.26 Some jurisdictions provide guidance on the matters that should be included in a settlement notice to class members. In Ontario, the court must consider whether the notice of a settlement hearing should include a statement of the purpose of the hearing and the process for objecting to the approval of the settlement. [36] If the court orders notice of an approved settlement, it will consider whether the notice should include an account of the conduct of the proceeding, a statement of the result of the proceeding and a description of any plan for distributing settlement funds. [37] Guidance on the content of settlement notices is also provided in a Judicial Protocol on multi-jurisdictional class actions. [38]

6.27 The Federal Court of Australia and Supreme Court of Victoria class actions practice notes contain detailed lists of matters that should be included in a notice of a proposed

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33 The Competition Appeal Tribunal Rules 2015 (UK), r 94(6)(b); Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.98]. Note that when the parties seek to settle pre-certification, notice must be given of the collective settlement order (appointing a settlement representative): The Competition Appeal Tribunal Rules 2015 (UK), r 96(15).

34 See our draft legislation, cl 6(4)(a).

35 See our draft legislation, cl 9(1)(a).

36 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(8).

37 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(12).

38 *Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice* (Canadian Bar Association, 2018) at [13] and [17].

settlement.[39] These include: a summary of the terms of the proposed settlement, who will benefit from the settlement, how to obtain a copy of the settlement agreement, an explanation of the approval process, how to communicate any objection or support of the settlement, the steps required to participate in the settlement (if required) and how to opt out of the settlement (if possible).

6.28 The United States and the United Kingdom Competition Appeal Tribunal do not provide guidance on the contents of proposed settlement notices in their class action rules.[40]

6.29 We think it would be beneficial to provide some guidance on what should be included in a notice of proposed settlement. At minimum, we think this notice should include:

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

(b) A brief description of the class action, including the legal basis for the claims, the remedies sought and the current stage of the litigation.

(c) The class description.

(d) A summary of the terms of the proposed settlement, including information that will allow class members to estimate their individual entitlement.

(e) Information as to any legal fees or litigation funding commission that will be deducted from payments to class members if the settlement is approved.

(f) An explanation of the settlement approval process, including the time and location of any hearing to consider the settlement.

(g) How a class member may express their opposition to, or support for, the settlement.[41]

(h) That if the settlement is approved, the court will set a date by which class members can opt out of the settlement.

(i) How a class member may obtain further information about the settlement, including contact details for the representative plaintiff's lawyer or any counsel to assist that has been appointed.

6.30 We also think it would be beneficial to provide guidance on the contents of a notice of approved settlement. We think the notice should include information on:

(a) The court's approval of a settlement which may affect their legal rights.

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39 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.2]; *Conduct of Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [16.3].

40 In the United States, rule 23 only refers to notice being made in a "reasonable manner" and the content of the notice is left to the court's discretion: United States Federal Rules of Civil Procedure, r 23(e)(1)(B); William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 8:17. Note that the Manual for Complex Litigation sets out a list of matters which should be contained in a settlement notice: David F Herr *Annotated Manual for Complex Litigation* (online ed, Thompson Reuters) at § 21.312. The United Kingdom Competition Appeal Tribunal Rules do not require specified matters to be included in a settlement notice. When an application for approval of a class action settlement is filed in the Tribunal, it must set out the form and manner in which the representative plaintiff proposes to give notice of the application: The Competition Appeal Tribunal Rules 2015 (UK), r 94(4)(f).

41 We consider the process for objecting to a proposed settlement in the next section.

(b) How to obtain further information about the settlement, including the court's judgment approving the settlement.

(c) How a class member may opt out of the settlement, and the deadline for doing so.

(d) The consequences of failing to opt out of the settlement.

(e) Any steps a class member must take to submit a claim.

(f) Who has been appointed as the settlement administrator (if any) and how to contact them.

6.31 Our draft provisions do not include our proposed requirements for a notice of proposed settlement and a notice of approved settlement as we think these are best located in the High Court Rules. Consideration could be given to developing standard forms of a notice of proposed settlement and a notice of approved settlement, which could be added to the forms in Schedule 1 of the High Court Rules.

QUESTION

Q40 Do you agree with the information we propose should be contained in the notice of proposed settlement and the notice of approved settlement?

Class members' objections

6.32 Our main comparator jurisdictions have a process by which class members may object to the proposed settlement. [42]

6.33 We think it is important to allow class members an opportunity to express any opposition to the settlement, given that they will be bound by its terms if the settlement is approved. The court may not otherwise be aware of these concerns, as both the representative plaintiff and defendant will be supporting the settlement. We envisage that objections would be made in writing and filed with the court. In appropriate cases, the court could grant leave for a class member to appear at the settlement approval hearing.

6.34 Our draft legislation provides that the court must set a date for any objections to the settlement to be lodged by class members. [43] As we have explained above, we think the notice of proposed settlement should explain the process and deadline for objecting to a settlement.

6.35 The experience of other jurisdictions indicates that class members face barriers to objecting to proposed settlements, such as a lack of legal assistance, difficulty in understanding the settlement agreement and the small value of individual claims, which may make it uneconomical to object. [44] In Australia and Canada, it appears to be rare for

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42 See for example *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.2]; Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(8); United States Federal Rules of Civil Procedure, r 23(e)(5)(A); and The Competition Appeal Tribunal Rules 2015 (UK), r 97(5).

43 See our draft legislation, cl 6(4)(b).

44 See Michael Legg "Class action settlements in Australia - the need for greater scrutiny" (2014) 38 MULR 590 at 599-600; Jasminka Kalajdzic "Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions" (2010) 6

a class member objection to result in the court declining to approve a settlement.[45] Ensuring there are simple procedures for objecting may reduce these barriers. For example, the Victorian Law Reform Commission (VLRC) has noted that reducing the costs of objecting and ensuring clear and concise notices to class members are ways of alleviating obstacles to class member participation in the settlement approval process.[46] It could be possible to have a standard form that a class member use to record their view on the settlement and post or email to the court. Providing legal assistance to class members can also assist. For example, the Class Action Clinic at Windsor Law School in Ontario will represent objecting class members in appropriate cases.[47]

QUESTION

Q41 Should class members be given an opportunity to object to a proposed settlement?

Other participants in settlement approval hearings

6.36 It may be appropriate to allow an independent lawyer or expert to make submissions on a proposed settlement, given the obstacles for class members wanting to object and the risk that the court will only hear from those favouring settlement. In *Southern Response v Ross,* the Supreme Court commented that courts might draw on the assistance of independent experts to meet some of the concerns expressed about the court's role in approving settlements of representative proceedings under HCR 4.24.[48]

6.37 Other jurisdictions allow lawyers or experts to be appointed to assist the court. While jurisdictions use a variety of names for these roles, they serve a similar purpose of helping the court to assess the settlement. In Australia, the court may appoint an independent representative to make submissions on settlement, sometimes known as a guardian or contradictor and this is specifically referred to in the Supreme Court of Victoria practice note.[49] The VLRC has recommended a presumption in favour of appointing a contradictor

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Canadian Class Action Review 215 at 234-235; William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:21, 13:58; and Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [12.12], [12.51] and [12.53]–[12.54].

45 See Michael Legg "Class action settlements in Australia - the need for greater scrutiny" (2014) 38 MULR 590 at 600; and Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 103.

46 Victorian Law Reform Commission *Access to Justice – Litigation and Group Proceedings: Report* (March 2018) at 4.186-4.187.

47 See for example "Our Mission and Services" (22 July 2021) Windsor Law: Class Action Clinic <www.classactionclinic.com>.

48 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82]. The Court cited the Federal Court of Australia class actions practice note, which provides that the material filed in support of an application for approval of a settlement will usually be required to include the terms of any advice received from any independent expert in relation to the issues which arise in the proceeding. It may be the Supreme Court envisaged a similar approach, rather an independent expert appearing at a settlement approval hearing. See *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.5(j)].

49 See Michael Legg "Class action settlements in Australia - the need for greater scrutiny" (2014) 38 MULR 590 at 611-613; and *Conduct of Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [16.8]. The Victorian Law Reform Commission has recommended that the practice note should include guidance for

for a settlement approval hearing for class actions involving certain types of claims, as well those involving complex settlement distribution schemes. [50] The Australian Parliamentary Inquiry recommended a presumption that a contradictor should be appointed at settlement where there is the potential for significant conflicts of interest or complex issues to arise. [51]

6.38 The Law Commission of Ontario (LCO) has recommended the court should have an express power to appoint an amicus curiae to assist the court in evaluating a proposed settlement. [52] While courts have inherent authority to appoint an amicus curiae, the LCO did not find any examples of courts appointing one to assist with settlement and so it recommended a specific provision. [53] There are examples of Ontario courts appointing an independent third party known as a court monitor to assist it in considering an application for settlement approval or appointing a litigation guardian for the class. [54]

6.39 A third party such as a non-governmental organisation could be given intervener status to allow it to make submissions on the proposed settlement. In Aotearoa New Zealand, courts regularly grant leave to a third party to intervene in proceedings. The Australian Securities and Investments Commission has an express power to intervene in any proceedings under the Corporations Act 2001 [55] and has used this power to successfully challenge a proposed class action settlement on the basis that the proposed distribution between class members was not fair and reasonable. [56] In the United States, defendants must provide notice of a proposed settlement to relevant federal and state officials, but officials are not expressly provided with standing to object to a settlement. [57]

6.40 We think in appropriate cases, counsel to assist the court could be appointed to provide an independent review of a proposed settlement. This may be one way of redressing the 'adversarial void' that exists at the settlement approval stage. Our draft legislation provides that the court may appoint a counsel to assist if it considers this will assist the court to determine whether the settlement approval test is met and may order one or

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the appointment of a contradictor: Victorian Law Reform Commission *Access to Justice – Litigation and Group Proceedings: Report* (March 2018) at 102.

50 Victorian Law Reform Commission *Access to Justice – Litigation and Group Proceedings: Report* (March 2018) at [4.182]. It recommended a presumption in favour of appointing a contradictor in claims brought in the Common Law Division of the Supreme Court of Victoria. Cases heard by this Division include: claims in property, tort and contract law; wills and estates litigation; claims arising out of breaches of trust or equitable obligation; employment and industrial issues; and cases relating to the Court's supervisory juridiction over other Victorian courts, tribunals and public officials: see <www.supremecourt.vic.gov.au>.

51 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [12.70].

52 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 56-57. It does not appear the Ontario Government accepted this recommendation as this was not part of the 2020 amendments to the Class Proceedings Act SO 1992 c 6 (Ontario).

53 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 56.

54 Garry D Watson *Holmested and Watson: Ontario Civil Procedure* (online ed, Thomson Reuters) at § 27:39.

55 Corporations Act 2001 (Cth), s 1330.

56 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [4].

57 Class Action Fairness Act of 2005 Pub L No 109-2, 118 Stat 4 at § 1715(b). See also William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:26.

more of the parties to meet the cost of this.[58] While there is a general power to appoint a counsel assisting in HCR 10.22, we think a specific provision may normalise the role and lead to more frequent appointments with respect to class action settlement approval. We envisage that the court would appoint counsel to assist directly, rather than the Solicitor-General (the latter occurs under HCR 10.22).[59] Where a counsel to assist is appointed, it may be appropriate to allow class members to communicate any concerns about the settlement directly to them. If so, this could be referred to in the notice of proposed settlement.[60]

6.41 Our draft legislation also provides that the court may appoint a court expert if this will assist the court to determine whether the test for settlement approval is met.[61] This may be particularly useful in relation to litigation funding commissions, as we discuss later in this chapter. As with counsel to assist the court, while the court already has a general power to appoint court experts, we think a specific provision in a class actions regime would be beneficial. It could also empower the court to order the parties to meet the cost of a court expert.[62]

6.42 While we think it may be appropriate to allow an intervener to make submissions on settlement in appropriate cases, an intervener is likely to play a different role to counsel assisting the court or an expert. An intervener would generally represent their own interests or systemic interests and might only wish to submit on limited aspects of a settlement. We therefore do not think it is necessary to have a provision which expressly refers to the court's ability to grant a third party leave to intervene on an application for settlement approval. We note that in *Southern Response v Ross,* the Supreme Court invited Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and the New Zealand Bar Association to intervene if they wished to do so and directed the Registrar to bring the appeal to their attention.[63] We think the High Court could take a similar approach where it considers a particular organisation should be notified of an application for settlement approval.

QUESTION

Q42 Do you agree there should there be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval? Should the court be able to order one or more parties to meet some or all of the cost of this?

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58 See our draft legislation, cl 8.

59 We think this is appropriate given that the Crown could be a party to a class action.

60 We note that the Australian Parliamentary Inquiry recommended the Government implement a procedure to facilitate class members' concerns and objections being conveyed to a contradictor when appointed: Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [12.71]. This recommendation is echoed in Georgina Dimopoulos and Vince Morabito "An Australian Perspective on the Judicial Review of Class Action Settlements" (2021) 29 NZULR 529 at 546.

61 See our draft legislation, cl 8.

62 High Court Rules 2016, r 9.36.

63 *Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140 at [1].

TEST FOR APPROVING A SETTLEMENT

6.43 In this section, we discuss the test the court should apply when deciding whether to approve a settlement and whether there should be factors to guide a court's assessment.

Test for court approval of settlement

6.44 The test that courts apply when deciding whether to approve a settlement is relatively similar across our comparator jurisdictions, although it is not codified in all of them.

6.45 The Australian regimes do not specify a test for the court to apply when approving a settlement and so principles have developed through case law.[64] The court's task has been described as follows:[65]

> The central question is whether the proposed settlement is a fair and reasonable compromise of the claims of the applicants and group members. That requires consideration of whether the proposed settlement is fair and reasonable, first, as between the applicants and group members and the respondent, and, second, as between the group members.

6.46 The Federal Court class actions practice note states that the parties will be required to persuade the court that:[66]

> (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).

6.47 When deciding whether to approve a class action settlement, Canadian courts generally consider whether the settlement is "fair, reasonable and in the best interests of the class as a whole", a test developed in the case law.[67] In 2020, the Ontario legislation was amended to refer to this standard.[68] This followed a recommendation of the LCO, which noted the standard had been widely adopted by parties and courts.[69] The other Canadian regimes do not expressly refer to the test to be applied when considering settlement.

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64 Note that the Victorian Law Reform Commission has recommended that the test for approving a settlement should be included in legislation: Victorian Law Reform Commission *Access to Justice – Litigation and Group Proceedings: Report* (March 2018) at [4.176].

65 *Prygodicz v Commonwealth (No 2)* [2021] FCA 634 at [85]. See also *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 at [15]; and *Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3)* [2017] FCA 330, (2017) 343 ALR 476 at [81].

66 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.3]. Courts have described these as the two "critical questions": Michael Legg and Ross McInnes Australian Annotated Class Actions Legislation (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at 22.5.

67 See *Dabbs v Sun Life Assurance Co of Canada* [1998] OJ No 1598 at [11]; Catherine Piché *A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness* (2009) 41 Ottawa L Rev 25 at 29 (noting that in both civil and common law provinces, the generally accepted standard is the *Dabbs* test).

68 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(5) ("The court shall not approve a settlement unless it determines that the settlement is fair, reasonable and in the best interests of the class or subclass members, as the case may be").

69 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 55 and 57.

6.48 Both the United States and United Kingdom Competition Appeal Tribunal class actions regimes set out a test for court approval of settlement. The United States rule provides that a court may only approve a settlement if it is "fair, reasonable and adequate".[70] The United Kingdom Competition Appeal Tribunal may make a collective settlement approval order where satisfied that the terms of the settlement are "just and reasonable".[71]

6.49 We think the test for judicial approval of a class action settlement should be set out in legislation as this will provide clarity and certainty for the parties. We propose that a court should have to consider whether a proposed settlement is fair, reasonable and in the interests of the class as a whole.[72]

6.50 This test should not mean a standard of perfection, as a settlement agreement is necessarily the result of a compromise between parties. When judging whether a settlement is fair and reasonable, there are likely to be a range of potential settlement terms that could meet this standard.[73]

QUESTION

Q43 When the court considers whether to approve a settlement, should it consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole? If not, what test should it apply?

Factors relevant to this test

6.51 Class actions legislation could specify a list of factors the court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole.

6.52 In the United States, when the court determines whether a settlement is "fair, reasonable and adequate" it must consider whether:[74]

(a) The representative plaintiff and class lawyer have adequately represented the class.

(b) The proposal was negotiated at arm's length.

(c) There is adequate relief for the class, taking into account:

(i) The costs, risks and delay of trial and appeal.

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70 United States Federal Rules of Civil Procedure, r 23(e)(2).

71 The Competition Appeal Tribunal Rules 2015 (UK), r 94(8).

72 See our draft legislation, cl 6(5).

73 See for example *Darwalla Milling Company Pty v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388, (2006) 236 ALR 322 at [50] ("There will rarely, if ever, be a case in which there is a unique outcome which should be regarded as the only fair and reasonable one … So long as the agreed settlement falls within the range of fair and reasonable outcomes, taking everything into account, it should be regarded as qualifying for approval under s 33V"); *Nunes v Air Transat A.T. Inc* [2005] 140 ACWS (3d) 25 (ONSC) at [7] ("Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions"); and Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.124] ("…the Tribunal will not require the settlement to be perfect and there is likely to be a range of reasonable settlements which could be approved by the Tribunal").

74 United States Federal Rules of Civil Procedure, r 23(e)(2). Note that the list of factors was added to the rule in 2018.

(ii) The effectiveness of any proposed method of distributing relief.

(iii) The terms of any proposed award of lawyer's fees.

(iv) Any agreements made in connection with the proposal.

(d) The proposal treats class members equitably relative to each other.

6.53 When the United Kingdom Competition Appeal Tribunal determines whether the terms of a settlement are "just and reasonable", it must take account of all relevant circumstances, including: [75]

(a) The amount and terms of the settlement, including any related provisions as to payment of costs, fees and disbursements.

(b) Number of people likely to be entitled to a share of the settlement.

(c) Likelihood of judgment being obtained for an amount significantly in excess of the settlement.

(d) Likely duration and cost of the class action if it proceeded to trial.

(e) Any opinion by an independent expert and the applicant's lawyer.

(f) Views of class members.

(g) How unclaimed funds will be dealt with (but payment to the defendant will not be considered unreasonable of itself).

6.54 Although the Australian class actions regimes do not set out criteria for the court to consider when deciding whether to approve a settlement, factors have developed through the case law. While there is no definitive list of factors that a court may or must take into account, relevant factors may include: [76]

(a) The complexity and duration of the litigation.

(b) The stage of the proceedings.

(c) The risks and prospects of establishing liability and damages or the risks of an appeal.

(d) The reasonableness of the settlement in light of the best case scenario and the risks of litigation.

(e) The ability of the defendant to withstand a greater judgment.

(f) The reaction of the class.

6.55 In its 2018 report, the Australian Law Reform Commission (ALRC) considered that it was unnecessary to have statutory criteria for judges to apply when approving settlements because of the extensive jurisprudence which had developed. [77] The VLRC also

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75 The Competition Appeal Tribunal Rules 2015 (UK), r 94(9).

76 See for example *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 at [114]; and *Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3)* [2017] FCA 330, (2017) 343 ALR 476 at [84]. Similar lists have been included in two Australian practice notes. See *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.5]; and *Group Proceedings (Class Actions)* (Supreme Court of Victoria, Practice Note SC Gen 10, October 2020) at [16.6].

77 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.7].

considered it was unnecessary to recognise the settlement approval criteria in legislation, noting the need to allow courts to maintain flexibility. [78]

6.56 In Ontario, courts have found the following factors to be relevant to whether a settlement is "fair, reasonable and in the best interests of the class": [79]

(a) Amount and nature of discovery evidence.

(b) The terms and conditions of the settlement.

(c) The recommendation and experience of the lawyers.

(d) The future expense and likely duration of the litigation.

(e) The recommendations of neutral parties.

(f) The number of objectors and the nature of the objections.

(g) The presence of good faith, arms' length bargaining and the absence of collusion.

6.57 The LCO considered whether to propose amending the legislation to provide criteria to guide judges, such as those set out above. It decided it was unnecessary because of the widespread acceptance of the factors that apply and the risk that it would hinder the evolution of the criteria. [80]

6.58 We consider the class actions regime should specify factors the court must consider when deciding whether to approve a settlement, while ensuring the court has discretion to consider any further relevant matters. We think this is preferable to waiting for factors to develop through the case law as it will provide greater clarity and certainty to parties from an earlier stage. While law reform bodies in Australia and Canada have rejected the need for statutory criteria to guide judicial approval of settlement, this is because of the existence of well-developed factors in the case law. Aotearoa New Zealand is likely to have a much smaller volume of class actions than those jurisdictions and it could take a long time for similar factors to become settled in case law.

6.59 We have proposed five factors that a court should consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole, while also enabling the court to consider any other factors it sees as relevant. [81] The five factors are:

(a) The terms and conditions of the proposed settlement.

(b) Any legal fees and litigation funding commission that will be deducted from relief paid to class members.

(c) Potential risks, costs and benefits of continuing with the proceeding.

(d) Views of class members.

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78 Victorian Law Reform Commission *Access to Justice – Litigation and Group Proceedings: Report* (March 2018) at [4.168]–[4.176]. As noted above, the VLRC did recommend that the settlement approval principles should be set out in the legislation (so that a settlement must be fair and reasonable and in the interests of the class as a whole).

79 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 54. For factors applied in British Columbia, see *Jeffrey v Nortel Networks Corp* 2007 BCSC 69 at [28].

80 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 55.

81 See our draft legislation, cl 6(5).

(e) Process by which the settlement was reached.

6.60 We discuss each of the five factors below.

Terms and conditions of the proposed settlement

6.61 A key focus for the court will be considering the terms and conditions of the settlement, as these set out how class members will benefit from the settlement.[82] We think the court's consideration should include:

(a) Any relief that will be provided to class members.

(b) Whether class members are treated equitably in relation to each other.

(c) The proposed method of distributing any settlement amounts to class members.

(d) The proposed method of dealing with any unclaimed settlement amounts.

6.62 We discuss each of these below.

Any relief provided to class members

6.63 We think an essential consideration for courts will be the relief that will be provided to class members under the settlement, including the amount of any compensation that class members will be eligible to receive.[83]

6.64 We have not proposed that any forms of relief should be prohibited in a settlement. However, we think terms which only provide class members with non-monetary relief, such as vouchers for the defendant's product or discounts on future purchases, may require close scrutiny.[84] We also think terms which propose to make a payment to a charity instead of to class members should be closely scrutinised. Such payments are known as cy-près relief in other jurisdictions, but we prefer the term alternative distribution.[85] We think payments should be made to individual class members where possible, and alternative distribution should ordinarily be limited to cases where the size of individual claims would be so small that few class members would bother to submit a claim. We also think it would be preferable for the activities of the recipient organisation to have some relevance to the claims.

Whether class members are treated equitably

6.65 When considering the terms and conditions of a settlement, we have proposed that a court should consider whether class members are treated equitably in relation to each other.[86] This is to ensure that the interests of one group of class members have not been overlooked in favour of another group. This should not prevent principled distinctions between class members, for example where one group of class members would be more

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82 See our draft legislation, cl 6(5)(a).

83 See our draft legislation, cl 6(5)(a)(i).

84 In the United States, settlement terms such as coupon settlements are seen as "hot button indicators" as they may indicate unfairness on their face: see Barbara J Rothstein and Thomas E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed, Federal Judicial Center, 2010) at 17-18.

85 We discuss alternative distribution with respect to damages in Chapter 5.

86 See our draft legislation, cl 6(5)(a)(ii).

likely to succeed in establishing liability if the matter proceeded to trial or be able to establish a higher quantum of loss.

6.66 One issue to consider is whether a settlement may include a higher payment to the representative plaintiff, to compensate them for the role they played in the litigation and/or to incentivise claimants to take up the role of representative plaintiff. In the United States, 'incentive awards' are paid to representative plaintiff in most class actions, with an average award of $10,000 to $15,000.[87] In Australia, it has become common for a representative plaintiff to be paid a "reimbursement payment".[88] Canadian courts have been more cautious about such payments. In Ontario, courts have said that an honorarium payment to a representative plaintiff should be "exceptional" and is only awarded if the plaintiff "has gone well above and beyond the call of duty".[89] Courts in British Columbia have been more willing to award a modest honorarium payment.[90]

6.67 We consider additional payments to representative plaintiffs at settlement are undesirable because they may lead to conflicts of interest.[91] The promise of an additional payment upon settlement could cause a representative plaintiff to agree to a settlement which is not in the interests of class members. In Chapter 3 we discuss ways of assisting the representative plaintiff with their role, including the possibility of an honorarium payment that is not tied to settlement.

Proposed method of distribution

6.68 We think the court should consider the proposed method of settlement distribution as this will affect how many class members actually receive compensation from the settlement.[92] The LCO commented that lack of compensation was one of the most common and trenchant criticisms of class actions and that the success of an individual class action and class actions in general were frequently evaluated through the lens of settlement distributions. It therefore considered that settlement distribution could not be an afterthought and should be a central consideration for the court in assessing any proposed settlement.[93]

6.69 The appropriate method of settlement distribution is likely to differ depending on the type of case. For example, in Australia, shareholder settlements usually involve a global sum with a loss assessment formula developed to divide the settlement among class

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87 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 17:1.

88 Georgina Dimopoulous and Vince Morabito "An Australian Perspective on the Judicial Review of Class Action Settlements" (2021) 29 NZULR 529 at 553 (stating that over the last five years, reimbursement payments have been granted in the vast majority of Australian class action settlements).

89 *Makris v Endo International* 2020 ONSC 5709 at [38]; *Baker (Estate) v Sony BMG Music (Canada) Inc* 2011 ONSC 7105 at [93].

90 See *Cardoso v Canada Dry Mott's Inc* 2020 BCSC 1569 at [49]–[50] (commenting that "[m]odest compensation is appropriate where the representative plaintiff has provided necessary and active assistance leading to success on behalf of all class members". A payment of $1,500 was awarded) and *Parsons v Coast Capital Savings Credit* 2010 BCCA 311 at [20]–[25] (approving a payment of $3,500 to the representative plaintiff).

91 We are not suggesting an actual conflict of interest would necessarily arise in all cases. In Australia, it has been said that only two reimbursement payments have generated actual, rather than perceived, problems with conflicts of interest: Georgina Dimopoulous and Vince Morabito "An Australian Perspective on the Judicial Review of Class Action Settlements" (2021) 29 NZULR 529 at 554.

92 See our draft legislation, cl 6(5)(iii).

93 See Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at 58.

members.[94] Mass tort class actions usually involve the settlement administrator dividing the settlement sum amongst group members, following individual assessments.[95] In some cases, a settlement can be directly distributed by a defendant based on its records.[96]

6.70 The method of settlement distribution should be designed to get compensation into the hands of class members.[97] While individual compensation should reflect the merits of each individual case, it is also important to minimise cost and delay for class members.[98] These competing objectives may require some balancing.

6.71 When a court considers a proposed method of distribution, we think relevant matters may include:[99]

(a) The nature of the claim and the relief claimed.

(b) Whether the proposed method of determining individual entitlements is consistent with how the case would have been advanced at trial (for example, the way in which entitlement to damages would have been established).

(c) Whether a direct distribution by the defendant to class members is possible.

(d) The costs of a more exact distribution, if applicable.

(e) Whether all class member claims will be assessed in the same way, or whether any different treatment is justified.

(f) Whether the proposed method of distribution is likely to result in a fair outcome for individual class members.

(g) How straight-forward the claims process will be for class members.

6.72 It is likely that some aspects of distribution will need to be worked out after the settlement has been approved. Later in this chapter we propose that the court should have a power

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94 Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [22.36]. The stages typically involved in the process of distributing a shareholder or investor settlement are outlined in Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.42].

95 Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [32.36]; and Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.194]. Mass tort class actions will sometimes involve a 'process settlement' where there is no global settlement sum (although there may be maximum recoveries for each type of loss or injury): see Rebecca Gilsenan and Michael Legg "Australian Class Action Settlement Distribution Scheme Design – Deciding Who Gets What" (2019) 38 U Queensland LJ 15 at 24.

96 An example is an employment case where a defendant employer holds employee records and account details: see William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:15.

97 See *Eidoo v Infineon Technologies AG* 2015 ONSC 5493 at [26] ("…the ideal distribution scheme for a class action gets the compensation into the hands of class members"), cited in Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms — Final Report* (July 2019) at [60]; and William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:53 ("…the goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible").

98 Michael Legg "Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice" (2016) 16 Macquarie LJ 89 at 89.

99 We have drawn on the factors outlined in *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 at [43]–[44]; as well as Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at 107 (recommendation 17).

to make any orders it considers appropriate for the administration and implementation of a settlement. This would include orders with respect to distribution.

Proposed method of dealing with unclaimed settlement amounts

6.73 We also think the court should consider how the settlement proposes to deal with any unclaimed settlement funds.[100]

6.74 Reasons why an eligible class member might not claim settlement funds include: not receiving the notice of approved settlement, failing to retain the necessary documents (for example, proof of purchase), finding the claims process too difficult or considering the amount at stake too small to make a claim worthwhile.

6.75 Options for dealing with unclaimed funds include:[101]

(a) Returning the money to the defendant.

(b) Distributing the money pro rata amongst those class members who did file claims.

(c) Giving the money to a charity which is related to the claim (known as cy-près distribution).

(d) Giving the money to the Government.

6.76 In the United States, all four of these methods are used for distributing unclaimed settlement funds. The settlement agreement will typically specify the approach to be taken, although in some cases it is left to the court to determine. In recent years, courts have preferred redistributing funds to class members pro rata to distributing funds on a cy-près basis.[102] Courts will sometimes order the parties to attempt to get more class members to file a claim before unclaimed funds are redistributed.[103]

6.77 The Ontario legislation expressly allows the court to approve settlement terms that provide for payment of all or some of a settlement on a cy près basis, if it is not practical or possible to compensate class members directly.[104] The payment can be made to a charity or non-profit organisation agreed by the parties if the court determines the payment would directly or indirectly benefit class members, or to Legal Aid Ontario.[105]

6.78 In the United Kingdom Competition Appeal Tribunal, unclaimed damages must be distributed to a designated charity (or be used to cover costs incurred by the representative plaintiff).[106] This rule does not apply to settlements, and it is possible for the parties to agree that unclaimed settlement funds will revert to the defendant.[107] While a provision that unclaimed funds will revert to the defendant will not of itself be

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100 See our draft legislation, cl 6(5)(a)(iv).

101 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:24.

102 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:28.

103 See William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:24; and Barbara J Rothstein and Thomas E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed, Federal Judicial Center, 2010) at 30. For example, a court could order an extension to the claims filing period or that the clarity of claim forms be improved.

104 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.2(2).

105 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.2(3).

106 The Competition Appeal Tribunal Rules 2015 (UK), r 93(6).

107 The Competition Appeal Tribunal Rules 2015 (UK), r 97(7)(g).

considered unreasonable, the Tribunal may consider it in the context of other aspects of the settlement.[108]

6.79 We have not proposed that any method of dealing with unclaimed funds should be expressly permitted or prohibited, although we consider that a settlement should facilitate payment of compensation to class members to the extent possible. For this reason, we think that distributing funds pro rata to class members who have already made a claim is likely to be preferable to funds reverting to the defendant. We have expressed a similar view with respect to unclaimed damages in Chapter 5.

6.80 If only a small proportion of class members claim compensation, we think there would be some benefit in the court considering whether any additional steps are desirable before unclaimed funds are distributed. For example, more extensive notice could be required, or the claims period could be extended. This could be done using the power we propose for the court to make orders with respect to administration and implementation of the settlement, which we discuss later in this chapter.

Legal fees and litigation funding commission

6.81 When the court is considering whether a settlement is fair, reasonable and in the interests of the class as a whole, we think it should consider the net amount that individual class members will receive from a settlement. For this reason, we propose that the court should consider any legal fees or litigation funding commission that will be deducted from the relief paid to class members.[109] These payments may have a significant effect on what a class member actually receives from a settlement, and ultimately the extent to which class members obtain a substantively fair result from a class action.

6.82 We think this should be a consideration in both opt-in and opt-out cases, although a greater degree of scrutiny may be required in an opt-out case, where class members may not have signed a legal retainer or litigation funding agreement. In the Australian Federal Court, a more extensive examination and assessment of legal costs and the litigation funder's records may be required where: there are class members who are not clients of the lawyer or the litigation funder, or where the proposed deductions would be a significant proportion of an individual's settlement amount, or where there are litigation funding charges beyond a percentage commission (such as a project management fee).[110]

6.83 We do not see it as the court's role to approve or vary legal fees as part of settlement approval. Lawyers already have an obligation to only charge a fee that is fair and reasonable for the services provided.[111] NZLS has processes for considering complaints that a fee is not fair and reasonable. The court's role is simply considering the deductions that will be made from relief paid to class members, as part of its consideration of whether

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108 The Competition Appeal Tribunal Rules 2015 (UK), r 97(7)(g). Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.125]. For example, a settlement that might result in substantial fees being paid to the plaintiff's lawyers and a significant part of the settlement sum being paid back to defendants, while barring future claims by class members, is unlikely to be viewed as just and reasonable.

109 See our draft legislation, cl 6(5)(b).

110 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [16.4].

111 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9. The fee must not be more than is fair and reasonable, having regard to the interests of both client and lawyer and the factors set out in rule 9.1.

the settlement is fair, reasonable and in the best interests of the class as a whole. It may be appropriate for the court to have a power to vary litigation funding commissions at settlement, as we discuss later in this chapter.

Potential risks, costs and benefits of proceeding with the litigation

6.84 Our third proposed factor is any information that is readily available to the court about the potential risks, costs and benefits of continuing with the litigation.[112] We think the court should consider the proposed settlement against the alternative of proceeding to hearing (or appeal). The court's consideration could include:

(a) The costs that are likely to be incurred if the litigation continues. The main cost is likely to be legal fees, but other costs may include expert fees, court fees and litigation funding commission.[113]

(b) The risks of proceeding to trial (or appeal), including any potential difficulties in establishing liability and damages.

(c) The potential relief that could be awarded if the claim was successful.

6.85 We think the court's consideration should be primarily based on material that is filed by the parties, rather than the court conducting any kind of preliminary merits assessment. In the Federal Court of Australia, the information filed by parties is usually expected to address:[114]

(a) The complexity and likely duration of the litigation.

(b) The risks of establishing liability.

(c) The risks of establishing loss or damage.

(d) The risks of continuing a class action.

(e) The ability of the respondent to withstand a greater judgment.

(f) The range of reasonableness of the settlement in light of the best recovery.

(g) The range of reasonableness of the settlement in light of all the attendant risks of litigation.

(h) The terms of any advice received from counsel and/or any independent expert in relation to the issues which arise in the proceeding.

6.86 We think information of this nature would assist the court to assess the risks, costs and benefits of continuing with the proceeding. Earlier in this chapter we proposed that an application for settlement approval should include information on the risks and benefits of continuing with the litigation.

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112 See our draft legislation, cl 6(5)(c).

113 In some litigation funding agreements, the funding commission may vary depending on the stage at which the matter resolves, with a lower percentage if it resolves at an earlier stage and a higher percentage if it resolves later: see Issues Paper at [14.3].

114 *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.5].

6.87 In some cases, a settlement will occur after the hearing on common issues and so there will be an evidential base for the court to rely upon.

Views of class members

6.88 We think the court should also consider any views expressed by class members, whether in favour of the settlement or opposed.[115] As we have explained above, we consider that class members should have a right to object to a settlement, so the court is able to hear any opposing views. We have also noted the difficulties that exist for class members in objecting to a settlement. One way of addressing this is for counsel assisting the court to be appointed, with class members being able to communicate any concerns about the settlement to them.[116]

Process of settlement negotiation

6.89 Our final factor is the process by which the settlement was reached, including whether any potential conflicts of interest were properly managed.[117] Our intention is to ensure that any conflicts of interest have not improperly influenced the settlement. In some jurisdictions, courts will consider the process of settlement negotiation. For example, Canadian courts will consider the presence of good faith, arm's length bargaining and the absence of collusion.[118] In the United States, courts will consider whether there was "arm's length negotiation".[119]

6.90 We think the court could consider matters such as: whether there was any independent valuation of the settlement amount, whether there was any third-party evaluation of the settlement terms (such as by a senior lawyer) and whether any related cases were settled at the same time.

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115 See our draft legislation, cl 6(5)(d).

116 We address this earlier in the chapter.

117 See our draft legislation, cl 6(5)(e).

118 United States Federal Rules of Civil Procedure, r 23(e)(2)(B); and Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 54.

119 United States Federal Rules of Civil Procedure, r 23(e)(2)(B). Guidelines developed by courts in assessing whether a settlement was negotiated at arm's length include: (a) settlement negotiations should only occur once the parties have a good sense of the strength and weaknesses of their claims, particularly through discovery; (b) legal fees should not be negotiated between lawyers until terms affecting class members' claims have been agreed upon; (c) where a neutral third party has overseen the settlement process, this may lend legitimacy to it, as may the presence of an independent government agency; and (d) simultaneous settlement of several related cases could indicate that class member claims have been compromised to benefit another settlement: William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:50.

QUESTION

Q44 Should there be specific factors a court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole? For example, should the court consider:

a. The terms and conditions of the settlement.

b. Any legal fees and litigation funding commissions that will be deducted from class member relief.

c. Any information readily available to the court on the potential risks, costs and benefits of continuing with the litigation.

d. Any views of class members.

e. The process by which the settlement was reached.

f. Any other factors it considers relevant.

Court's powers in approving settlement

6.91 In other jurisdictions, the court's power is generally limited to approving or declining to approve a class action settlement and a judge cannot rewrite the terms of the settlement agreement. If the court has concerns about a settlement that prevents it from providing approval, the judge may communicate those concerns to the parties so they can decide whether to renegotiate the settlement to address those concerns.[120] In general we think this approach is appropriate as the settlement agreement will be the result of negotiations between the plaintiff and defendant and the agreement may not be acceptable to both parties if one or more terms is changed.

6.92 One exception to this may be the litigation funding commission payable in connection with a settlement. We seek submitters views on what powers the court should have if it considers the funding commission that would be deducted from settlement payments means the settlement is not fair, reasonable and in the interests of the class as a whole.

6.93 One option is for the judge to simply decline to approve the settlement and convey their concerns about the funding commission to the parties so they can decide whether to submit a new application for settlement approval with a reduced litigation funding commission. Alternatively, the court could have a power to amend litigation funding commission at settlement. This could occur through a common fund order or through a separate power to amend funding commission at settlement.

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120 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:46; Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.135]–[6.138]; and Garry D Watson *Holmested and Watson: Ontario Civil Procedure* (online ed, Thomson Reuters) at § 27:39.

Common fund orders

6.94 In some jurisdictions, the court has a power to make a common fund order.[121] A common fund order requires all class members to pay the litigation funder a commission from the settlement or judgment proceeds, regardless of whether the class members signed a litigation funding agreement. The purpose of a common fund order is to ensure the costs of the litigation are equitably shared by all those who will benefit from the settlement or judgment. A common fund order would generally only be necessary in an opt-out class action as signing a litigation funding agreement is often a condition of signing up to an opt-in class action.[122]

6.95 If a common fund order is made, the funding commission rate will need to be approved by the court to ensure that the order benefits class members and does not cause material detriment to their interests. It is likely the court approved funding commission will be lower than the commission applicable under the funding agreement, as the order will allow the funder to claim its commission from more people. There are several points at which the funding commission could be set, with one option being at the settlement approval stage.[123] We discuss common fund orders in detail in Chapter 4 and seek feedback on whether and how they should be used in Aotearoa New Zealand.

Power to amend litigation funding commission at settlement

6.96 Another option is to give the court an express power to amend litigation funding commissions at settlement in all cases. If a common fund order mechanism is also available, this power might only be appropriate in cases where there is no common fund order in place.

6.97 The benefit of allowing the court to vary funding commissions at settlement is that it could safeguard the interests of class members by ensuring that the net compensation they receive from a settlement is fair. While class members may have knowingly signed up to a litigation funding agreement, they may have had little bargaining power to negotiate a funding commission and limited alternative options for funding litigation. The fact that a class member has agreed to a litigation funding commission may not necessarily mean it is fair and reasonable.[124] We note, however, that a competitive market for litigation funding would help to reduce litigation funding commissions. A power for the court to vary funding commissions may be more efficient for the court and the parties than the alternative of the court declining to approve the litigation funding agreement and requiring a new application for settlement approval to be made.

6.98 Allowing the court to vary funding rates at settlement could introduce commercial uncertainty for litigation funders which may deter them from funding class actions in Aotearoa New Zealand. There may also be a risk of hindsight bias if the courts can vary

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121 We discuss common fund orders in Chapter 4.

122 There may be exceptions to this, for example where a litigation funder begins funding an opt-in proceeding at a late stage when class members have already opted in.

123 As we discuss in Chapter 4, alternatively the court could set the funding rate at an early stage of the proceeding, or after the common issues are determined.

124 See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 184 at [72] and [80] as cited in *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 at [26]–[29].

a litigation funding commission at a late stage of the proceeding. If the court should have a power to vary funding rates in cases where a class member has signed up to the agreement, it may be more appropriate to exercise this at an early stage of proceedings.[125] There is also a question of whether setting litigation funding rates is within the institutional competence of courts, although this could be addressed by appointing a court expert to assist with assessing funding rates. While these risks also exist with common fund orders, they may be justified because of the corresponding benefit to litigation funders of allowing them to collect a commission from all class members.

6.99 Giving the court a power to vary funding commissions at settlement may be particularly controversial in cases where class members have actively signed up to the terms of the funding agreement and agreed to the funding commission (such as in opt-in class actions). In Australia, there is some uncertainty as to whether courts have the power at settlement to vary the funding commission rate in a litigation funding agreement that class members have signed up to.[126]

QUESTION

Q45 Should the court have an express power to amend litigation funding commissions at settlement?

FINALISING THE CLASS FOR SETTLEMENT

6.100 In this section we discuss several issues associated with finalising the class for settlement:

(a) Whether there should be a power to convert an opt-out class action to an opt-in class action for the purposes of settlement.

(b) Whether class members should have an ability to opt out of a settlement.

(c) Certification for the purposes of settlement.

Converting an opt-out class action to opt-in for settlement

6.101 In an opt-out class action, the identity of many class members and the circumstances of their claims will likely be unknown. This lack of information can inhibit settlement discussions as parties may be reluctant to agree to settlement proposals without knowing how many class members could be eligible and the details of their claims.

6.102 In Australia, the parties have managed this issue by seeking class closure orders from the courts. A class closure order effectively converts an opt-out class action to an opt-in class action for the purposes of settlement. Class closure orders are commonly sought to facilitate a mediation or settlement but may also be sought as part of the settlement

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125 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.90].

126 See *Endeavour River Pty Ltd v MG Responsible Entity Ltd (No 2)* [2020] FCA 968 at [3]–[5].

approval process or after the court has given judgment on the common issues.[127] One form of class closure order requires class members to identify themselves and provide specified information about their claim by a certain date. If a class member fails to do so, they will not be eligible for any benefit from the settlement but will still be bound by its terms, so cannot not bring a subsequent claim.[128] Another way of closing the class is to amend the class definition so it is limited to those who have registered to participate in the class action. Those who do not register cannot participate in the settlement but are not bound by it and do not have their claim extinguished.[129]

6.103 The ALRC has noted that it has become routine for parties in shareholder class actions to apply for class closure prior to mediation because it would otherwise be difficult to assess how many individuals fall within the class definition and their estimated loss.[130] However, it said that class closure was not always necessary in other types of class actions where the parties agree to settle on an aggregate basis.[131]

6.104 The class actions regime in Victoria has an express power to make class closure orders.[132] There is no express power to make class closure orders in the federal legislation and so the Federal Court has relied on its general power to make orders in class actions.[133] However, recent court decisions indicate that the Federal Court may not have the power to order class closure prior to a settlement or judgment under its general power.[134] In light of this, the Australian Parliamentary Inquiry recommended that the federal legislation should be amended to introduce an express power to make class closure orders.[135] It said

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127 Simone Degeling and Michael Legg "Class Action Settlements, Opt-Out and Class Closure: Fiduciary Conflicts" (2017) 11 J Eq 319 at 323; and Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [8.7].

128 Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [32.42]; and *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98, (2017) 252 FCR 1 at [74].

129 Simone Degeling and Michael Legg "Class Action Settlements, Opt-Out and Class Closure: Fiduciary Conflicts" (2017) 11 J Eq 319 at 324; and Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [32.42].

130 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.19]. This was because the way shares were traded on the ASX, such as through custodians and nominees.

131 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.19]. It also noted at [4.20] that when the ALRC originally recommended a class actions regime, it proceeded on the expectation that settlements would be reached on an aggregate basis, with rules as to how that aggregate would be divided among class members. This approach avoided the need for class closure prior to mediation.

132 Supreme Court Act 1986 (Vic), s 33ZG.

133 Michael Legg and Ross McInnes *Australian Annotated Class Actions Legislation* (2nd ed, LexisNexis Butterworths, Chatswood, 2018) at [32.41].

134 *Gill v Ethicon SàrlL (No 2)* [2019] FCA 177 at [25]; *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 3)* [2020] FCA 748 at [198]–[214]; and *Furnell v Shahin Enterprises Pty Ltd* [2021] FCA 73 at [60]–[74]. See also *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 at [121]–[123]; and *Wigmans v AMP Ltd* [2020] NSWCA 104 at [76]–[79], [95] and [132] regarding the equivalent power in the Civil Procedure Act 2005 (NSW).

135 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at Recommendation 5.

that the ability to close the class was integral to facilitating settlements in 'open' (opt-out) class actions and to providing defendants with finality.[136]

6.105 We acknowledge that in some cases it may be difficult for the parties to reach a settlement in an opt-out class action because of uncertainty about the size of the class and the nature of the claims. We think settlement of class actions should be facilitated because this can enable the cost-effective and timely resolution of claims and reduce the burden on courts. Therefore, we consider the representative plaintiff should be able to seek an order that an opt-out class action be converted to an opt-in class action for the purposes of facilitating settlement. Such an order could be sought at the outset of a mediation or other settlement negotiation process or as part of the settlement approval process. It would require notice to be given to class members and a sufficient opportunity to opt in.

6.106 A class member who does not opt in at settlement will not be eligible to receive the proceeds of settlement. However, we do not think they should be bound by the terms of the settlement. We think this would be unfair, given their lack of participation could result from not receiving or understanding a notice.

6.107 If a settlement is not reached or approved, a question arises as to whether the proceeding should remain as opt-in or should revert back to opt-out. We think this may depend on the stage of the proceeding and so we suggest the court has discretion as to whether a case should remain as opt-in. At the same time, we think it is undesirable for a proceeding to change between opt-in and opt-out on multiple occasions, as this will cause confusion for class members and increased cost and delay.

6.108 We do not think it will be necessary for an opt-out proceeding to convert to opt-in for settlement in all cases. For instance, it may not be necessary where:

(a) The parties agree to settle on an aggregate sum basis, with individual entitlements determined by a formula.

(b) The defendant holds information about class members (for example, because they are customers).

(c) The class size can be easily estimated and there are unlikely to be high degrees of individual variation among claims.

6.109 We have not included a power to convert an opt-out proceeding to opt-in for the purposes of settlement in our draft settlement provisions as the parties may wish to seek an order at an earlier stage (such as when negotiating a settlement or entering into a mediation process). We suggest there could be a more general provision to seek an order that an opt-out class action be converted to an opt-in class action.

QUESTION

Q46 Should the court have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement?

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136 Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [8.44].

Opting out of the settlement

6.110 In an opt-out class action, class members could be given a second opportunity to opt out of the class action at settlement. Class members who have signed up to an opt-in class action could also be given the opportunity to opt out at settlement. Jurisdictions have taken different approaches to this issue.

6.111 The Australian class actions regimes do not provide an express right to opt out of a settlement, although it appears open to the parties to negotiate an opportunity for class members to opt out.[137] If class members had an initial opportunity to opt out of the class action, it is not routine to provide a second opportunity to opt out once a settlement has been approved.[138] Similarly, the Canadian regimes do not provide an express right to opt out of a settlement and courts have not developed a general practice of providing a second right to opt out.[139]

6.112 In the United States, it is up to the court whether to approve a settlement which does not include another opportunity to opt out.[140] Relevant factors include whether there have been any changes in the information available to class members since the first opportunity to opt out and the nature of the individual claims.[141] Commentary notes that in most class actions, a settlement is reached prior to certification and so class members will have a single opportunity to opt out of the 'settlement class action'.[142]

6.113 In the United Kingdom Competition Appeal Tribunal, class members will have an opportunity to opt out of the collective settlement after it has been approved, whether or not they objected to its terms at the settlement approval hearing.[143]

6.114 We consider class members should be given an opportunity to opt out of a settlement so they can decide whether they prefer to settle their claim or preserve the ability to bring their own proceedings.[144] It is possible that a settlement will occur a long time after the initial opportunity to opt out of the class action and matters may have changed

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137 See Cameron Hanson "Weighing the bird in the hand: settlement of class actions" in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) at 262 and 272. See also *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.2(p)], which states that notice of a proposed settlement should outline any steps required to be taken by persons wishing to opt out of the settlement "if that is possible under the terms of the settlement".

138 Cameron Hanson "Weighing the bird in the hand: settlement of class actions" in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2017) at 272.

139 Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 96. However, it appears possible for class members to be given a second opportunity to opt out at settlement. See for example *Robertson v ProQuest Information and Learning LLC* 2011 ONSC 2629 at [26] and [29]; and *Macaronies Hair Club and Laser Centre Inc v Bank of Montreal* 2021 ABCA 40 at [47] (where the Court accepted that the Class Proceedings Act SA 2003 c C-16.5 (Alberta) allowed for the possibility of more than one right to opt out to address the issue of sequential settlements).

140 United States Federal Rules of Civil Procedure, r 23(e)(4). This provides that the court "may" refuse to approve a settlement unless it gives class members another opportunity to opt out.

141 Notes of Advisory Committee on 2003 amendment to United States Federal Rules of Civil Procedure, r 23(e)(2).

142 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 9:52.

143 Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.122]; and The Competition Appeal Tribunal Rules 2015 (UK), rr 94(10) and 97(8)–97(9).

144 See our draft legislation, cl 9(1)(b).

considerably since then. If a class action settles prior to certification, class members will have the opportunity to consider the terms of a settlement when deciding whether to opt out. We think that if a matter settles post-certification, class members should have that same opportunity to decide whether to settle or not. We think the opportunity to opt out of a proceeding at settlement should apply to both opt-out and opt-in proceedings.

6.115 We suggest the opt-out date should be after the settlement has been approved. Otherwise, class members could opt out of a class action on the basis of a settlement that is not ultimately approved by the court.

6.116 There is one situation where we think it is unnecessary to allow class members to opt out after settlement. This is where settlement of an opt-in class action was reached prior to certification. In this case, class members will have been notified of the terms of a settlement prior to opting into the class action.[145]

6.117 An associated issue is whether other potential class members should be allowed to opt into the proceeding at settlement (i.e. those who decided against participating in the proceeding at the initial opt-in or opt-out stage). We think a class actions regime should allow this, although it should not be required.[146] We do not think there is any unfairness from excluding someone from a settlement who has decided to opt out of the proceeding, or decided not to opt into the proceeding, at an earlier stage. We also think this could deter class members from joining the class action at an earlier point, as they could simply wait and see if there is a settlement. However, there may be cases where a defendant would want a settlement to bind the widest group possible and so would seek to provide an additional opportunity for potential class members to opt into a class action at settlement.

QUESTION

Q47 Do you agree that class members should be able to opt out of a class action settlement once it is approved?

Q48 Should other potential class members have an opportunity to opt in at settlement?

Certification for the purposes of settlement

6.118 Earlier in this chapter, we proposed that court approval should be required if a settlement of a class action is reached prior to certification. In this situation, there will need to be a process for certifying or approving the class for settlement, so it is clear who the settlement is binding upon.

6.119 One approach is to have certification occur before the court considers whether to approve the settlement. In the United Kingdom Competition Appeal Tribunal, if the parties

145 See our draft legislation, cl 9(2).

146 See our draft legislation, cl 9(1)(c).

reach a settlement prior to certification, the plaintiff must apply for a collective settlement order, appointing them as settlement representative.[147] The criteria for approving a settlement representative are broadly the same as the certification criteria.[148] If the court grants the collective settlement order, the settlement representative and the defendant may then apply for an order approving the settlement.[149]

6.120 Another approach is for the court to make a conditional or preliminary certification order prior to the settlement approval hearing, with a final determination on certification when the settlement is approved. This is the approach taken in the United States. At the preliminary approval stage the court will consider whether it will likely be able to certify the class for the purposes of settlement.[150] This is sometimes referred to as 'conditional certification' or a 'preliminary determination' on class certification.[151] The court will apply the certification criteria, with the exception of the requirement that a class action trial will be manageable.[152] Other aspects of the certification criteria require "undiluted, even heightened" attention when the court is considering certification for settlement, because the court will not have the opportunity to adjust the class as the case unfolds.[153] The defendant will not contest certification but will usually insist on retaining the right to oppose certification if the settlement is not approved.[154] At the final approval stage, the court will decide whether to certify the class (as well as approve the settlement).[155]

6.121 In Canada, the parties will typically bring an application to certify the class action for settlement purposes only.[156] The court does not need to apply the certification criteria as rigorously when determining certification for settlement, because the concerns about manageability of a class action are removed.[157]

6.122 We propose that when the parties seek to settle a proceeding prior to certification, the court should decide whether to certify the class for the purposes of settlement.[158] The court would apply the usual certification criteria with any necessary modifications (for example, the court would not need to consider whether the time and cost of a class action is proportionate to the remedies sought).[159] A hearing may be required to determine

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147 The Competition Appeal Tribunal Rules 2015 (UK), r 96.

148 Competition Appeal Tribunal *Guide to Proceedings* (2015) at [6.103] and [6.108].

149 The Competition Appeal Tribunal Rules 2015 (UK), r 97.

150 United States Federal Rules of Civil Procedure, r 23(e)(1)(B)(ii).

151 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:17.

152 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:18. The manageability requirement is in United States Federal Rules of Civil Procedure, r 23(b)(3)(D).

153 *Anchem Products Inc v Windsor* (1997) 521 US 591 at 620. However, commentary notes that the requirement for heighted scrutiny where certification is sought for settlement has been "honoured more in the breach than the observance": William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:18.

154 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:18.

155 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 13:39.

156 Lenczner Slaght *Class Actions in Canada 2019* (2019) at 11. Note that some provinces provide that where an application is made to certify a class action for the purposes of settlement, the court cannot certify the proceeding unless it has approved the settlement: Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 5(5); Class Proceedings Act SNS 2007 c 28 (Nova Scotia), s 7(3); and Class Proceedings Act RSNB 2011 c 125 (New Brunswick), s 6(3).

157 *Gariepy v Shell Oil Co* [2002] OJ No 4022 at [27] and *Buote Estate v R* 2014 FC773 at [8].

158 See our draft legislation, cls 4 and 7(1)–(2).

159 See our draft legislation, cl 7(2).

certification for settlement, although we envisage this would be shorter than a normal certification hearing as the defendant is likely to consent to certification for the purposes of settlement.

6.123 The notice of proposed settlement would also need to advise that the class action has been certified for the purposes of settlement and that a representative plaintiff has been appointed.[160] The notice would need to include the process for opting in or opting out as appropriate.

6.124 In an opt-in case, we envisage that the date for opting in would be prior to the settlement approval hearing. This would enable the parties to know the size of the class prior to the hearing, which is one of the benefits of having an opt-in class. It would also give class members who have opted in standing to be heard on the proposal. As noted above, in an opt-in case where settlement is reached prior to certification, we do not think it is necessary to provide an opportunity to opt out if the settlement is approved. This is because class members were aware of the settlement when deciding to opt in.[161]

6.125 In an opt-out case, we envisage that the date for opting out would be after the settlement is approved.

QUESTION

Q49 When a settlement is reached prior to certification, do you agree that the court should consider whether to certify it for the purposes of settlement?

SETTLEMENT DISTRIBUTION AND ADMINISTRATION

6.126 Once a settlement is approved by the court, the terms of the settlement will need to be implemented. This will include distributing any settlement sum to class members. Earlier in this chapter we proposed that the court should consider the proposed method of settlement distribution as part of its assessment of the terms and conditions of a settlement.

6.127 In this section we discuss the following aspects of settlement distribution and administration:

(a) Court supervision and monitoring of settlement.

(b) The role of a settlement administrator.

(c) Requirements for reporting on the outcome of the settlement process.

Court supervision and monitoring of settlement

6.128 We consider the court should maintain oversight of the administration and implementation of the settlement, to ensure that class member interests are protected and to respond to any issues that arise. For example, there could be a dispute about the

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160 See our draft legislation, cl 7(3).

161 See our draft legislation, cl 9(2).

effect of a particular term in the settlement agreement, or implementation issues that were not contemplated by the settlement. Our draft provision provides that the court must supervise the administration and implementation of a settlement, based on a similar Ontario provision.[162]

6.129 We also propose the court should have the power to make any orders it considers appropriate with respect to the administration and implementation of a settlement.[163] We note that in Australia, the court has an express power to make "such orders as are just" with respect to distribution of a settlement.[164] We consider our proposed power would enable the court to make orders with respect to distribution of a settlement, as well as orders on non-monetary aspects of a settlement. As we noted earlier in this chapter, it is likely that some details of the distribution will need to be worked out after the settlement has been approved. We also noted that if only a small proportion of class members claim compensation, it may be desirable for the court to consider whether any additional steps should be taken before unclaimed funds are distributed. This could include more extensive notice to class members or extending the claims period. Our proposed power would enable the court to address these issues.

6.130 We note the comments of the VLRC that the extent to which the court will need to supervise settlement distribution will depend on the type of case. For example, while the court may need to maintain close supervision of a settlement involving highly individualised loss assessments, settlement distribution may be more straightforward in other class actions and intensive court supervision may increase cost and delay.[165] We agree that the court's role in supervising implementation of a settlement will vary depending on the case and we think our draft provision provides sufficient flexibility.

QUESTION

Q50 Should the court supervise the administration and implementation of a class action settlement?

Appointing a settlement administrator

6.131 In some cases it will be appropriate to appoint an administrator to carry out the process of assessing individual claims and arranging for payment to class members. There will be situations where this is not necessary, such as where the defendant can pay class members directly without a claim being required.

6.132 Settlement administration needs to be carried out in a way that is accurate and efficient. The cost of settlement administration is also relevant as this is generally deducted from

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162 See our draft legislation, cl 10(1); and Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(13).

163 See our draft legislation, cl 9(1)(e).

164 Federal Court of Australia Act 1976 (Cth), s 33V(2). Note that the Australian legislation involves two distinct, but related, powers: the power to approve the settlement and the power to approve the distribution of payments under the settlement: see *Botsman v Bolitho* (2018) 57 VR 68 at [200] (referring to Supreme Court Act 1986 (Vic), s 33V).

165 Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.194].

the total settlement sum.[166] In Australia, administration costs have generally been less than three per cent of the total settlement, but they have sometimes been higher (such as five to seven per cent).[167] Shareholder class actions using a formula have generally been cheaper to administer than claims requiring individual assessment.[168]

6.133 In Australia it is common for the plaintiff's law firm to carry out settlement administration.[169] The VLRC said class members could perceive this as 'double dipping' by lawyers and said that settlement distribution did not always require legal expertise.[170] The ALRC said the court should be able to have a tender process for a settlement administrator and that this might assist to reduce the cost of settlement administration and improve the efficiency of the process.[171] It said that in shareholder class actions, an accounting firm, share registry service or claims administration company might be able to undertake settlement administration as competently as the plaintiff's firm and with greater cost efficiency.[172]

6.134 In Ontario and the United States, the court may appoint a private company known as a claims administrator to manage the settlement distribution process.[173] Claims administrators in Ontario have a statutory duty to administer the distribution "in a competent and diligent manner".[174] This followed a recommendation by the LCO, which considered there should be more consistency and transparency of the role of

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166 See William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:20; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.35].

167 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.36].

168 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.37]. It referred to costs for administering shareholder class actions ranging from $250,000 to $600,000 while the costs of administering personal injury class actions often exceeded $3 million.

169 Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.113]; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.35].

170 Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.115]. It suggested that in smaller, less complex class actions, Funds in Court (an office of the Supreme Court which administers funds paid into court in civil proceedings) could administer settlement distribution: at [4.117].

171 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.43] and Recommendation 9 at 141. The ALRC agreed with the Law Council of Australia's suggestion that a tender process could be run by the judge who is conducting the settlement approval hearing, a registrar, or a court-appointed expert who provides the judge with a recommendation: at [5.50].

172 Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.39].

173 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 64; and William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:20. In the United States, courts will sometimes appoint a special master instead.

174 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(15).

administrators.[175] In the United States, administrators have an obligation to perform their duties in good faith.[176]

6.135 Our draft provision would enable a court to appoint a person as settlement administrator, based on an Ontario provision.[177] This is not mandatory as in some cases, distribution can take place without any kind of claims process. The role of settlement administrator could be performed by a range of people, including a barrister, accountant or corporate trustee. In some cases, the court might also consider it appropriate for the plaintiff's law firm to fulfil the role of settlement administrator. We think the court should have discretion as to who is appointed as settlement administrator, as the appropriate administrator will differ depending on the nature of the case. However, we envisage that an appropriate administrator would be able to distribute settlement funds in an accurate and efficient way, make it easy for class members to engage with the process and charge a fee that is reasonable. We envisage the parties would propose an administrator and the court would consider whether that person is suitable for the role.

QUESTION

Q51 Should the court have a power to appoint a settlement administrator? Who would be appropriate to fulfil this role?

Reporting requirements

6.136 We consider the court should be given information on the outcome of settlement implementation, including the extent to which class members received compensation from the settlement and the costs incurred in settlement administration. This will improve the transparency, monitoring and evaluation of settlements and enable the court to develop its expertise regarding the effectiveness of settlement distribution procedures.[178] We have therefore proposed that a settlement outcome report must be filed within 60 days of the settlement implementation process being completed. The Ontario legislation has this requirement, while the Federal Court of Australia class actions practice note requires the court to be advised of the performance of the settlement and the costs incurred in administering it.[179]

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175 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 64.

176 William Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at § 12:20.

177 See our draft legislation, cl 9(1)(d). The Ontario provision is: Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(14). This provision was inserted in the 2020 amendments to the legislation, following a recommendation of the Law Commission of Ontario: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 69.

178 We note that the Law Commission of Ontario considered that mandatory and consistent settlement outcome reports could significantly improve the transparency, monitoring and measurement of settlements: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 8.

179 Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(16) (note that the provision sets out the information that must be provided in the report); and *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.7]. These followed recommendations of the Law Commission of Ontario and the Australian Law Reform Commission.

6.137 The settlement outcome report could be filed by the settlement administrator, or by the parties if the court has not appointed a settlement administrator. We envisage that the report could include the following information:

(a) Total amount in the settlement fund.

(b) Total number of class members (or an estimate if this is unknown).

(c) Number of class members who opted out of the settlement.

(d) Number of class members who received a payment from the settlement.

(e) Number of class members who had their claim declined and the reasons for this.

(f) Information about the size of payments received by class members (which could be broken into categories).

(g) Information on implementation of any non-monetary aspects of the settlement.

(h) Cost of administering the settlement.

(i) Amounts paid to litigation funders.

(j) Amounts paid to lawyers.

(k) Amount of unclaimed funds and how this was distributed.

6.138 Our draft provision simply requires the court to be provided with a settlement outcome report within 60 days of the settlement implementation process being completed.[180] We think more detailed requirements about the contents of the report would fit better in the High Court Rules.

6.139 We think it is desirable for settlement outcome reports to be made available to class members as well as the wider public. This will help to foster transparency and provide valuable public policy information on the extent to which class actions enable substantive access to justice and to identify potential issues for reform. For example, outcome reports might indicate that in certain types of cases, only a small percentage of class members tend to submit a claim. We note that overseas law reform bodies have recommended that information on settlement outcomes should be publicly available.[181] In the United States, the Federal Judicial Center has recommended that judges should routinely order the parties to report information on claims rates and class member recoveries to the court and place it in the public record.[182]

6.140 We recognise that settlements are usually confidential in ordinary civil litigation. However, we think there are differences in class actions that make it appropriate to have settlement outcomes made publicly available. These include:

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180 See our draft legislation, cl 10(2).

181 Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 65-68 and 70; and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [5.70]–[5.76] and Recommendation 10. The ALRC observed that without a report on settlement administration, it is difficult for the court, class members, participants and the public to gain an in-depth understanding of how class actions resolve and for the legal profession, academics and policy makers to have a clear and accurate evidence base.

182 Barbara J Rothstein and Thomas E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (2nd ed, Federal Judicial Center, 2009) at 23. Note that in California there is a requirement for the parties to report to the court the total amount that was paid to class members: Code of Civil Procedure (California) § 384(b).

(a) A potentially large number of class members will have been advised of the terms of the settlement, making it difficult to assure confidentiality.

(b) Class action settlements are approved by the court, which does not usually occur with other forms of litigation.

(c) The broader public interest in knowing the extent to which class actions fulfil the goals of improving access to justice and managing multiple claims in an efficient way.

(d) Payments to individual class members will often have litigation funding commission deducted, which could potentially include cases where individual class members did not expressly sign up to a litigation funding agreement. Transparency with respect to the compensation ultimately received by class members may help to facilitate competition amongst litigation funders.

(e) In future cases, it will provide class members, counsel assisting, court experts and courts with information to draw on when considering whether a proposed settlement is fair, reasonable and in the best interests of the class as a whole.

6.141 We recognise that in some cases, the court may make confidentiality orders which prevent all details of a settlement from being made public. However, to the extent possible, we think settlement outcome reports should be publicly available.

QUESTION

Q52 Should there be an obligation to provide a settlement outcome report to the court? Should this be made publicly available?

OUR DRAFT SETTLEMENT PROVISIONS

6.142 We set out below our draft settlement provisions, which give effect to the views we have expressed above. In Appendix One we also include a diagram which outlines our proposed settlement process (for a settlement that occurs post-certification).

6 Settlement of class action

(1) The settlement of a class action proceeding must be approved by a court.

(2) An application for approval of a settlement must be made jointly by the representative plaintiff and the defendant.

(3) For a proceeding with more than 1 defendant, if not all the defendants will be covered by the settlement, the application must be made jointly by all representative plaintiffs whose claims will be covered by the settlement and all relevant defendants.

(4) Before considering whether to approve the settlement, the court must—

(a) approve a notice to class members informing them of the proposed settlement; and

(b) set a date by which any objections to the settlement must be lodged by class members.

(5) The court must not approve the settlement unless it is satisfied that it is fair, reasonable, and in the interests of the class as a whole after taking into account—

(a) the terms and conditions of the settlement, including—

(i) any relief that will be provided to class members; and

(ii) whether class members are treated equitably in relation to each other; and

(iii) the proposed method of distributing any settlement amounts to class members; and

(iv) the proposed method of dealing with any unclaimed settlement amounts; and

(b) any legal fees and litigation funding fees that may be deducted from the relief payable to class members; and

(c) any information that is readily available to the court about the potential risks, costs, and benefits of continuing with the proceeding; and

(d) any views of class members; and

(e) the process by which the settlement was reached, including whether any potential conflicts of interest were properly managed; and

(f) any other factors it considers relevant.

7 Settlement application prior to certification of proceeding

(1) This section applies if an application for approval of a settlement is made prior to the certification of a class action proceeding.

(2) The court must, before considering that application, consider whether the proceeding meets the requirements of **section 4** (with any necessary modifications) and if so, for the purposes of settlement,—

(a) certify the proceeding as a class action proceeding; and

(b) appoint 1 or more representative plaintiffs.

(3) If the court certifies the proceeding, **section 7** applies to the application except that the notice referred to in **section 7(4)(a)** must also give notice that—

(a) the proceeding has been certified as a class action proceeding for the purposes of settlement; and

(b) 1 or more representative plaintiffs have been appointed.

(4) If the court certifies the proceeding as an opt-in proceeding, the notice must also specify the date by which a person who is eligible to opt in as a class member must do so.

8 Appointment of counsel to assist court or expert

(1) The court may appoint counsel to assist the court or a court expert if it considers this will assist the court to determine whether a settlement is fair, reasonable, and in the interests of the class as a whole.

(2) The court may order that 1 or more of the parties pay part or all of the costs of the counsel or expert.

9 Approval of settlement

(1) If the court approves a settlement, it—

(a) must approve a notice of the approved settlement to class members; and

(b) must specify a date by which class members (subject to **subsection (2)**) may opt out of the settlement (the **opt-out date**); and

(c) may, if permitted by the terms of settlement, specify a date by which persons who are eligible to opt in as a class member may do so; and

(d) may appoint a person as an administrator to implement the settlement; and

(e) may make other orders it considers appropriate for the administration and implementation of the settlement.

(2) In an opt-in proceeding, it is not necessary to give an opportunity to opt out to class members who opted in to the proceeding after being notified of the proposed terms of settlement.

(3) If a class member opts out of the settlement, the suspension period under **section 5** (relating to any limitation period that applies to their claim) ends on the day they do so.

(4) On the day immediately following the opt-out date, the settlement is binding on all parties to the settlement and all remaining class members.

10 Administration and implementation of settlement

(1) The court must supervise the administration and implementation of the settlement whether or not it has appointed an administrator.

(2) An administrator or the parties (if the court has not appointed an administrator) must file a report with information about the process and outcome of the implementation of the settlement within 60 days of the implementation process being completed.

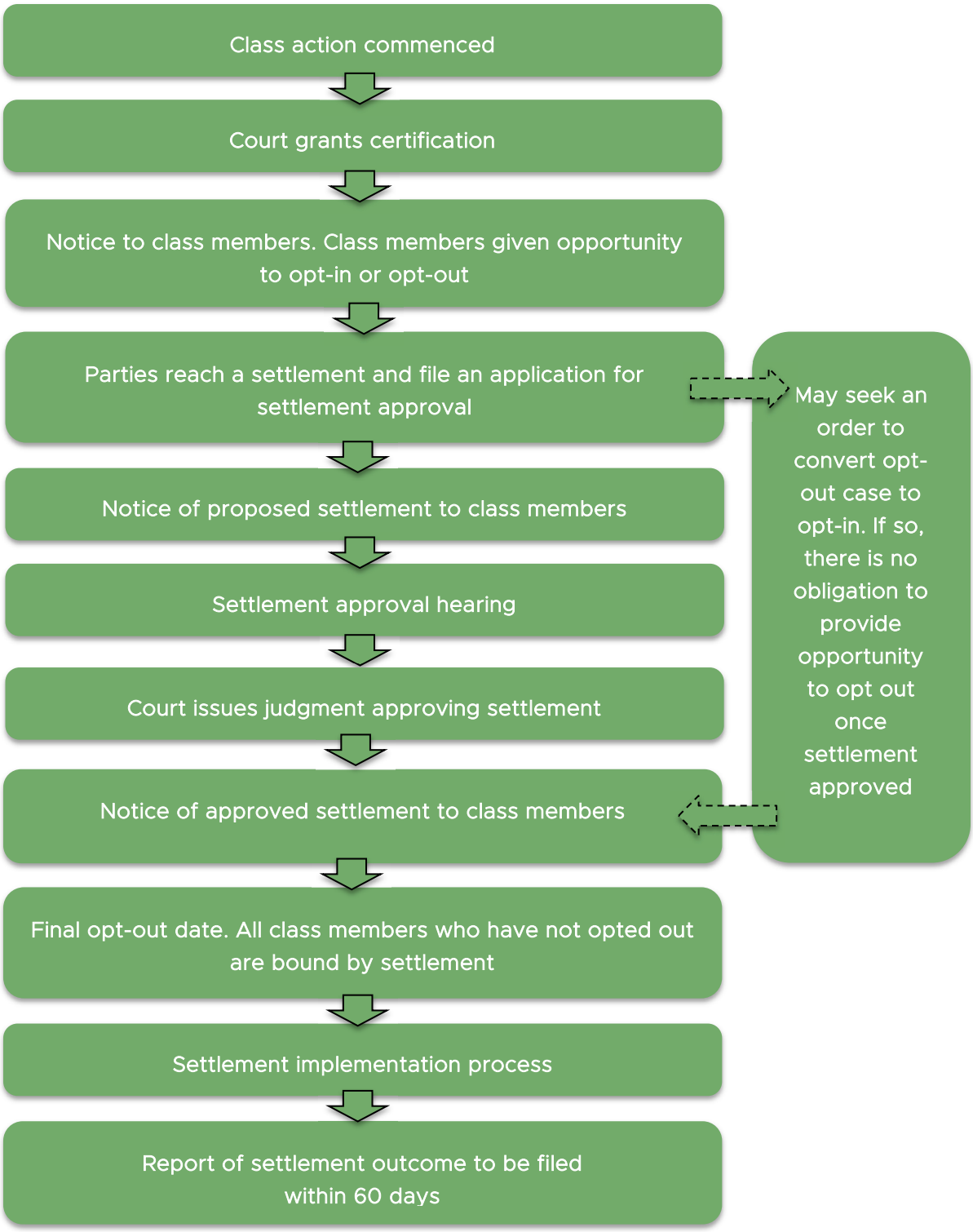
QUESTION

Q53 Do you have any other feedback on our proposed settlement provisions?

Q54 Is there anything else you would like to tell us?

APPENDIX 1

Process for settlement post-certification



APPENDIX 2

Provisions for a Class Actions Bill

1 Commencement of class action

(1) A person may commence a class action proceeding against 1 or more defendants in the High Court as a representative plaintiff—

(a) on behalf of themselves and 2 or more other persons; and

(b) if their claim and the claims of the other persons all raise a common issue.

(2) A proceeding under **subsection (1)** may be commenced by more than 1 representative plaintiff.

(3) A State entity that has the power under another Act (the **empowering Act**) to bring proceedings on behalf of 2 or more persons may commence a class action proceeding against 1 or more defendants in the High Court as a representative plaintiff—

(a) on behalf of 2 or more persons; and

(b) if the claims of those persons all raise a common issue.

(4) The commencement of a proceeding under **subsection (3)** is subject to any limits or requirements in the empowering Act.

(5) In this section, **common issue** means a common issue of fact or law of significance to the resolution of each person's claim.

2 Multiple defendants

(1) If a class action proceeding is commenced under **section 1(1)** against more than 1 defendant,—

(a) for each defendant there must be a representative plaintiff and at least 2 other persons with a claim against that defendant:

(b) if there are 2 or more representative plaintiffs, it is not necessary for each representative plaintiff to have a claim against all of the defendants:

(c) it is not necessary for each person on whose behalf the proceeding is commenced to have a claim against all of the defendants.

(2) If a class action proceeding is commenced under **section 1(3)** against more than 1 defendant,—

(a) for each defendant there must be at least 2 persons with a claim against that defendant:

(b) it is not necessary for each person on whose behalf the proceeding is commenced to have a claim against all of the defendants.

3 Application for class action

When a class action is commenced it must be accompanied by an application for—

(a) an order certifying the proceeding as a class action proceeding; and

(b) an order appointing 1 or more representative plaintiffs for the proceeding.

4 Certification of class action

(1) A court may certify a proceeding as a class action proceeding if it is satisfied that—

(a) the statement of claim discloses a reasonably arguable cause of action; and

(b) the persons on whose behalf the proceeding was commenced have claims that all raise a common issue of fact or law of significance to the resolution of each claim; and

(c) the 1 or more representative plaintiffs are each suitable and will fairly and adequately represent class members; and

(d) the opt-in or opt-out mechanism proposed for the proceeding is an appropriate means of determining class membership in the circumstances of the proceeding; and

(e) a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members.

(2) The court may consider the following when assessing the suitability of a representative plaintiff and whether they will fairly and adequately represent class members:

(a) whether there is a conflict of interest that could prevent them from properly fulfilling the role as representative plaintiff:

(b) whether they have a reasonable understanding of the nature of the claims and the obligations of a representative plaintiff, including for costs:

(c) if they will be representing members of their hapū or iwi, the tikanga of the hapū or iwi as relevant to representation in the proceeding:

(d) any other factors it considers relevant.

(3) The court may consider the following when assessing whether a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members:

(a) the number or potential number of class members:

(b) the nature of the claims:

(c) the extent of the other issues that will need to be determined once the common issue is resolved:

(d) whether the likely time and cost of the proceeding is proportionate to the remedies sought:

(e) whether there is another procedure available to class members that would be a more appropriate means of dealing with their claims:

(f) any other factors it considers relevant.

5 Effect of judgment on common issue

(1) A judgment on a common issue binds every class member, but only to the extent that the judgment determines a common issue that—

(a) is set out in the certification order; and

(b) relates to a claim described in the certification order; and

(c) relates to relief sought by class members as stated in the certification order.

(2) A judgment on a common issue is not binding between a party to the class action proceeding and—

(a) a person who was eligible to opt in to the proceeding but did not do so:

(b) a person who has opted out of the proceeding.

6 Settlement of class action

(1) The settlement of a class action proceeding must be approved by a court.

(2) An application for approval of a settlement must be made jointly by the representative plaintiff and the defendant.

(3) For a proceeding with more than 1 defendant, if not all the defendants will be covered by the settlement, the application must be made jointly by all representative plaintiffs whose claims will be covered by the settlement and all relevant defendants.

(4) Before considering whether to approve the settlement, the court must—

(a) approve a notice to class members informing them of the proposed settlement; and

(b) set a date by which any objections to the settlement must be lodged by class members.

(5) The court must not approve the settlement unless it is satisfied that it is fair, reasonable, and in the interests of the class as a whole after taking into account—

(a) the terms and conditions of the settlement, including—

(i) any relief that will be provided to class members; and

(ii) whether class members are treated equitably in relation to each other; and

(iii) the proposed method of distributing any settlement amounts to class members; and

(iv) the proposed method of dealing with any unclaimed settlement amounts; and

(b) any legal fees and litigation funding fees that may be deducted from the relief payable to class members; and

(c) any information that is readily available to the court about the potential risks, costs, and benefits of continuing with the proceeding; and

(d) any views of class members; and

(e) the process by which the settlement was reached, including whether any

potential conflicts of interest were properly managed; and

(f) any other factors it considers relevant.

7 Settlement application prior to certification of proceeding

(1) This section applies if an application for approval of a settlement is made prior to the certification of a class action proceeding.

(2) The court must, before considering that application, consider whether the proceeding meets the requirements of **section 4** (with any necessary modifications) and if so, for the purposes of settlement,—

(a) certify the proceeding as a class action proceeding; and

(b) appoint 1 or more representative plaintiffs.

(3) If the court certifies the proceeding, **section 7** applies to the application except that the notice referred to in **section 7(4)(a)** must also give notice that—

(a) the proceeding has been certified as a class action proceeding for the purposes of settlement; and

(b) 1 or more representative plaintiffs have been appointed.

(4) If the court certifies the proceeding as an opt-in proceeding, the notice must also specify the date by which a person who is eligible to opt in as a class member must do so.

8 Appointment of counsel to assist court or expert

(1) The court may appoint counsel to assist the court or a court expert if it considers this will assist the court to determine whether a settlement is fair, reasonable, and in the interests of the class as a whole.

(2) The court may order that 1 or more of the parties pay part or all of the costs of the counsel or expert.

9 Approval of settlement

(1) If the court approves a settlement, it—

(a) must approve a notice of the approved settlement to class members; and

(b) must specify a date by which class members (subject to **subsection (2)**) may opt out of the settlement (the **opt-out date**); and

(c) may, if permitted by the terms of settlement, specify a date by which persons who are eligible to opt in as a class member may do so; and

(d) may appoint a person as an administrator to implement the settlement; and

(e) may make other orders it considers appropriate for the administration and implementation of the settlement.

(2) In an opt-in proceeding, it is not necessary to give an opportunity to opt out to class members who opted in to the proceeding after being notified of the proposed terms of settlement.

(3) If a class member opts out of the settlement, the suspension period under **section 5**

(relating to any limitation period that applies to their claim) ends on the day they do so.

(4) On the day immediately following the opt-out date, the settlement is binding on all parties to the settlement and all remaining class members.

10 Administration and implementation of settlement

(1) The court must supervise the administration and implementation of the settlement whether or not it has appointed an administrator.

(2) An administrator or the parties (if the court has not appointed an administrator) must file a report with information about the process and outcome of the implementation of the settlement within 60 days of the implementation process being completed.

11 Aggregate monetary relief

(1) A court may award monetary relief to class members on an aggregate basis if—

(a) it is satisfied that it can make a reasonably accurate assessment of the total amount to which class members are entitled (the **award**); and

(b) no question of fact or law remains to be determined to establish the amount of the defendant's liability other than questions relating to the assessment of monetary relief.

(2) For the purpose of the court's assessment of the award, it is not necessary for any individual class member to establish the amount of loss or damage suffered by them.

(3) The court may make any orders for the distribution of the award that it considers appropriate, and these may include an order—

(a) that the defendant must distribute the award directly to class members:

(b) appointing a person as the administrator to distribute the award to class members:

(c) directing the manner in which a class member is to establish their entitlement to a share of the award:

(d) directing how any unclaimed portion of the award is to be distributed:

(e) directing how the costs of the distribution are to be met.

(4) An administrator or the parties (if the court has not appointed an administrator) must file a report with information about the process and outcome of the distribution of the award within 60 days of the distribution process being completed.

12 Alternative distribution

(1) This section applies if it is not practical or possible for an award made under **section 11** or any portion of it to be distributed to individual class members.

(2) The court may order that the award be paid instead to an eligible charity or organisation.

(3) In this section, **eligible charity or organisation** means—

(a) an entity whose activities are related to claims in the class action proceeding

and whose activities are likely to directly or indirectly benefit some or all class members:

(b) an entity prescribed by regulations as an eligible charity or organisation for the purposes of this section.

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