

Pūrongo | Report 147

Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa

Class Actions and Litigation Funding

List of recommendations



Recommendations

CHAPTER 2: A CLASS ACTIONS REGIME FOR AOTEAROA NEW ZEALAND

- R1** A new statute called the Class Actions Act should be enacted as the principal source of law in relation to class actions.
- R2** Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing new High Court Rules for class actions.
- R3** The statutory objectives of class actions should be improving access to justice and managing multiple claims in an efficient way.
- R4** The Class Actions Act should clarify that it only applies to class actions and not to other forms of litigation.
- R5** The Rules Committee should consider amending High Court Rule 4.24 to provide that it should not be used where a proceeding is more appropriately brought as a class action.
- R6** The Rules Committee should consider amending District Court Rule 4.24 to provide that it should not be used where a proceeding is more appropriately brought in Te Kōti Matua | High Court as a class action.
- R7** The Class Actions Act should only apply to plaintiff class actions and not defendant class actions.

CHAPTER 3: KEY ACTORS IN A CLASS ACTION

- R8** The representative plaintiff should be responsible for making decisions about the conduct of the class action and giving informed instructions to their lawyer. Te Kāhui Ture o Aotearoa | New Zealand Law Society should consider amending the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 to clarify who a lawyer should take instructions from in a class action.

R9 The representative plaintiff should have a duty to act in what they believe to be the best interests of the class. This duty should be specified in the Class Actions Act. The Act should also specify that the representative plaintiff does not owe fiduciary duties to class members.

R10 The Class Actions Act should provide the representative plaintiff with immunity from claims by a class member with respect to their statutory duty to act in what they believe to be in the best interests of the class, unless the representative plaintiff has acted recklessly or in wilful default or bad faith.

R11 A proceeding should not be certified under the Class Actions Act as a class action unless the proposed representative plaintiff has received legal advice on the duty and responsibilities of the role from an independent lawyer who is not associated with the class action.

R12 Te Kura Kaiwhakawā | Institute of Judicial Studies should consider whether to produce resources for judges on class actions.

CHAPTER 4: COMMENCING A CLASS ACTION

R13 The Class Actions Act should not be limited in its application to certain areas of the law or types of claim.

R14 The Class Actions Act should specify that class actions may be commenced in Te Kōti Matua | High Court, with respect to claims where the High Court has existing jurisdiction.

R15 The Government should consider developing class action rules for the employment jurisdiction.

R16 The Class Actions Act should specify that a class action may be commenced by a proposed representative plaintiff on behalf of a proposed class of persons if all claims raise a common issue of fact or law. The proposed class must comprise at least two persons, in addition to the representative plaintiff.

R17 The Class Actions Act should require the representative plaintiff to be a class member, except in the case of a state entity. The Act should allow a state entity to bring a class action as a representative plaintiff if it is a class member or if another statute authorises it to do so.

R18

The Class Actions Act should specify that if a class action is commenced against multiple defendants:

- a. There must be a representative plaintiff and at least two other class members with a claim against each defendant.
- b. It is not necessary for each representative plaintiff or each class member to have claim against all defendants.

R19

The Class Actions Act should specify that when a class action is commenced, the limitation periods applying to the claim of each person falling within the proposed class definition are suspended.

R20

The Class Actions Act should specify that if a person subsequently becomes eligible to be a class member as the result of a change to the class definition, the limitation period applying to their claim is suspended from the date at which they become eligible to join the class action.

R21

The Class Actions Act should specify that the limitation period applying to the claim of a class member or potential class member begins running again if and when:

- a. The court dismisses an application for certification or decertifies the class action.
- b. The court makes an order that has the effect of removing or excluding the claim from the proceeding.
- c. In an opt-in proceeding, the potential class member does not opt into the class action by the date specified in the opt-in notice.
- d. In an opt-out proceeding, a potential class member opts out of the class action by the date specified in the opt-out notice.
- e. The proceeding is dismissed without an adjudication on the merits.
- f. The proceeding is abandoned or discontinued.

If there is a right of appeal in any of these situations listed, then the limitation period should not begin running until the expiry of any appeal period or until any appeal has been finally disposed of.

CHAPTER 5: CONCURRENT CLASS ACTIONS

R22

The Class Actions Act should define a concurrent class action proceeding as a class action proceeding that has in common with another class action proceeding that is currently before the court:

- a. The same or substantially similar issues in dispute; and
- b. At least one defendant.

R23

Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule to require a proposed representative plaintiff to file a Summary of Class Action form when commencing a class action that provides the following information:

- a. The proposed defendant or defendants.
- b. The proposed class definition.
- c. Whether it is proposed that class membership would be determined on an opt-in or opt-out basis.
- d. A summary of the circumstances giving rise to the claims, including any relevant time periods.
- e. The causes of action.
- f. The relief sought.
- g. Whether the applicant is aware of any concurrent class action that has been filed.
- h. The lawyer acting for the representative plaintiff and the class.
- i. Details of any website with further information about the class action.

R24

Te Tāhū o te Ture | Ministry of Justice should create a class actions webpage within ngā Kōti o Aotearoa | Courts of New Zealand website and be responsible for keeping this updated. The information on this webpage should include:

- a. A public register of class actions that contains a list of class actions that have been commenced, the date on which the class action was published on the public register and a Summary of Class Action form for each class action.
- b. An option to subscribe to email updates of new class actions added to the public register of class actions.

R25

The Class Actions Act should specify that a concurrent class action proceeding must be commenced within 90 days of the date on which notice of the first of the concurrent class action proceedings is given on the class actions register, or with the leave of the Court.

R26

The Class Actions Act should require the court to consider the applications for certification of concurrent class action proceedings together.

R27

The Class Actions Act should specify that when a court is considering the applications for certification of concurrent class action proceedings:

- a. The court should first consider whether each concurrent proceeding meets the test for certification.
- b. If more than one concurrent class action proceeding meets the test for certification the court must decide whether all, or if not all, which of those proceedings will be certified.

- c. For any concurrent class action proceeding that the court decides will not be certified, although it meets the test for certification, the application for certification must be dismissed.
- d. If the court decides that more than one class action proceeding will be certified, it may make orders for the efficient management of those proceedings, including orders that:
 - i. the class actions be case managed together;
 - ii. the class actions be consolidated;
 - iii. the class actions be heard together or successively; or
 - iv. one or more of the class actions be temporarily stayed.

R28

The Class Actions Act should specify that when a court is deciding which concurrent class actions will be certified, it must consider which approach will best allow class member claims to be resolved in a just and efficient way. In making this assessment, the court should be able to consider:

- a. How each case is formulated.
- b. The preferences of potential class members.
- c. Litigation funding arrangements.
- d. Legal representation.
- e. Any other factor it considers relevant.

CHAPTER 6: CERTIFICATION**R29**

The Class Actions Act should require a proceeding to be certified to proceed as a class action and prescribe a certification test.

R30

The certification test should require the proceeding to disclose one or more reasonably arguable causes of action.

R31

The certification test should require a common issue of fact or law that applies to the claim of each member of the proposed class.

R32

The certification test should require the court to be satisfied there is at least one representative plaintiff who is suitable and will fairly and adequately represent the class. When the court is making this assessment:

- a. It should consider whether there is, or is likely to be, a conflict of interest that could prevent them from properly fulfilling the role of representative plaintiff.
- b. It should consider whether the person has a reasonable understanding of the nature of the claims and the duty and responsibilities of the representative plaintiff, including their potential liability for costs.

- c. It should be satisfied the person has received independent legal advice on the duty and responsibilities of the role.
- d. If the proposed representative plaintiff will be representing members of their hapū or iwi, the court should be able to consider the tikanga of the hapū or iwi as relevant to representation in the proceeding.
- e. It should also be able to take into account any other factors it considers relevant.

R33

The Class Actions Act should specify that the representative plaintiff may only withdraw from the role with the leave of the court. The Act should also empower the court to substitute the representative plaintiff if:

- a. It grants the representative plaintiff leave to withdraw from the role; or
- b. It considers the representative plaintiff is no longer able to fairly and adequately represent the class.

R34

The certification test should require a class action proceeding to be an appropriate procedure for the efficient resolution of the claims of class members. The test should specify that the court must consider the following factors when making this assessment:

- a. The proposed class definition.
- b. The potential number of class members.
- c. The nature of the claims.
- d. The nature and extent of the other issues that will need to be determined once the common issue is resolved.
- e. Whether the likely time and cost of the proceeding is proportionate to the remedies sought.
- f. Whether there is another procedure available to class members that would be a more appropriate means of dealing with their claims.
- g. Any other factors it considers relevant.

R35

The certification test should require the opt-in or opt-out mechanism proposed for the proceeding to be an appropriate means of determining class membership in the circumstances of the proceeding. The test should specify the court may consider the following factors when making this assessment:

- a. The potential size of the class and how potential class members will be identified.
- b. The characteristics of the class.
- c. The nature of the claims, including the subject matter and the size of individual claims.
- d. Whether class members could be adversely affected by the proceedings.
- e. Whether a particular class mechanism would unfairly prejudice the defendant in running its defence.
- f. Any other factors it considers relevant.

R36 The Class Actions Act should specify that the court must certify a proceeding as a class action if it considers the certification test is met, unless more than one concurrent class action proceeding meets the test for certification.

R37 The Class Actions Act should require an application for an order certifying the proceeding as a class action and appointing one or more persons as the representative plaintiff(s) to be filed at the same time as the proceeding is commenced. The application should be supported by an affidavit from the proposed representative plaintiff.

R38 The Class Actions Act should specify that when a proceeding is certified as a class action, the court must make a certification order that includes:

- a. The class definition.
- b. The name of the representative plaintiff(s).
- c. A description of the causes of action that are pleaded.
- 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.

R39 The Class Actions Act should specify that the court may amend a certification order.

R40 Te Tāhū o te Ture | Ministry of Justice should publish certification orders on the class actions webpage on Ngā Kōti o Aotearoa | Courts of New Zealand website.

R41 If the court is satisfied the certification criteria are no longer met, the Class Actions Act should empower the court to make an order decertifying the proceeding or any other order it considers appropriate. A party or a class member should be able to apply for such an order with the leave of the court. A court should also be able to make such an order of its own motion.

CHAPTER 7: THE CLASS

R42 The Class Actions Act should specify that, in both opt-in and opt-out class actions, a person who resides outside Aotearoa New Zealand can only become a class member if they opt in.

R43 The Class Actions Act should specify that, in both opt-in and opt-out class actions, a Minister of the Crown or government department should only become a class member if they opt in.

R44 Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule to specify that, unless the court orders otherwise, a class member (or potential class member) does not require a litigation guardian solely because they:

- a. Are under the age of 18 years; or
- b. Are considered to lack sufficient decision-making capacity with respect to a step in a class action proceeding.

R45 The Rules Committee should consider developing a High Court Rule to specify that where there is an opportunity or requirement for a class member (or potential class member) to take a step in the proceeding, the court may make any order it considers appropriate to protect the interests of a class member who:

- a. Is under the age of 18 years; or
- b. It considers lacks sufficient decision-making capacity with respect to that step.

R46 The Rules Committee should consider developing a High Court Rule to specify that where a court needs to determine whether a class member (or potential class member) has sufficient decision-making capacity with respect to a step in the proceeding, it should consider whether the person is able to:

- a. Understand information relevant to the step.
- b. Retain that information to the extent necessary to make decisions relevant to that step.
- c. Use or weigh that information as part of the process of making those decisions.
- d. Communicate those decisions.

R47 The Lawyers and Conveyancers Act 2006 should be amended to specify that when a proceeding is certified as a class action, the representative plaintiff's lawyer is regarded as the lawyer for the class and is considered to have a relationship with the class.

R48 Te Kāhui Ture o Aotearoa | New Zealand Law Society should consider what amendments may be needed to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 to clarify the obligations of lawyers acting in class actions.

R49 When considering what changes may be required to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 for class actions, NZLS should consider a rule that after certification, the defendant's lawyer should direct any class communications to the lawyer for the class.

CHAPTER 8: STEPS DURING A CLASS ACTION

R50

Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule that would require notice to class members of the following events (unless the court considers this is not necessary to protect the interests of class members):

- a. When an individual has an opportunity to opt into or opt out of the class action.
- b. Where the representative plaintiff seeks to discontinue the class action.
- 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. When the representative plaintiff intends to abandon an appeal on the common issues.
- g. A proposed or approved settlement.
- h. Any other situation where the court considers that notice is appropriate.

R51

The Rules Committee should consider developing a High Court Rule to require court approval of the contents of notices to class members.

R52

The Rules Committee should consider developing a High Court Rule on the contents of an opt-in or opt-out notice to class members. This could require notices to contain:

- a. General information about what a class action is.
- b. An explanation of the proceeding, including who it has been brought against and the remedies sought.
- c. The class definition and any criteria a person must fulfil to be part of the class.
- d. What a class member must do to opt into 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 action judgment or a settlement on class members.
- f. The identity of the representative plaintiff, including a brief explanation of their role and duty to the class.
- g. The identity of the lawyer acting for the representative plaintiff and the class, including a brief explanation of their role and obligations to the class.
- h. An explanation of when class member participation may be required and the circumstances where adverse costs may be ordered.
- i. In a funded case, the identity of the funder and information on how the funding commission will be calculated.
- j. Who to contact if the class member would like any further information on the class action.
- k. Anything else the court considers appropriate.

R53 The Rules Committee should consider developing a sample opt-in or opt-out notice to be included in Schedule 1 to the High Court Rules. It may wish to draw on the expertise of communications professionals and experts in accessible communication when developing a sample notice.

R54 The Rules Committee should consider developing a High Court Rule empowering the court to order any method of giving notice to class members that it considers appropriate in the circumstances, and to require a report on the outcome of that notice.

R55 The Rules Committee should consider developing a High Court Rule to empower the court to order the defendant to disclose the names and contact details of potential class members to the representative plaintiff or to assist with giving notice to class members. Where the defendant is required to disclose information about potential class members, the Rule could require the representative plaintiff to only use that information for the purposes of the proceeding.

R56 The Rules Committee should consider developing a High Court Rule to empower the court to make orders with respect to the costs of providing notice.

R57 The Class Actions Act should specify that a class member may opt into or opt out of a class action:

- a. In the time and manner specified in the opt-in or opt-out notice; or
- b. According to a specific direction of the court.

R58 The Class Actions Act should empower the court to order that a class member should be given an additional opportunity to opt out of a class action where it considers the interests of justice require it.

R59 The Class Actions Act should empower the court to order that a potential class member should be given an additional opportunity to opt into a class action where the interests of justice require it.

R60 The Rules Committee should consider developing a schedule to the High Court Rules listing issues to be addressed at pre-certification and post-certification case management conferences for class action proceedings.

R61

The Rules Committee should consider developing a High Court Rule to empower the court to order one or more class members to provide discovery. This rule could provide that the following matters are relevant when determining whether a class member or members should be required to provide discovery and the extent of that discovery:

- a. The stage of the class action and the issues to be determined at that stage.
- b. Whether discovery is necessary in all the circumstances of the case, including the discovery that can be obtained from parties to the proceeding.
- c. Whether discovery would result in unfairness or undue burden or expense for a class member.
- d. Any other matter the court considers relevant.

R62

The Rules Committee should consider developing a High Court Rule that requires the representative plaintiff to maintain a list of persons who have opted into the class action or opted out of the class action. The rule could enable the defendant to seek an order requiring the representative plaintiff to provide it with information about class members who have opted in or opted out.

R63

The Class Actions Act should empower the court to order a sub-class to be created in the following cases:

- a. There is, or is likely to be, a conflict between the interests of different groups of class members. In such a case, a sub-class representative plaintiff should usually be appointed and they should instruct a lawyer in relation to sub-class issues.
- b. There is an issue common to a group of class members and it would assist with the efficient management and resolution of that issue. In such a case, a sub-class representative plaintiff should only be required if the representative plaintiff would be unable to fairly and adequately represent the sub-class.

R64

The Rules Committee should consider developing a High Court Rule to empower the court to make orders to promote efficiency in the hearing of a class action, including:

- a. An order that the hearing should be heard in stages.
- b. An order as to which issues should be determined at each stage.

R65

The Class Actions Act should empower the court to determine issues applying to individual class members and to give directions with respect to determination of the individual issues, including:

- a. Appointing an expert to inquire into individual issues.
- b. Giving directions as to the way or form in which evidence on individual issues may be given.
- c. Ordering individual issues to be determined through a non-judicial process, where the participants agree to that.

CHAPTER 9: COST SHARING ORDERS

R66

The Class Actions Act should specify the court may make a cost sharing order enabling the litigation costs of a class action (including the legal fees and funding commission) to be spread equitably among all class members, on the application of the representative plaintiff.

R67

The Class Actions Act should specify that if the court makes a cost sharing order that enables a litigation funder to receive a funding commission from class members who have not signed an agreement with it, it may:

- a. Set a provisional funding commission (or range of commissions) when making the cost sharing order; and
- b. Vary the funding commission at a later date.

CHAPTER 10: JUDGMENTS, RELIEF AND APPEALS

R68

The Class Actions Act should specify that a judgment on a common issue binds every class member, but only to the extent the judgment determines a common issue:

- a. Is set out in the certification order;
- b. Relates to a cause of action described in the certification order; and
- c. Relates to relief sought by class members as stated in the certification order.

R69

The Class Actions Act should require a judgment on a common issue to include:

- a. The class definition.
- b. A description of the common issue of law or fact.
- c. A description of the causes of action that were pleaded.
- d. The relief sought by the class.

R70

The Class Actions Act should specify that 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 into the proceeding but did not do so.
- b. A person who has opted out of the proceeding.

R71

The Class Actions Act should specify that:

- a. The court may make an aggregate assessment of the monetary relief to which a class is entitled if it is satisfied it can make a reasonably accurate assessment of this amount.
- b. For the purpose of the court's assessment of the aggregate monetary relief, it is not necessary for any individual class member to establish the amount of loss or damage suffered by them.

- c. The court may make an award in the amount assessed as the aggregate monetary relief.

R72

The Class Actions Act should specify the court may make any orders for the distribution of an award of aggregate monetary relief that it considers appropriate, including orders:

- 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. Approving the process for class members to establish their entitlement to a share of the award.
- d. Directing how any unclaimed portion of the award is to be distributed, including by making an order for alternative distribution.
- e. Directing how the costs of the distribution are to be met.

R73

The Class Actions Act should require an administrator or the parties (if the court has not appointed an administrator) to 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, or at a later time if allowed by the court.

R74

Te Kōmiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule on the requirements for a distribution outcome report. This rule could require the report to include the best available information on the following matters:

- a. The total number of class members.
- b. The number of class members who received a payment from the award of aggregate monetary relief.
- c. The number of class members who had their claim declined and the reasons for this.
- d. The cost of administering the distribution of the award of aggregate monetary relief.
- e. The amount of any unclaimed funds and how this is proposed to be distributed.
- f. Any amounts paid to a litigation funder.

R75

Te Tāhū o te Ture | Ministry of Justice should make distribution outcome reports available on the class actions webpage of Ngā Kōti o Aotearoa | Courts of New Zealand website, subject to any confidentiality orders made by the court.

R76

The Class Actions Act should specify the court may order alternate distribution of all or part of an award of aggregate monetary relief where:

- a. It is not practical or possible for all or part of the award to be distributed to individual class members; or
- b. The costs of distributing all or part of the award to individual class members would be disproportionate to the amount they would receive.

R77

The Class Actions Act should specify that, where the court makes an order for alternative distribution, it must be paid to:

- 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; or
- b. An entity prescribed by regulations as eligible to receive an alternative distribution award.

R78

The Class Actions Act should specify that:

- a. Where the court decides to grant certification, or to decline certification on the basis that the certification test is not met, the parties may appeal the decision as of right.
- b. Where more than one concurrent class action proceeding meets the test for certification and the court decides that more than one will be certified, the defendant may appeal this decision with the leave of the court.
- c. Where more than one concurrent class action proceeding meets the test for certification and the court decides that one or more of those proceedings will not be certified, an unsuccessful applicant may appeal this decision with the leave of the court.
- d. The parties may appeal a decision declining to approve a settlement with the leave of the court.

R79

The Class Actions Act should specify that if the representative plaintiff does not bring an appeal against the judgment on common issues or gives notice they intend to abandon an appeal against the judgment on common issues:

- a. A class member can apply to replace the representative plaintiff for the purpose of appealing this judgment. The application to replace the representative plaintiff must be made within 20 working days from the date on which notice of the judgment on common issues or notice of the intention to abandon an appeal against the common issues judgment is given.
- b. If the court grants the class member's application to replace the representative plaintiff, the class member will have 20 working days from the date of the court's decision to file a notice of appeal or an amended notice of appeal against the judgment on common issues.

R80

The Class Actions Act should specify that class members have a right of appeal against any individual determination that relates to them.

CHAPTER 11: SETTLEMENT OF A CLASS ACTION

R81

The Class Actions Act should require court approval in order for the settlement of a class action proceeding to be binding. This should apply whether the class action is opt-in or opt-out and whether the settlement is reached before or after certification.

R82

The Class Actions Act should specify that any application for approval of a class action settlement must be made by the representative plaintiff or proposed representative plaintiff.

R83

Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule on what should be included in an affidavit in support of an application for the approval of a class action settlement. The rule should refer to the type of information that may assist the court to assess whether a settlement is fair, reasonable and in the interests of the class. This could include:

- a. The terms and conditions of the proposed settlement, including:
 - i. The type of relief to be provided to class members and the total amount of any monetary relief.
 - ii. How the benefits of the settlement will be allocated as between class members.
 - iii. If the settlement proposes to treat class members differently, the reasons for this.
 - iv. The proposed method of determining individual class member entitlements.
 - v. Any steps a class member will need to take to benefit from a settlement.
- b. The proposed method of settlement distribution and administration, including a proposal for dealing with any unclaimed monetary relief.
- c. Any legal fees or litigation funding commission that will be deducted from the relief paid to class members.
- d. The likely cost and duration of the class action if the litigation continues.
- e. Any risks associated with continuing the litigation.
- f. The potential relief that could be awarded if the case is successful.
- g. Whether any steps have been taken to manage potential conflicts of interest.

R84

The Rules Committee should consider developing a High Court Rule on the contents of a notice of proposed settlement. It could require the notice to contain:

- 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 and conditions of the proposed settlement, including information about how individual entitlements will be determined.
- e. Information about 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 the settlement and the deadline for doing so.
- h. How a class member may obtain further information about the settlement, including contact details for the lawyer for the class or any counsel to assist that has been appointed.

R85

The Rules Committee should consider developing a High Court Rule on the process for class members to object to a proposed settlement. This rule could:

- a. Require a class member who wishes to object to file a written objection with the court by the date specified in the notice of proposed settlement.
- b. Require a class member to obtain the leave of the court in order to appear at the settlement approval hearing.

R86

Te Tāhū o te Ture | Ministry of Justice should consider developing a template form for class member objections that could be provided on the class actions webpage of ngā Kōti o Aotearoa | Courts of New Zealand website.

R87

The Class Actions Act should specify the court may appoint a counsel to assist the court or a court expert if it considers this will assist it to determine whether the settlement is fair, reasonable and in the interests of the class. The Act should specify the court may order that one or more parties must pay part of or all of the costs of the counsel or expert.

R88

The Class Actions Act should specify that a court must approve the settlement of a class action if it is satisfied the settlement is fair, reasonable and in the interests of the class.

R89

The Class Actions Act should specify that the court must consider the following factors when determining whether a settlement is fair, reasonable and in the interests of the class:

- a. The terms and conditions of the proposed settlement, including:
 - i. The type of relief to be provided to class members and the total amount of any monetary relief.
 - ii. How the benefits of the settlement will be allocated as between class members.
 - iii. Whether class members are treated equitably in relation to each other.

- iv. The proposed method of determining individual class member entitlements.
- v. Any steps a class member must take to benefit from the settlement.
- vi. The proposed method of dealing with any unclaimed settlement amounts.
- b. Any legal fees and litigation funding commission that will be deducted from relief payable to class members.
- c. Any information that is readily available to the court about the potential risks, costs and benefits of continuing with the proceeding.
- d. Any views of class members.
- e. Any steps taken to manage potential conflicts of interest.
- f. Any other factors it considers relevant.

R90

The Class Actions Act should specify that if the court approves a settlement, it must describe which class members are bound by the settlement. The Act should specify that the settlement is binding on the parties to the settlement and the class members described by the court on and from the date of the court's approval.

R91

The Class Actions Act should specify that the court may order that a class member may opt out of a settlement where:

- a. This is permitted by the terms of the settlement agreement; or
- b. It considers the interests of justice require it.

R92

The Class Actions Act should specify that the court may order that a person who was eligible to become a class member but did not do so may opt into a settlement where:

- a. This is permitted by the settlement agreement; or
- b. It considers the interests of justice require it.

R93

The Class Actions Act should specify that if a settlement of a class action proceeding is reached prior to certification, the following process applies:

- a. The proposed representative plaintiff must file an application for approval of the settlement.
- b. The court must consider whether the proceeding meets the requirements of the certification test, with any necessary modifications. If it does, the court must, for the purposes of settlement, certify the proceeding and appoint one or more representative plaintiffs.
- c. The court must then consider the application for approval of the settlement.

- R94** The Class Actions Act should specify that:
- a. The court retains jurisdiction to oversee the administration and implementation of a class action settlement.
 - b. The court may make any orders it considers appropriate for the administration and implementation of the settlement.
- R95** The Class Actions Act should specify that the court may appoint a person as an administrator to implement the settlement.
- R96** The Class Actions Act should specify that the settlement administrator or the parties (as appropriate) should file a settlement outcome report with information on the process and outcome of settlement implementation within 60 days of the settlement implementation process being completed (or at a later time if allowed by the court).
- R97** Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule on the contents of a settlement outcome report. This could require the report to provide the best available information on the following matters:
- a. The total amount to be distributed.
 - b. The total number of class members (or an estimate if this is unknown).
 - c. The number of class members who received a payment from the settlement.
 - d. The number of class members who had their claim declined and the reasons for this.
 - e. The size of payments received by class members (which could be provided in bands).
 - f. The implementation of any non-monetary aspects of the settlement.
 - g. The cost of administering the settlement.
 - h. The amounts paid to litigation funders.
 - i. The amounts paid to the lawyer acting for the class.
 - j. The amount of unclaimed funds and how this was distributed.
- R98** The Ministry of Justice should make settlement outcome reports available on the class actions webpage of Ngā Kōti o Aotearoa | Courts of New Zealand website, subject to any confidentiality orders made by the court.
- R99** The Class Actions Act should specify that any defendant communication with an individual class member about settlement of their individual claim must include a statement about the class action that has been approved by the court.

R100 The Class Actions Act should require the defendant to seek court approval of individual settlements with potential class members that are reached after certification when there is a realistic prospect of the settlements effectively disposing of the class action. In determining whether to approve individual settlements, the court should apply the class action settlement approval test with any necessary modifications.

R101 The Class Actions Act should specify that if the representative plaintiff wishes to settle their individual claim, they must first seek leave to withdraw as the representative plaintiff.

R102 The Class Actions Act should specify that a representative plaintiff must obtain court approval to discontinue a class action. When considering whether to approve the discontinuance of a class action, the court should consider whether discontinuance will prejudice the interests of class members.

R103 The Class Actions Act should specify that the provisions on settlement approval apply where there is an agreement between the representative plaintiff and one or more defendants that will have the effect of extinguishing some or all class member claims.

CHAPTER 12: ADVERSE COSTS IN CLASS ACTIONS

R104 The existing costs provisions in the High Court Rules should apply to class actions.

R105 Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider amendments to Schedule 3 of the High Court Rules to provide a specific time allocation for certification.

R106 The Rules Committee should consider developing a High Court Rule specifying that the court may not order a class member (other than the representative plaintiff) to pay costs except:

- a. With respect to the determination of an individual issue applying to the class member.
- b. With respect to the determination of sub-class issues, where the class member has been appointed as the sub-class representative plaintiff.
- c. Where the class member is the applicant or respondent with respect to an interlocutory application or is otherwise granted leave to appear in the class action, with respect to that application or appearance.

CHAPTER 13: ABOLISHING MAINTENANCE AND CHAMPERTY

R107 The torts of maintenance and champerty should be abolished.

CHAPTER 14: MODELS FOR REGULATION AND OVERSIGHT OF LITIGATION FUNDING

R108 Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule to require a funded plaintiff to disclose their litigation funding agreement to the court and to the defendant, with redactions of privileged matters or information that may confer a tactical advantage. Disclosure of the funding agreement could occur when the statement of claim is filed or, if the funding agreement is entered after the statement of claim has been filed, as soon as practicable after the funding agreement has been entered into.

CHAPTER 15: SECURITY FOR COSTS

R109 Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing High Court Rules to:

- a. Create a rebuttable presumption that funded representative plaintiffs will provide security for costs in funded class actions.
- b. Create a rebuttable presumption that security for costs, in all funded proceedings, will be provided in a form that is enforceable in Aotearoa New Zealand.
- c. Expressly empower the court, in all funded proceedings, to make orders directly against the litigation funder for the provision of security for costs and payment of adverse costs.

CHAPTER 16: PROFESSIONAL REGULATION OF LAWYERS IN FUNDED PROCEEDINGS

R110 With respect to all funded proceedings, Te Kāhui Ture o Aotearoa | New Zealand Law Society should consider amending the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 to clarify how conflicts of interest should be avoided and managed in funded proceedings, including conflicts arising from a lawyer or law firm having financial or other interests in a funder that is financing the same matter in which they are acting.

R111 NZLS should consider amending the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 to prohibit a lawyer acting in a class action from claiming any unpaid legal expenses from a funded representative plaintiff if the funder fails to meet its financial commitment to pay those expenses.

CHAPTER 17: COURT OVERSIGHT OF FUNDING TERMS AND COMMISSIONS

R112 The Class Actions Act should specify that, in a funded class action, a litigation funding agreement (including any amendment to an existing agreement) is enforceable by a funder only if it is approved by the court.

R113 The Class Actions Act should require the representative plaintiff in a funded class action to apply for court approval of the litigation funding agreement. The timing for seeking court approval should be:

- a. If settlement occurs prior to certification, together with the application for settlement approval.
- b. If the agreement is entered into before certification, as soon as practicable following certification.
- c. If the agreement is entered into after certification, as soon as practicable after the agreement is entered into.
- d. If the terms of an approved litigation funding agreement are amended, as soon as practicable after that amendment.

R114 While the defendant should not be a respondent to the application for funding approval, they should be notified of the application and the outcome of the application. Te Kōmiti mō ngā Tikanga Kooti | Rules Committee should consider whether any amendments to the High Court Rules 2016 are necessary to achieve this.

R115

The Class Actions Act should specify that the court must not approve a litigation funding agreement unless it is satisfied that:

- a. The representative plaintiff has received independent legal advice on the agreement; and
- b. The agreement is fair and reasonable.

R116

When determining whether a litigation funding agreement is fair and reasonable, the court may consider:

- a. The circumstances in which the funder is entitled to terminate the agreement.
- b. Whether the agreement will diminish the rights of the representative plaintiff to instruct their lawyer or control the litigation, or otherwise impair the lawyer-client relationship.
- c. Any process for resolving disputes between the funder, the representative plaintiff, and class members, including disputes about settlement and termination of the agreement.
- d. Whether the agreement prescribes that the governing law under the agreement is the law of Aotearoa New Zealand.
- e. If the agreement provides for an adverse costs indemnity, the terms and extent of that indemnity.
- f. The fairness and reasonableness of the funding commission.
- g. Any other matters the court considers are relevant.

R117

The Class Actions Act should specify that, when determining whether the funding commission is fair and reasonable, the court may consider:

- a. The type of relief claimed, including the estimated total amount of monetary relief.
- b. The number of people likely to be entitled to a share of any relief.
- c. The estimated costs if the litigation is successful or unsuccessful.
- d. The complexity and likely duration of the case.
- e. The estimated returns to the funder, and how the returns will accommodate variation in the factors identified above in (a)-(d).
- f. Any other matters the court considers are relevant.

R118

The Class Actions Act should specify that the court may:

- a. Appoint an expert at any stage of a funded class action if it considers that will assist the court's consideration of the fairness and reasonableness of a funding commission; and
- b. Order that one or more of the representative plaintiffs or the litigation funder pay part or all of the costs of the expert.

R119

The Class Actions Act should specify that in opt-in class actions that proceed to judgment, the court may vary the funding commission that is to be deducted from any damages award to the extent that the funding commission is materially in excess of the estimated returns provided to the court as part of the court's approval of the litigation funding agreement.

CHAPTER 18: REDUCING ACCESS TO JUSTICE BARRIERS FOR CLASS MEMBERS

R120

The Government should consider creating a public class action fund that can indemnify the representative plaintiff in a class action for adverse costs and provide funding towards legal fees, disbursements and security for costs. The fund's main objective should be to improve access to justice.

R121

Te Tāhū o te Ture | Ministry of Justice should consider:

- a. Producing a clear and accessible online guide to assist class members to understand the class action process; and
 - b. Exploring options that would enable free legal advice to be provided to class members, such as supporting a class actions law clinic.
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