

Pūrongo | Report 147

# **Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa**

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## **Class Actions and Litigation Funding**



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

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.

*Kia whanake ngā ture o Aotearoa mā te arotake motuhake*

*Better law for Aotearoa New Zealand through independent review*

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Claudia Geiringer – Kaikōmihana | Commissioner

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The Māori language version of this report's title was developed for Te Aka Matua o te Ture | Law Commission by Kiwa Hammond and Maakere Edwards, of Aatea Solutions Limited. The title was finalised in conjunction with the Commission's Māori Liaison Committee.

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27 May 2022

Tēnā koe Minister

**NZLC R147 – Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding**

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Nāku noa, nā

A handwritten signature in blue ink, reading 'Amokura Kawharu'.

**Amokura Kawharu**

Tumu Whakarae | President



# Foreword

Significant financial, social and other barriers currently undermine access to civil justice in Aotearoa New Zealand. This is a risk to democracy as legal rights provide little protection without meaningful access to institutions that can uphold them.

Improving access to civil justice requires a coordinated effort across many different areas. While class actions and litigation funding do not offer a panacea, they can both make important contributions.

We recommend the creation of a statutory class actions regime, including a new Class Actions Act as the principal source of class actions law. The increasing number of large representative proceedings in Aotearoa New Zealand demonstrates a clear need for a group litigation mechanism that can resolve claims justly and efficiently. It has also exposed the inadequacies of the current procedure and the cost and delay it entails for all parties and the courts. A modern well-designed class actions regime will enable claimants to overcome some of the difficulties in accessing civil justice and help to ensure that multiple claims can be managed, to the benefit of all parties and the courts, in an efficient way.

We also recognise that litigation funding can help to address problems created by the burgeoning costs of legal advice and litigation in Aotearoa New Zealand.

Our recommendations on litigation funding complement our proposals for a statutory class actions regime. Class actions do not always require funding. However, the high costs of class action litigation mean that many cases will not be possible without it. Our recommendations include a range of measures and protections to manage concerns about the provision of litigation funding, in both class actions and ordinary litigation. We also propose that a public class action fund be created to address funding gaps, for example in public interest litigation.

We thank everyone who has taken the time to discuss these challenging and wide-ranging issues with us during our review. While we see this review as one part of broader efforts to improve access to civil justice in Aotearoa New Zealand, we are confident that our recommendations will have a meaningful impact in this context.



**Amokura Kawharu**

Tumu Whakarae | President

# Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of the many individuals and organisations who have assisted us in the course of our review.

In particular we wish to acknowledge the generous contributions made by our Expert Advisory Group. These individuals provided guidance as we identified issues, developed policy proposals, considered feedback and developed reform recommendations. Members of the Group were:

- Nikki Chamberlain
- Michael Heard
- Jack Hodder QC
- Matthew Smith (nominated by Ngā Ahorangi Motuhake o te Ture | New Zealand Bar Association)
- Tim Stephens (nominated by Te Kāhui Ture o Aotearoa | New Zealand Law Society)
- Adina Thorn
- Dr Bridgette Toy-Cronin

We are grateful to the members of the legal profession and litigation funders who have discussed aspects of the project with us and provided helpful information to us during the course of our review. We have also benefitted from discussions with several overseas-based academics working in the areas of class actions and litigation funding. We thank in particular Associate Professor Jasminka Kalajdzic, Dr Michael Legg, Professor Vince Morabito, Professor Rachael Mulheron QC and Professor Vicki Waye. We acknowledge and appreciate the feedback we received from the Commission's Māori Liaison Committee, Te Kāhui Ture o Aotearoa | New Zealand Law Society and members of the judiciary. We thank in particular the Hon Justice Cooke for coordinating responses from the judiciary on issues and questions we raised with them. We also wish to thank all those who submitted on our two Issues Papers, responded to our online survey of group members in representative actions, and attended our class actions consultation workshops. We emphasise nevertheless that the views we express in this report are those of the Commission and not necessarily those of the people who have assisted our work.

Nō reira, ko tēnei mātou e mihi nei ki a koutou, kua whai wā ki te āwhina i a mātou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

The Commissioner responsible for this project is Amokura Kawharu. The legal and policy advisers who worked on this project are Jenny Ryan, Catherine Helm, Rebecca Garden, Nick Gillard and Jesse Watts. Cathy Rodgers, Parliamentary Counsel at Te Tari Tohutohu Pāremata | Parliamentary Counsel Office, drafted the legislative provisions for both the Supplementary Issues Paper and this report. We acknowledge the assistance provided by law clerks who have worked on this project. We also acknowledge the earlier contributions by former Commissioners Sir Douglas White and Belinda Clark. Helen McQueen was a Law Commissioner at the time this report was considered and approved by the Commission's Board. While Claudia Geiringer has held a warrant as a Law Commissioner since 2 May 2022, she did not participate in the project or in reviewing this report as the report was largely completed prior to that date.

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# Glossary

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<b>Adverse costs</b>	This is where the court orders an unsuccessful party to pay costs to a successful party in a proceeding or interlocutory application to reimburse them for their legal costs. Adverse costs rules are sometimes also referred to as 'loser pays', 'costs follow the event' or 'costs shifting' rules.
<b>After-the-event insurance</b>	After-the-event insurance is purchased after a legal dispute has arisen, to indemnify the insured in the event the court makes an adverse costs order.
<b>Aggregate litigation</b>	A form of group litigation which involves multiple individual claims being determined in the same proceeding.
<b>Aggregate monetary relief</b>	Aggregate monetary relief involves the court assessing monetary relief on an aggregate basis and granting an order for relief based on the aggregate amount. The monetary relief is calculated by proving the damage sustained by the class as a whole, without calculating individual class member entitlements.
<b>Alternative distribution</b>	An order for alternative distribution is where the court orders some or all of an award of aggregate monetary relief to be paid to an organisation or charity associated with the claim because it is impossible or impracticable to distribute the relief to individual class members. This is often referred to as cy-près relief in other jurisdictions.
<b>Australian Parliamentary Inquiry</b>	On 13 May 2020, Australia's House of Representatives referred an inquiry into litigation funding and the regulation of the class action industry to the Parliamentary Joint Committee on Corporations and Financial Services. The committee published its report in December 2020.
<b>Certification</b>	Certification is a preliminary stage where the court decides whether the case can proceed in class action form.
<b>Champerty</b>	Champerty is a tort (and in some jurisdictions, a crime) where a person who is not a party to, and has no interest in, the litigation provides financial assistance to a party to a civil action in return

	for a share of any recovery. Champerty is a form of maintenance (defined below).
<b>Class member</b>	A person who has opted into a class action or has not opted out by the required date. A class member is not a party to the litigation, unless they are the representative plaintiff.
<b>Concurrent class action</b>	A class action proceeding that has the same or similar issues in dispute as another class action proceeding currently before the court, as well as at least one common defendant. In other jurisdictions, this is known as a competing class action.
<b>Conditional fee</b>	A conditional fee is a fee agreement where some or all of the lawyer's fees and expenses are payable only if there is a successful outcome. In Aotearoa New Zealand, a conditional fee may include a premium to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not receiving payment on account, provided it is not calculated as a proportion of the amount received by the client.
<b>Contingency fee</b>	A contingency fee is a fee arrangement where, if there is a successful outcome, the lawyer's fee will be calculated as a proportion (usually a percentage) of any sum recovered. If the matter is unsuccessful, the lawyer will be paid nothing. This form of fee arrangement is not permitted in Aotearoa New Zealand.
<b>Cost sharing order</b>	Cost sharing orders are orders which provide for the legal and funding costs of a class action to be equitably spread among all class members, even if they have not signed up to a litigation funding agreement.
<b>D&amp;O insurance</b>	Directors and officers liability insurance (D&O insurance) is a form of insurance designed to protect company directors and senior employees against personal loss arising from liabilities incurred in the performance of their duties. D&O insurance also provides cover for the reasonable costs of defending a claim.
<b>Group litigation</b>	Group litigation is a term to describe forms of civil litigation where a group of claimants seek redress collectively. It includes class actions and representative actions, as well as civil procedure techniques such as joinder and consolidation and mechanisms applying to specific areas of the law.
<b>Group member</b>	A person who is a member of a representative action. A group member is not a party to the litigation, unless they are the representative plaintiff or defendant.

<b>HCR 4.24</b>	Rule 4.24 of the High Court Rules 2016. HCR 4.24 enables a plaintiff (or a defendant) in Aotearoa New Zealand to sue (or be sued) on a representative basis.
<b>Litigation funding</b>	Litigation funding is where a person who is not a party to, and has no interest in, the litigation agrees to fund some or all of a party's costs, in exchange for a share of any sum recovered.
<b>Maintenance</b>	Maintenance is a tort (and in some jurisdictions, a crime) where a person who is not a party to and has no interest in the litigation, assists a party to a civil action to bring or defend the action, without lawful justification, and this causes damage to the other party.
<b>Opt-in</b>	Opt-in is an approach to determining class membership in a representative action or class action. Under this approach, potential class members must affirmatively opt into the litigation by taking a prescribed step by a certain date in order to be bound by any judgment on the common issues in the proceeding, or by a settlement.
<b>Opt-out</b>	Opt-out is an approach to determining class membership in a representative action or class action. Under an opt-out approach, all people who fall within the description of the class are bound by the judgment on common issues or settlement unless they take a prescribed step by a certain date to exclude themselves from the proceeding.
<b>Representative action</b>	A representative action permits a person to sue (or be sued) on behalf of other people who share the same interest in the subject matter of a legal proceeding. In Aotearoa New Zealand, a representative action can be brought under HCR 4.24.
<b>Representative plaintiff</b>	The representative plaintiff represents the other class members in representative actions and class actions. Unlike other class members, they are a party to the litigation.
<b>Rules Committee</b>	Te Komiti mō ngā Tikanga Kooti   Rules Committee is a statutory body which has responsibility for procedural rules in the Supreme Court, Court of Appeal, High Court and District Court.
<b><i>Rules of conduct and client care for lawyers</i></b>	The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

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# Executive summary

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## INTRODUCTION

1. Te Aka Matua o te Ture | Law Commission has undertaken a review of class actions and litigation funding. The review has taken place within a wider context of ongoing and pressing concern about financial, social and other barriers to accessing civil justice in Aotearoa New Zealand.
2. At present, Aotearoa New Zealand does not have class actions legislation. Rule 4.24 of the High Court Rules 2016 (HCR) allows a person to sue (or be sued) on behalf of, or for the benefit of, all persons with the same interest in the proceeding. This rule is increasingly being used to bring large, complex cases which are similar in nature to class actions. However, the representative action procedure was not designed for litigation of this kind. As a result, there has been extensive litigation on procedural issues, which has caused delay for parties and required considerable court resources. We have concluded that a statutory class actions regime will be clearer, more certain and more accessible. This in turn will improve access to justice for New Zealanders.
3. Aotearoa New Zealand also currently lacks specific regulation of litigation funding. The torts of maintenance and champerty, which have historically prohibited litigation funding, remain part of our law. Consequently, there is uncertainty about when and how litigation funding may be provided. This may impact on the availability and affordability of litigation funding and provide insufficient protection for funded plaintiffs. We have concluded that specific regulation is desirable to address these issues and to assure the integrity of the court system. With specific regulation in place, the torts of maintenance and champerty should be abolished.

## STATUTORY REGIME FOR AOTEAROA NEW ZEALAND

4. Existing methods of group litigation in Aotearoa New Zealand, including the representative actions rule in HCR 4.24, are insufficient. We recommend the creation of a class actions regime, including a Class Actions Act as the principal source of law in relation to class actions. In addition, specific class actions rules in the High Court Rules will be necessary to address more detailed matters of procedure. We explain our view that class actions will improve access to justice and allow multiple claims to be managed in an efficient way and recommend these should be the statutory objectives of class actions. We also discuss the potential disadvantages of class actions and explain how many of these can be mitigated by the design of the regime.
5. In developing our proposals, we have been guided by the principles that a 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.
  - d. Strike an appropriate balance between flexibility and certainty.
  - e. Be appropriate for contemporary Aotearoa New Zealand.
  - f. Recognise and reflect relevant tikanga Māori.
  - g. Not adversely impact on other methods of group litigation.
  - h. Provide clarity on issues arising in funded litigation.
6. We recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider amending the representative actions rules in HCR 4.24 and District Court Rule 4.24 to provide they should not be used when a class action would be a more appropriate procedure. This is to avoid the risk of these rules being used to circumvent the protections of a class actions regime.
  7. While some jurisdictions have provided for defendant class actions, we recommend the Class Actions Act should only apply to plaintiff class actions.

## KEY ACTORS IN A CLASS ACTION

### Class members

8. A defining feature of a class action is the presence of class members. They are not parties to the litigation and have little control over how the class action is conducted but will be bound by the outcome. It is therefore essential that a class actions regime includes safeguards to protect the interests of class members and many features of the class actions regime we recommend provide for this.

### The representative plaintiff

9. In a class action, the plaintiff is a representative plaintiff. There are two important dimensions to the representative plaintiff's role. First, the representative plaintiff, like an ordinary plaintiff, is a party to the proceeding and has a claim against the defendant. Second, the representative plaintiff represents the other class members.
10. We recommend the representative plaintiff should be responsible for making decisions about the conduct of the class action and giving informed instructions to the lawyer acting for them and the class. We prefer this to the approach of governance and decision-making in a class action being vested in a group such as a litigation committee.
11. We consider a representative plaintiff should have an overarching 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. We recommend the Act also specify the representative plaintiff does not owe fiduciary duties to class members. There are a number of responsibilities associated with the role of representative plaintiff, such as taking the steps necessary to progress the class action and meeting any order for adverse costs. These responsibilities arise primarily from being a party to the proceeding, but their extent is amplified because they are bringing the litigation on behalf of a large group of class members as well as themselves.
12. The role of representative plaintiff is significant, and we have accordingly identified some ways of supporting a person in the role. The Class Actions Act should provide the

representative plaintiff with a statutory immunity from claims by a class member with respect to their duty unless they have acted recklessly or in wilful default or bad faith. We also recommend a proposed representative plaintiff must receive independent legal advice on the duty and responsibilities of the role.

### The defendant

13. The role of a defendant in a class action does not differ substantially from normal litigation. However, the nature of a class action can give rise to challenges in responding to the litigation and can increase the financial risks and potential liability for defendants. We recommend some measures to respond to these issues, such as enabling a defendant to obtain information on class members who have opted in or opted out and a presumption that in funded class actions, a litigation funder will provide security for costs.

### The court

14. The court will have a more active role in class actions than in most other litigation to ensure the interests of class members are adequately protected. Stages of a class action that require additional court oversight include the requirement for a proceeding to be certified in order to proceed as a class action, court approval of notices to class members and court approval of settlement. The need for this oversight may require extensive judicial resources. We have accordingly made various recommendations to allow the court to manage class actions in an efficient way.

## COMMENCING A CLASS ACTION

15. We recommend the Class Actions Act should not restrict class actions to certain areas of the law or type of claim and that class actions should be able to be commenced in Te Kōti Matua | High Court with respect to claims where the High Court has existing jurisdiction. We do not recommend class actions be available in the District Court, Environment Court or Māori Land Court. However, we recommend the Government consider developing class actions rules for the employment jurisdiction.
16. To commence a class action, we recommend there must be a proposed representative plaintiff acting on behalf of a class comprising at least two other class members. Each claim must raise a common issue of fact or law, to ensure a single judgment will determine an issue for all class members and prevent disparate claims from being grouped together.
17. We recommend the representative plaintiff should be a class member, in accordance with normal standing rules. 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 who is motivated by a desire to resolve their legal claim. We think a state entity should be able to bring a class action as representative plaintiff either where it is a class member or where another Act enables it to do so.
18. When a class action is commenced, we recommend the limitation periods applying to the claim of each person falling within the proposed class should be suspended. The Class Actions Act should specify a list of circumstances that will lead to limitation periods starting to run again.

## CONCURRENT CLASS ACTIONS

19. Having concurrent (or competing) class actions relating to the same dispute is generally undesirable as this may lead 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 the same issue. We recommend there should be a 90-day deadline to commence a concurrent class action, which will enable the court to consider the certification applications of concurrent class actions together. If more than one concurrent class action meets the certification test, we recommend the court must decide which of those class actions will be certified. When making its decision, we recommend the court should consider which approach will best allow class member claims to be resolved in a just and efficient way. If more than one concurrent class action is certified, the court should have the power to make orders for the efficient management of those proceedings.

## CERTIFICATION OF CLASS ACTIONS

20. We recommend the Class Actions Act should require a proceeding to be certified in order to proceed as a class action. While class actions may provide improved access to justice, they also place a significant burden on defendants and the court system as they are usually expensive and lengthy. Class actions also risk insufficient protection of class members' interests. We therefore think it is appropriate for a proceeding to have to meet a certification test before it is allowed to proceed as a class action.
21. We recommend that in order for a proceeding to be certified as a class action, the court must be satisfied that:
  - a. The proceeding discloses a reasonably arguable cause of action.
  - b. There is a common issue of fact or law in the claim of each class member.
  - c. The representative plaintiff is suitable and will fairly and adequately represent the class.
  - d. Class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members.
  - e. The opt-in or opt-out mechanism proposed for the proceeding is an appropriate means of determining class membership.
22. We consider that both opt-in and opt-out class actions should be allowed in Aotearoa New Zealand. We consider there are advantages and disadvantages to both forms of class action and our proposed certification test will allow flexibility to determine which is appropriate for a particular case.

## THE CLASS

### Rules for particular class members

23. We recommend additional rules for certain categories of class members. First, we think that people who reside outside Aotearoa New Zealand should only be able to join a class action if they opt in. This approach responds to the difficulty in providing adequate notice of an opt-out class action to those outside Aotearoa New Zealand. It may also facilitate recognition and enforcement of the court's judgment in other jurisdictions.



24. Ministers of the Crown and government departments should only become a class member if they opt in. A key rationale for opt-out class actions is to provide access to justice. However, this is unlikely to apply to the Crown because it has sufficient resources for litigation.
25. We also recommend rules on class members who are minors or who are considered to lack sufficient decision-making capacity with respect to a particular step. We do not favour a rule where a litigation guardian must be appointed for such a class member as we think it will depend on the class member involved and the consequences of taking, or not taking, a particular step. We therefore recommend that class members (and potential class members) are not required to have a litigation guardian solely because they are under the age of 18 years or are considered to lack sufficient decision-making capacity with respect to a step in a class action proceeding (unless the court orders otherwise). However, the court should have a power to make any order it considers appropriate to protect the interests of such class members.

### The relationship between the lawyer and class members

26. We consider that, after certification, the representative plaintiff's lawyer should be regarded as the lawyer for the class. As the lawyer will be carrying out legal work on behalf of the entire class, they should not be regarded as solely the representative plaintiff's lawyer. Class members will be bound by the outcome of the litigation and they should be able to rely on the lawyer to conduct the litigation in a way that advances their interests and complies with ethical and professional obligations.
27. We think the lawyer-class relationship that arises upon certification needs to be prescribed by legislation and recommend the Lawyers and Conveyancers Act 2006 should be amended to mandate this relationship. We also recommend that Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) consider what amendments may be needed to the *Rules of conduct and client care for lawyers* to clarify the obligations of lawyers acting in class actions.

## STEPS DURING A CLASS ACTION

### Notice to class members

28. Class members need to be notified of particular stages in a class action in order to make informed decisions about their participation. We recommend a list of events that should require notice to class members, with the court retaining a discretion to order that notice is not required. The initial notice in a class action will inform potential class members that a class action has been certified and there is an opportunity to opt into or opt out of the class action. We make detailed recommendations about the contents of this notice. We also recommend the court should approve the contents of notices before they are sent to class members and should have a broad discretion to order any method of notice that it considers appropriate in the circumstances.

### Case management and discovery

29. Class actions will need close case management to ensure they proceed efficiently and in a way that protects the interests of class members. We recommend the Rules Committee

consider developing a schedule to the High Court Rules listing the matters to be discussed at case management conferences for class actions.

30. We consider it would be desirable to have a specific rule empowering the court to order one or more class members to provide discovery. We do not think the non-party discovery rule is well suited to class members, as it is designed to apply to persons who are not part of the litigation. We also recommend a defendant should be able to seek an order for information resulting from the opt-in or opt-out process, such as the number of class members.

### Sub-classes

31. We recommend the Class Actions Act should empower a court to order a sub-class to be created in two situations. The first category is where there is a conflict of interest between different groups of class members, such as where the relief sought by some class members could harm the interests of other class members. In this case, we think a sub-class representative plaintiff will usually be needed and they should instruct a lawyer in relation to sub-class issues. The second category is where there is an additional issue shared by a group of class members, but it does not give rise to a conflict.

### Staged hearings

32. In a class action, there will generally be both common and individual issues to resolve. It will often be appropriate for the court to have staged hearings, with common issues considered together and individual issues considered together. We recommend the Class Actions Act should empower the court to make orders for the efficient hearing of a class action, including an order that the hearing should be heard in stages and an order as to which issues should be determined at each stage.

### Determining individual issues

33. If the representative plaintiff obtains a successful judgment on the common issues, the individual issues in the proceeding will need to be determined. We think the Class Actions Act should empower the court to determine issues on an individual basis and to give directions with respect to determination of those issues. We think it is desirable for the court to have flexibility as to how individual issues are determined to ensure this occurs in a fair and efficient way. This could include appointing an expert to enquire into individual issues, giving directions as to the way or form in which evidence on individual issues may be given and ordering individual issues to be determined through a non-judicial process.

### COST SHARING ORDERS

34. In an opt-out class action, a problem can arise where only some class members are contractually required to contribute to the costs of the proceeding, but all class members benefit from any settlement or damages award. To mitigate this, we recommend the court should have the power to order that the litigation costs of a class action (including the legal fees and funding commission) be equitably spread among all class members, even if they have not signed up to the litigation funding agreement. We call this a cost sharing order.
35. We consider the court should have flexibility as to the terms of the cost sharing order. This will allow the court to either require all class members to contribute a share of their settlement or damages award to cover the costs of the proceeding, or to give a share of

their settlement or damages award to class members who have signed a funding agreement with the funder.

36. To limit the risk of cost sharing orders facilitating windfall profits for funders, we think the court should also be empowered to set a provisional funding commission (or range of commissions) when granting an application for a cost sharing order that enables the funder to receive a funding commission from class members who have not signed a litigation funding agreement. The court should also have the power to vary that funding commission at a later date to ensure it is fair and reasonable in light of the actual costs and circumstances of the class action.

## **CLASS ACTION JUDGMENTS, RELIEF AND APPEALS**

### **Class action judgments**

37. The ability of a judgment on common issues to bind all class members is a central feature of a class actions regime. If class members were not bound by this judgment, the common issues would not be resolved, and the efficiencies of a class actions regime would not be achieved. We recommend the Class Actions Act should specify that a judgment is binding on class members, with respect to the common issues as set out in the certification order.

### **Aggregate monetary relief**

38. Where there are many class members, it may not be practicable or efficient for the court to assess each class member's claim for damages individually. We therefore recommend the court should have the power to make an aggregate assessment of the monetary relief to which the class is entitled and make an order for this amount. In order for the court to make an aggregate assessment of monetary relief, it should be satisfied it can make a reasonably accurate assessment of the amount, but it should be not necessary for an individual class member to establish the amount of loss or damage they have suffered.
39. We recommend the court should have the power to make any orders for the distribution of an award of aggregate monetary relief that it considers appropriate, including appointing an administrator to distribute the award. We also recommend a distribution outcome report should be filed with the court once the process has been completed.

### **Alternative distribution**

40. In some jurisdictions, monetary relief may be paid to an organisation or charity associated with the claim rather than to class members. This is known overseas as cy-près damages, but we prefer the term 'alternative distribution'.
41. We think it is preferable for relief, where possible, to be distributed to class members. We recommend alternative distribution should only be available where it is not practical or possible to distribute the amount to individual class members or the costs of doing so would be disproportionate. If the court orders alternative distribution of an award, it should usually be paid to a eligible charity or organisation whose activities are related to the claims in the class action and whose activities are likely to directly or indirectly benefit class members.

## Appeal rights in class actions

42. Some aspects of a class action proceeding are unique and require tailored appeal rules. One is the court's decision on certification. We recommend the plaintiff and defendant should be able to appeal this decision as of right as the implications of certification will be significant to both. However, we recommend that leave should be required to appeal a decision not to certify more than one concurrent class action. We also recommend the parties should be able to appeal a court's decision declining to approve a settlement with leave of the court.
43. We do not think class members should have any rights of appeal. While an individual class member may disagree with the representative plaintiff's decision not to appeal a decision, allowing them to bring an appeal could have significant consequences for other class members. However, we recognise the importance of the judgment on common issues to class members. If the representative does not appeal this judgment, or abandons the appeal, we recommend a class member should be able to apply to replace the representative plaintiff for the purpose of bringing an appeal.

## SETTLEMENT OF A CLASS ACTION

44. We consider court approval should be required in order for the settlement of a class action 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. Court approval of settlement is an important part of the court's supervisory role to protect the interests of class members, who are unlikely to be involved in negotiating the settlement but will be bound by its terms and conditions.
45. When a court is deciding an application to approve a class action settlement, we recommend it consider whether the settlement is fair, reasonable and in the interests of the class. In applying the test, we recommend the court consider the following factors:
  - 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. 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.
46. We recommend class members should have an opportunity to file a written objection to the settlement. In addition, the court should have a power to appoint a court expert or counsel to assist if it considers this will assist it to determine whether to approve a settlement.
47. We do not recommend a general right for class members to opt out of a settlement as this could cause significant uncertainty and prevent class actions from being settled. Instead, we recommend a class member should only be able to opt out of a settlement where this is permitted by the settlement agreement, or the court considers the interests of justice require it. We also recommend a potential class member should only be able to opt into a settlement on these same grounds.

48. We consider the court should retain jurisdiction to oversee the administration and implementation of the settlement, as part of its ongoing role to protect the interests of class members. As part of this, the court should have a power to make any orders it considers appropriate for the administration and implementation of a class action settlement. We also recommend a settlement outcome report be filed with the court within 60 days of the settlement implementation process being completed, or at a later time if allowed by the court.
49. The defendant may also want to reach a settlement with an individual class member. We recommend two protections with respect to individual settlements. First, if a defendant wishes to communicate with class members about individual settlements after certification, we think the defendant should be required to include some court-approved standard text about the class action in that communication. Second, we recommend the defendant must seek approval of individual settlements reached after certification where the number of settlements means there is a realistic prospect that they will effectively dispose of the class action.

### Discontinuance of a class action

50. When a class action is discontinued it will bring the proceeding to an end for class members and so we consider court approval should be required. A discontinuance will not extinguish class members' claims like a settlement will and so we consider a lesser threshold is appropriate. We recommend the court consider whether discontinuing a class action would prejudice the interests of class members.

### ADVERSE COSTS

51. We consider the usual adverse costs rule should apply to class actions, which means the successful party in a proceeding or interlocutory application will normally be entitled to an award of costs. While the risk of adverse costs may be a barrier to litigants wanting to commence a class action, we are not convinced that removing the adverse costs rule from class actions is likely to make class action proceedings more feasible.
52. The representative plaintiff will be liable for any adverse costs award in favour of the defendant since they are a party to the litigation. We anticipate a representative plaintiff would generally obtain an indemnity for adverse costs, such as from a litigation funder. Class members will generally not be liable for costs since they are not a party to the litigation. We consider it would be desirable for the High Court Rules to provide clarity on the limited situations when a class member could be ordered to pay costs.

### ABOLISHING MAINTENANCE AND CHAMPERTY

53. We think litigation funding is desirable for Aotearoa New Zealand in principle. While litigation funding is not a 'silver bullet' for the significant access to justice issues facing Aotearoa New Zealand, it has an important role to play in improving access to justice. It can allow plaintiffs to bring claims they could not, or would not, have brought for financial or other reasons. It can also help to level the playing field in litigation against well-resourced defendants. In our view, the statutory class actions regime we recommend would have limited practical utility without litigation funding.

54. We think the law should clarify that litigation funding is permitted by abolishing the torts of maintenance and champerty. These torts, which have historically prohibited litigation funding, act as an impediment to access to justice. The policy rationales for the torts, to protect members of society from malicious litigation and to assure the integrity of the courts, remain important but can be addressed in other ways. For example, through appropriate and transparent regulation of litigation funding, and the court's general powers to stay or dismiss proceedings that are an abuse of its process.

## MODELS FOR REGULATION AND OVERSIGHT OF LITIGATION FUNDING

55. There is a need for further regulation and oversight of litigation funding in Aotearoa New Zealand. Currently, litigation funding is not specifically regulated and there is uncertainty about the extent to which it is permitted. This may reduce the availability and affordability of litigation funding, and increase the risk of challenges to funding agreements. It may also mean that plaintiffs are not adequately protected against the risks that can arise in funded proceedings. For example, in relation to funder control of litigation, conflicts of interest, funder profits and funder capital adequacy. We consider the need for further regulation and oversight of litigation funding is strongest in the class actions context.
56. We think the objectives for permitting and regulating litigation funding should be improving access to justice, while assuring the integrity of the court system. In developing our recommendations, we were guided by the following principles:
- To facilitate access to courts, the litigation funding market should be sustainable, competitive and promote consumer confidence.
  - To ensure substantively just outcomes in class actions, the costs of litigation funding to representative plaintiffs and class members and the terms of litigation funding agreements should be fair and reasonable.
  - To assure the integrity of the court system, and recognise defendant concerns in funded proceedings, the involvement and role of litigation funders in funded proceedings should be appropriate and transparent.
57. We discuss various models for regulation and oversight, including industry self-regulation and oversight, or licensing requirements overseen by an appropriate regulator. However, we conclude that the concerns with litigation funding can best be addressed through regulation and court oversight of funding agreements in class actions, alongside professional regulation of lawyers acting in funded proceedings and changes to strengthen the security for costs mechanism. We think this approach is the most practical and proportionate response to the concerns with litigation funding.

## Disclosure of funding agreements

58. In all funded proceedings, we think there should be a requirement for plaintiffs to disclose their funding agreement to the court and the defendant, with redactions to protect privileged matters or those which might confer a tactical advantage on the defendant. This will assist the defendant to make informed choices about whether to apply for security for costs, or a stay of proceedings on abuse of process grounds. Transparency will also provide greater assurance in the integrity in the court system.

## SECURITY FOR COSTS

59. In response to defendant concerns about litigation funding, we make a number of recommendations to strengthen the security for costs mechanism in funded proceedings. A funder's failure to maintain adequate capital may mean a successful defendant is left with a significant loss if the funder and the funded plaintiff are unable to meet an adverse costs order. This risk is greatest for defendants in class actions, as class actions tend to be significantly more expensive and protracted than ordinary proceedings.
60. We do not think the existing security for costs mechanism in HCR 5.45 adequately protects defendants in funded proceedings or promotes efficiency and economy in litigation. Security is currently ordered at the discretion of the courts, and only if sought by the defendant. If the funder is based overseas, a successful defendant may be put to the additional expense, risk and inconvenience of litigation in a foreign jurisdiction to enforce the security provided. Further, HCR 5.45 only empowers the court to order a plaintiff to provide security, which does not accurately reflect the dynamics of some funded proceedings. In class actions, for example, the funder is usually contractually responsible for paying the full costs of the litigation including any security for costs. We think defendants, particularly in funded class actions, need greater certainty that capital will be available to cover their costs in the event they are successful.
61. We recommend the Rules Committee consider developing a rebuttable presumption that funded representative plaintiffs will provide security for costs in class actions. We also recommend a rebuttable presumption that security for costs, in all funded proceedings, will be provided in a form that is enforceable in Aotearoa New Zealand. Finally, we recommend that the court, in all funded proceedings, should be expressly empowered to order costs, including security for costs, directly against the litigation funder.

## PROFESSIONAL REGULATION OF LAWYERS IN FUNDED PROCEEDINGS

### Lawyer-plaintiff conflicts of interest

62. The relationship of trust and confidence between lawyer and client is an essential tool for safeguarding the plaintiff's interests in litigation. However litigation funding can complicate that relationship, because while the lawyer owes duties to the plaintiff, the lawyer's fees are paid by the funder.
63. Conflicts of interest between a lawyer and funded plaintiff can arise where the lawyer has (or wants to cultivate) an ongoing relationship with the funder, owes duties to both the funder and the plaintiff, or where the funder exerts control over the litigation. Conflicts may also arise from any commercial ties between the lawyer and the funder. Conflict-prone stages of funded litigation include determining the litigation strategy and deciding whether to settle a claim. During these stages, the lawyer may be incentivised to protect or promote their own interests by advising or persuading the plaintiff to adopt the funder's preferred course of action. Conflicts can arise in any funded case and are not limited to funded class actions.
64. To address these concerns, we recommend NZLS consider amending the *Rules of conduct and client care for lawyers* 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.



## Plaintiff's potential liability for unpaid costs

65. A funder's failure to fulfil its financial obligations may mean the plaintiff is left with a substantial and unexpected liability for any unpaid legal costs or adverse costs in excess of any security provided. This risk is particularly concerning in class actions, as the legal costs will be disproportionate to the value of the representative plaintiff's own claim, and to the risks that other class members carry.
66. We recommend NZLS should consider amending the *Rules of conduct and client care for lawyers* to prohibit lawyers from claiming unpaid legal fees and expenses from the representative plaintiff. We think a prohibition will protect representative plaintiffs, and may also encourage best practice. For example, it may incentivise lawyers to ensure that any expert fees, and their own fees, are paid up front or in regular instalments by the funder. It may also encourage lawyers to only recommend funders to their clients that, in their assessment, are competent and financially stable.

## COURT OVERSIGHT OF FUNDING AGREEMENTS AND COMMISSIONS

67. We recommend litigation funding agreements should be subject to court approval in class actions. This responds to concerns about funder control of litigation, conflicts of interest between the funder and the representative plaintiff, and excessive funder profits that may significantly diminish returns to the class. We think court approval will protect the interests of the representative plaintiff and class members, and ensure that litigation funding provides meaningful access to justice. It also will provide assurance in the integrity of the court system, and improve transparency and funder accountability in class actions.
68. Given the often commercial nature of other funded proceedings, we consider that most individual funded plaintiffs are likely to be sophisticated and able to protect their interests when negotiating funding agreements. Therefore we do not recommend court approval of funding agreements outside the class actions context.
69. We recommend that court approval of the funding agreement should occur early in the class action, and the funder should be unable to enforce the funding agreement against the representative plaintiff or class members unless the agreement has been approved. The court may only approve a funding agreement if it is satisfied that the representative plaintiff has received independent legal advice on the funding agreement and the agreement as a whole is fair and reasonable. We discuss various factors the court may consider when assessing the fairness and reasonableness of the funding terms and the funding commission. We also recommend a power for the court to appoint an expert if this will assist it to determine whether a funding commission is fair and reasonable.

## REDUCING BARRIERS TO ACCESS TO JUSTICE FOR CLASS MEMBERS

70. Throughout this review, we have discussed some of the access to justice barriers for potential representative plaintiffs and class members. The costs of litigation, especially legal fees, mean that seeking redress through the courts is beyond the means of most New Zealanders. The adverse costs rule may also act as a barrier to accessing the courts.
71. While litigation funding can remove or reduce these barriers in some cases, it is only likely to be available in cases that are sufficiently profitable for a litigation funder. It is unlikely to be available in public interest litigation, or where the relief sought is non-monetary.



72. We consider a public class action fund could have significant access to justice benefits, particularly given the pressures on the legal aid system and the fact that legal aid is unlikely to be available for many of the individual claims that make up a class action. We discuss how a class action fund could be administered and funded.
  73. We also recognise that, while class members have a largely passive role in the litigation, there are certain stages where they can take an active step in the litigation, such as deciding whether to opt in or opt out and considering whether to object to a settlement. Class members need sufficient understanding of these stages to be able to participate in them and may need assistance to take particular steps. We recommend Te Tāhu o te Ture | Ministry of Justice consider producing a clear and accessible online guide to assist class members to understand the class action process. It could also explore options for providing free legal advice to class members, for example through support for a class actions law clinic.
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# 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.

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| <b>R9</b>  | 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.                             |
| <b>R10</b> | 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. |
| <b>R11</b> | 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.                                       |
| <b>R12</b> | Te Kura Kaiwhakawā   Institute of Judicial Studies should consider whether to produce resources for judges on class actions.   |

## CHAPTER 4: COMMENCING A CLASS ACTION

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| <b>R13</b> | The Class Actions Act should not be limited in its application to certain areas of the law or types of claim.  |
| <b>R14</b> | 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.   |
| <b>R15</b> | The Government should consider developing class action rules for the employment jurisdiction.  |
| <b>R16</b> | 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. |
| <b>R17</b> | 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:
- There must be a representative plaintiff and at least two other class members with a claim against each defendant.
  - 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:
- The court dismisses an application for certification or decertifies the class action.
  - The court makes an order that has the effect of removing or excluding the claim from the proceeding.
  - 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.
  - In an opt-out proceeding, a potential class member opts out of the class action by the date specified in the opt-out notice.
  - The proceeding is dismissed without an adjudication on the merits.
  - 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:
- The same or substantially similar issues in dispute; and
  - 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:
- The class definition.
  - The name of the representative plaintiff(s).
  - A description of the causes of action that are pleaded.
  - The relief sought by the class.
  - The common issues of law or fact.
  - 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:
- In the time and manner specified in the opt-in or opt-out notice; or
  - 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:
- With respect to the determination of an individual issue applying to the class member.
  - With respect to the determination of sub-class issues, where the class member has been appointed as the sub-class representative plaintiff.
  - 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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## CHAPTER 1

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# Introduction

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- 1.1 Te Aka Matua o te Ture | Law Commission has undertaken a review of class actions and litigation funding. The review has taken place within a wider context of ongoing and pressing concern about financial, social and other barriers to accessing civil justice in Aotearoa New Zealand. This report sets out our findings from the review and makes recommendations for reform. These include our recommendations for a new Class Actions Act and measures for the regulation and oversight of litigation funding.
- 1.2 At present, Aotearoa New Zealand does not have class actions legislation. Rule 4.24 of the High Court Rules 2016 (HCR) allows a person to sue (or be sued) on behalf of, or for the benefit of, all persons with the same interest in the proceeding. The number of claims being initiated as representative actions under HCR 4.24 is increasing. However, the representative action procedure was not designed for claims of the scale or complexity of recent cases. As a result, there has been extensive litigation on procedural issues, which has caused delay for parties and required considerable court resources. We have concluded that a specific class actions regime will be clearer, more certain and more accessible. This, in turn, will improve access to justice for New Zealanders.
- 1.3 Aotearoa New Zealand also currently lacks specific regulation of litigation funding. The torts of maintenance and champerty, which have historically prohibited litigation funding, remain part of our law. Consequently, there is uncertainty about when and how litigation funding may be provided. This may impact on the availability and affordability of litigation funding and provide insufficient protection for funded plaintiffs. We have concluded that specific regulation is desirable to address these issues and to assure the integrity of the court system. With specific regulation in place, the torts of maintenance and champerty should be abolished.
- 1.4 There are risks and costs associated with both class actions and litigation funding. Class actions can be expensive and time-consuming for the parties. They are resource-intensive for courts to manage, especially given the procedural steps that are required to ensure class member interests are not overlooked. Litigation funding can give rise to conflicts of interest between a representative plaintiff and the funder and between the representative plaintiff and their lawyer. Funding commissions can also diminish returns to plaintiffs and class members, impacting the ability of class action litigation to achieve substantively just outcomes.
- 1.5 In making our recommendations, we recognise the law in these areas should enable the advantages of class actions and litigation funding to be realised and at the same time manage their risks and costs.

## OUR REVIEW

### Terms of reference

- 1.6 We published terms of reference for the review in December 2019. They required us to consider whether and to what extent the law should allow class actions and whether and to what extent the law should allow litigation funding with particular regard to the torts of maintenance and champerty. Our review was designed to ensure the law in these areas supports an efficient economy and a just society and is understandable, clear and practicable.
- 1.7 If we concluded that class actions should be provided for, the terms of reference also required us to consider how they should be regulated. This included the criteria and process for commencing a class action, how class actions should be managed, and the issues of damages, costs and settlement.
- 1.8 The terms of reference also required us to consider the role of the courts in overseeing litigation funding arrangements and whether and to what extent litigation funders and funding arrangements should be regulated.

### Matters not addressed in this report

- 1.9 A class action is a procedural device that provides a mechanism for bringing claims together that might otherwise be brought as individual proceedings. Although encouraged by some submitters to do so, we have not reviewed substantive rights and obligations that often give rise to class actions such as continuous disclosure laws in the context of financial markets. Any issues arising from the enhanced enforceability of substantive laws as a result of a new class actions regime should be the subject of separate consideration.
- 1.10 There are several other issues that relate to matters addressed in our review but fall outside the terms of reference. These include whether lawyers should be able to charge contingency fees, whether the law relating to assignments of bare causes of action should be reformed and whether the interests of third parties who may be associated with or support litigation (for example, insurers) should be subject to the same oversight as litigation funders. Our proposals for reform with respect to class actions and litigation funding may promote separate consideration of these issues in the future. In accordance with the terms of reference, civil legal aid also falls outside the scope of this review.

## OUR PROCESS

### Overseas comparisons and other studies

- 1.11 There are now around 40 countries with class actions regimes.<sup>1</sup> We have considered, in particular, approaches taken in the United States, Australia (federal and state jurisdictions) and Canada (in particular Ontario). These jurisdictions are relevant comparators given each of them began with a rule on representative actions similar to that provided by HCR 4.24. The class actions regime in the United Kingdom Competition Appeal Tribunal has

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<sup>1</sup> Deborah R Hensler "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally" (2017) 65 U Kan L Rev 965 at 966.

also provided a useful comparator, as it allows for both opt-in and opt-out class actions. While overseas jurisdictions use a variety of terms for their class actions regimes, for simplicity we refer to class actions and class members throughout.

- 1.12 Class actions and litigation funding have also been the subjects of several law reform exercises, to some extent in Aotearoa New Zealand and more widely overseas. Where relevant we draw on findings and take account of overseas experiences in this report.

## Engagement

- 1.13 During the review we met with a number of stakeholders, including government agencies, members of the legal profession and litigation funders. We published an Issues Paper in December 2020 that invited feedback on 60 questions about class actions and litigation funding.<sup>2</sup> In the Issues Paper, we discussed the advantages and disadvantages of class actions and expressed the preliminary view that it would be desirable to have a class actions regime for Aotearoa New Zealand. We also discussed the scope of a class actions regime and some key design features such as whether to have a certification test, how a class should be formed and who could fulfil the role of representative plaintiff. We asked whether litigation funding is desirable in principle and whether any of the identified concerns about litigation funding warrant a regulatory response. We expressed the preliminary view that litigation funding is desirable in principle as long as concerns with the provision of litigation funding can be adequately managed.
- 1.14 In September 2021, we published a Supplementary Issues Paper that outlined our preliminary conclusions on class actions and sought feedback on detailed aspects of a class actions regime.<sup>3</sup> We invited feedback on 54 questions and some draft statutory provisions. We held four consultation workshops in October 2021 to discuss the proposals in the Supplementary Issues Paper. The consultation workshops were attended by around 40 people, including representatives from law firms, business and community organisations, barristers, litigation funders, participants in representative actions and academics. As agreed with attendees, we do not attribute comments arising from the consultation workshops to any individuals.
- 1.15 We received 51 submissions in response to the Issues Paper and 32 submissions in response to the Supplementary Issues Paper. All submitters are listed in Appendix Two to this report. Submitters include government entities, business and community organisations, Te Hunga Rōia Māori o Aotearoa | Māori Law Society, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), law firms, barristers, litigation funders, members of the public and academics. When we refer to or summarise submissions received on the Issues Paper and Supplementary Issues Paper, we use the submitter's language as much as possible with minor edits if needed for readability.<sup>4</sup>
- 1.16 In addition to these engagements, we undertook an online survey of group members in representative actions under HCR 4.24. The survey was accessible via a weblink. We

<sup>2</sup> 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).

<sup>3</sup> Te Aka Matua o te Ture | Law Commission *Class Actions and Litigation Funding: Supplementary Issues Paper* | *Ko Ngā Hunga Take Whaipānga me Ngā Pūtea Tautiringa* (NZLC IP48, 2021).

<sup>4</sup> Some submitters made submissions on both the Issues Paper and the Supplementary Issues Paper. In many cases it is clear from the context whether the submission was made in response to one or the other but in some cases we state this expressly for the sake of clarity.

contacted lawyers who have acted for representative plaintiffs and asked them to distribute the link. The purpose of the survey was to gain a better understanding of the experiences and understanding of people who have been involved in group litigation, including funded group litigation. We received responses from 409 people. While it is only a snapshot of views from people involved in a small number of representative actions, the feedback we received through the survey has been useful and informative.

- 1.17 Throughout our review we have been supported by an Expert Advisory Group, received guidance from the Commission's Māori Liaison Committee and discussed certain aspects of the review with members of the judiciary, NZLS and Te Kōmiti mō ngā Tikanga Kooti | Rules Committee.

## OUR REPORT

- 1.18 We make 121 recommendations in this report, addressing a wide range of matters.
- 1.19 In Chapters 2 to 12, we set out our recommendations for class actions, including our principal recommendation for a new Class Actions Act. We recognise that to be effective a comprehensive class actions regime will require new procedural rules and professional regulation. We therefore also recommend the Rules Committee may wish to consider developing new High Court Rules to address detailed matters of class actions procedure. Further, we suggest NZLS may wish to consider amendments to the Lawyers and Conveyancers Act 2006 and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 to clarify lawyers' obligations when acting in a class action.
- 1.20 In Chapters 13 to 18, we address the need for regulation and oversight of litigation funding. We begin by explaining why, on balance, we think the torts of maintenance and champerty no longer serve a useful purpose and should be abolished. We make recommendations on security for costs in funded proceedings, the regulation of lawyers acting in funded proceedings and court approval of litigation funding agreements in class actions. In our final chapter we recommend the creation of a public class action fund and other measures to further reduce barriers to access to justice for class members.
- 1.21 We have provided draft legislative provisions on some of our key recommendations to aid readers in understanding these recommendations and how they could be given effect. Further drafting will be required to produce a complete bill. We indicate throughout the report other matters that will need to be addressed in the Class Actions Act as well as matters that will need to be addressed in the High Court Rules. Specific draft provisions are set out at the end of the chapter they relate to. The complete set of draft provisions is set out in Appendix One.
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## CHAPTER 2

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# A class actions regime for Aotearoa New Zealand

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## INTRODUCTION

2.1 In this chapter, we discuss:

- (a) Group litigation and its benefits.
- (b) Current methods of group litigation in Aotearoa New Zealand and their limitations.
- (c) Potential advantages of class actions.
- (d) Potential disadvantages of class actions.
- (e) Why Aotearoa New Zealand should adopt a statutory class actions regime.
- (f) Our proposed objectives for class actions.
- (g) Principles for designing a class actions regime.
- (h) Retaining the representative actions rule.
- (i) Defendant class actions.

## GROUP LITIGATION

- 2.2 Group litigation enables many people to have a legal issue determined by the court in one proceeding. Some forms of group litigation enable individual claims to be combined to form a larger claim, which we refer to as aggregate litigation. Other forms of group litigation involve the determination of a single claim that impacts on a wider group.
- 2.3 From the perspective of plaintiffs, group litigation can improve access to justice by enabling legal costs to be shared among a large group of claimants and by reducing the social and psychological barriers that can prevent individuals from bringing a legal action on their own. It may be easier to attract litigation funding for group litigation because the size of the claim is typically larger. Group litigation may also be more efficient for the defendant and the court system because it can avoid a series of individual cases.
- 2.4 Our work has focused on one particular form of group litigation, the class action. A class action is a procedure that enables a group or class of people with similar claims to have those claims determined in a single proceeding. This is normally achieved through the selection of one class member to act as a representative plaintiff on behalf of the class. All class members are bound by the decision on common issues but generally do not take an active part in the litigation. A class action is a form of aggregate litigation.

- 2.5 Key features of class actions include:<sup>1</sup>
- (a) Preliminary court approval before the case can proceed as a class action, usually known as certification.
  - (b) The requirement for one or more common issues.
  - (c) The existence of a representative plaintiff or representative defendant.
  - (d) The existence of a class of represented persons.
  - (e) A mechanism to determine membership of the class, such as ‘opt-in’ or ‘opt-out’.<sup>2</sup>
  - (f) The decision on the common issues binds the class.
  - (g) A method of determining individual issues.
  - (h) Active court supervision of proceedings.
  - (i) The requirement for the court to approve any settlement.
  - (j) Typically, funding by a lawyer or litigation funder.
- 2.6 In some jurisdictions it is possible for class actions to be brought against a defendant class, although defendant class actions are rare. Later in this chapter, we recommend that the class actions regime for Aotearoa New Zealand provide only for plaintiff class actions, not defendant class actions.

## GROUP LITIGATION IN AOTEAROA NEW ZEALAND

- 2.7 Aotearoa New Zealand does not currently have a class actions regime. Proceedings that might be taken as a class action in comparable jurisdictions may be able to be pursued as a representative action under Rule 4.24 of the High Court Rules 2016 (HCR). There are also other methods of bringing group litigation.

### Representative actions

- 2.8 A representative action permits a person to sue (or be sued) on behalf of other people who share the same interest in the subject matter of a legal proceeding. The representative action was developed in the Courts of Chancery in the late 17th and early 18th century.<sup>3</sup>
- 2.9 A representative actions rule has been in place in Aotearoa New Zealand since 1882. The current provision is HCR 4.24, which states:
- One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
- (a) with the consent of the other persons who have the same interest; or
  - (b) as directed by the court on an application made by a party or intending party to the proceeding.
- 2.10 We are aware of 47 cases in which Te Kōti Matua | High Court has allowed a case to proceed under HCR 4.24 (or its predecessor rules), with the majority of these filed after

<sup>1</sup> See Issues Paper at [2.7]–[2.24].

<sup>2</sup> An opt-out class action is where all persons falling within the class definition are automatically part of the class action unless they take steps to remove themselves. Conversely, an opt-in class action is where individuals are only part of the class action if they take steps to become class members.

<sup>3</sup> We discuss the history of the representative actions rule in the Issues Paper at [2.26]–[2.27] and [3.3]–[3.5].

2000.<sup>4</sup> In the Issues Paper we grouped these into the following broad categories of case: government, investor, shareholder, general commercial, consumer, trusts and estates, and environmental.<sup>5</sup>

- 2.11 In the absence of a class actions regime in Aotearoa New Zealand, the law on representative actions has been incrementally developed to include many of the features of a class actions regime.<sup>6</sup> Te Kōti Mana Nui | Supreme Court has said that “so long as the concern not to work injustice is kept in mind, r 4.24 should continue to be interpreted to meet modern requirements”.<sup>7</sup> In the Issues Paper we noted that many recent representative actions have similar characteristics to cases brought as class actions in other jurisdictions.<sup>8</sup>

### **Problems with using HCR 4.24 for group litigation**

- 2.12 In the Issues Paper we identified several problems with using HCR 4.24 to bring claims that are similar in nature to class actions. We observed there has not been a comprehensive public policy process to consider whether a class actions regime is desirable for Aotearoa New Zealand and, if so, the design and scope of a regime. We noted that representative actions were proceeding without the benefit of procedural rules to specify how they should be managed and that the lack of certainty and clarity is causing delay and expense. The lack of rules has also led to debate about whether HCR 4.24 and the High Court’s inherent jurisdiction are sufficient to regulate all aspects of representative actions. Finally, we suggested that the current procedural framework for representative actions might be preventing or limiting group litigation in relation to some issues or areas of the law, including consumer cases and compensation claims following regulatory action.<sup>9</sup>
- 2.13 We asked submitters what problems they had encountered when relying on HCR 4.24 for group litigation. We received 18 submissions on this question.<sup>10</sup> Most submitters considered that HCR 4.24 does not provide sufficient certainty and clarity as to the procedures to be followed. Issues that were said to result from this included:
- (a) The uncertainty invites interlocutory applications and subsequent appeals, which can increase cost and delay.

<sup>4</sup> We identified 44 of these cases in the Issues Paper at [3.10]. Additional cases are: *Fullarton v Arowana International Ltd* [2021] NZHC 931; *Taua v Tahi Enterprises Ltd* [2021] NZSC 182; *Re Halifax New Zealand Ltd (in liq)* [2021] NZHC 1113. We are aware of several other proceedings which have been commenced on a representative basis (but there is not yet a decision as to whether leave should be granted under HCR 4.24): see *Simons v ANZ Bank and ASB Bank Ltd* (CIV-2021-404-1190), *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2020] NZHC 985, and <[www.a2milkclassaction.com](http://www.a2milkclassaction.com)>.

<sup>5</sup> See Issues Paper at [3.15]–[3.21].

<sup>6</sup> See Issues Paper at [4.2]–[4.3].

<sup>7</sup> *Southern Response Earthquake Services Ltd v Ross* [2021] 1 NZLR 117 at [89].

<sup>8</sup> See Issues Paper at [4.4].

<sup>9</sup> Issues Paper at [4.8]–[4.43].

<sup>10</sup> Andrew Barker QC, Bell Gully, Colin Carruthers QC, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Gilbert Walker, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith and Tom Weston QC. Two submissions on the Supplementary Issues Paper addressed this issue: GCA Lawyers and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

- (b) Case law is slow to develop, and occurs in a ‘piecemeal way’. Some significant issues have not received judicial consideration to date because they have not yet arisen in a particular case.
  - (c) Courts sometimes take inconsistent approaches in different cases.
  - (d) It does not comply with access to justice or rule of law values.
  - (e) Lawyers face difficulties advising clients on representative actions.
- 2.14 Several submitters also pointed to some more specific issues they had experienced with the current representative actions regime. These included:
- (a) Inefficiencies caused by a poorly defined common issue or differentiated class of plaintiffs.
  - (b) The common interest test being too permissive.
  - (c) A lack of certainty on limitation rules as they relate to representative actions.
  - (d) Practical issues not being considered at the outset of proceedings, such as how the plaintiff will practically advance their claims and how the defendant’s rights to procedural fairness will be recognised.
  - (e) Plaintiffs not being required to provide particulars, which can prejudice a defendant’s right to bring third party claims.
  - (f) Potential group members being confused about the process, including uncertainty about competing representative actions or concern about the risk of adverse costs.
  - (g) Lack of clarity on the role of a lawyer in a representative action.
- 2.15 Some submitters indicated that the lack of rules for representative actions had not been problematic. Omni Bridgeway commented that the current representative actions regime had worked well to date, with the court having the flexibility to approach procedural issues on a case-by-case basis. Nonetheless it supported a clear and more detailed legislative regime as this would be more likely to create certainty for all parties on how the case would proceed.
- 2.16 We also asked submitters which kinds of claims were unlikely to be brought under HCR 4.24 and why. We received 10 submissions on this question.<sup>11</sup> Submitters identified consumer claims, compensation claims following regulatory action, lower value claims and claims involving significant factual differences or different types of loss as being inhibited by the current regime.
- 2.17 The current lack of certainty and clarity around HCR 4.24 was seen as a key reason why claims were not being brought. This included the uncertainty about whether claims could be brought on an opt-out basis prior to the Supreme Court’s decision in *Ross v Southern Response*. It was also suggested that plaintiffs and funders might be more willing to risk this uncertainty where they had higher-value claims. Associate Professor Kate Tokeley (Te Herenga Waka | Victoria University of Wellington) acknowledged that not all of the barriers to bringing a consumer representative action would be resolved by a class actions regime such as lack of awareness of consumer rights, difficulty in finding a motivated consumer representative and lack of resourcing. Meredith Connell commented that, if there had been a statutory regime in place, more claimants would have

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<sup>11</sup> BusinessNZ, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Omni Bridgeway, Simpson Grierson, Nicole Smith, Kate Tokeley and Tom Weston QC.



participated in proceedings to date and a greater number of proceedings would have been filed.

- 2.18 Omni Bridgeway said it had not experienced barriers to bringing any particular kinds of claim under HCR 4.24. Similarly, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said it was difficult to envisage any type of claim that was unlikely to be brought under HCR 4.24, given how broad and general the rule was.

### Other means of bringing group litigation

- 2.19 A representative action under HCR 4.24 is not the only means of bringing group litigation in Aotearoa New Zealand. We outlined some alternative procedures for group litigation in the Issues Paper, including some limitations of these approaches.<sup>12</sup>
- 2.20 General techniques for bringing group claims include joining multiple plaintiffs to a claim, seeking an order to consolidate proceedings under HCR 10.12, bringing a test case and obtaining a representation order under HCR 4.27. Some of these approaches may work best when there are relatively few plaintiffs.
- 2.21 There are also some specific group litigation procedures in the Companies Act 1993, Health and Disability Commissioner Act 1994, Human Rights Act 1993, Privacy Act 2020 and Employment Relations Act 2000. Some of these mechanisms are very rarely used.
- 2.22 Both Te Komihana Tauhokohoko | Commerce Commission and Te Mana Tatai Hokohoko | Financial Markets Authority have powers that enable them to seek compensation on behalf of individuals.<sup>13</sup> In the Issues Paper we noted that regulators must prioritise their enforcement activities and cannot bring proceedings against every possible defendant who is alleged to have caused loss to a group. We also observed that, while private litigants are likely to have compensation as a key goal of proceedings, regulators are likely to have broader aims, such as encouraging compliance with the law, deterring misconduct, clarifying the law and ensuring public safety.<sup>14</sup>
- 2.23 Group litigation can also involve a single claim that will affect a wider group. An example is a judicial review claim brought on behalf of a group. This type of group litigation serves a slightly different purpose from aggregate litigation such as class actions, which involve multiple individual claims being grouped into a single proceeding.

### POTENTIAL ADVANTAGES OF CLASS ACTIONS

- 2.24 In the Issues Paper we identified three primary advantages of class actions: improving access to justice, enabling economy and efficiency of litigation and strengthening incentives for compliance with the law. We asked submitters what they saw as the advantages of class actions and to what extent class actions would realise the three advantages we identified. We received 34 submissions on this question.<sup>15</sup> In the following

<sup>12</sup> Issues Paper at [3.57]–[3.97].

<sup>13</sup> Issues Paper at [3.79]–[3.89].

<sup>14</sup> Issues Paper at [7.9]–[7.10].

<sup>15</sup> Barry Allan, Association of Litigation Funders of Australia, Samuel Becher, Bell Gully, David Bigio QC (Supplementary Issues Paper submission), Jennifer Braithwaite, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Te Komihana Tauhokohoko | Commerce Commission, Consumer NZ, Michael Duffy, Tony Ellis, GCA Lawyers

sections we discuss each of these potential advantages and submitters' feedback on them.

## Access to justice

- 2.25 The state's fundamental obligations to provide access to justice and enable citizen participation in legal institutions are central to the rule of law and underpin our democracy. As we discussed in the Issues Paper, Aotearoa New Zealand is facing significant issues with respect to access to civil justice, with many individuals unable to afford to bring civil proceedings.<sup>16</sup>
- 2.26 Access to justice is about enabling people to have their legal rights determined and upheld through a process that is fair, efficient and transparent. In the Issues Paper we drew on the holistic concept of access to justice in class actions developed by Canadian academic Associate Professor Jasminka Kalajdzic (University of Windsor). Rather than simply focusing on access to the courts and lawyers, Kalajdzic proposes four components of access to justice: access to the courts, a fair and transparent process, meaningful participation rights for class members and a substantively just result.<sup>17</sup> This broader conception of access to justice means the focus is not simply on class actions improving access to the court system but also considers whether the entire process from commencement to resolution meaningfully achieves a fair and just result for class members. It also requires consideration of the defendant's access to justice rights and the interests of the wider public and the court system.

## Improving access to the courts

- 2.27 Class actions may improve access to the courts by helping to overcome financial, social and psychological barriers to litigation. The costs of bringing a legal claim mean that it is uneconomic to resolve a claim through the court system unless the claim seeks a significant amount. Some have estimated a claim needs to be at least \$100,000 to be economic to pursue through the court system, while others have put the figure even higher.<sup>18</sup> By grouping many claims together, a class action increases the size of the claim amount and enables the legal costs to be shared by many litigants. The larger claim size may also make the case more attractive to litigation funders.
- 2.28 Social and psychological barriers can also limit access to the courts. For example, claimants may not know they have a possible claim, be unfamiliar with the legal system, doubt that litigation will be worthwhile, fear possible reprisals or feel shame or embarrassment about the circumstances giving rise to the claim. By grouping claimants

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(Supplementary Issues Paper submission), Gilbert Walker, Insurance Council, International Bar Association (IBA) Antritrust Committee, Jasminka Kalajdzic, Zane Kennedy (Supplementary Issues Paper submission), Michael Legg, Maurice Blackburn/Claims Funding Australia, Hikina Whakatutuki | Ministry of Business, Innovation and Employment (MBIE), NZLS, NZ Shareholders' Association, Omni Bridgeway, Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner, Russell Legal (Supplementary Issues Paper submission), Simpson Grierson, Nicole Smith, Christopher St Johanser, Kate Tokeley, Vicki Waye and Tom Weston QC (Issues Paper and Supplementary Issues Paper submissions).

<sup>16</sup> Issues Paper at [1.9]–[1.13]. See also Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Improving Access to Civil Justice: Initial Consultation with the Legal Profession* (Discussion Paper, 16 December 2019).

<sup>17</sup> Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 51.

<sup>18</sup> See Issues Paper at [1.10] and The Rules Committee *Improving Access to Civil Justice Further Consultation with the Legal Profession and Wider Community* (Further Consultation Paper, 14 May 2021) at [13].

together, a class action can help individuals overcome some of the stresses and difficulties posed by individual litigation. A class action may also help redress any power imbalance felt by individuals when litigating against a large and powerful defendant.<sup>19</sup>

- 2.29 Class actions are only likely to improve access to the courts in certain kinds of cases. Whether a class action is feasible will depend on the substantive basis for the claim, the remedy sought, the size of the potential class, how similar the individual claims are, the evidence that would be required and the availability of litigation funding, among other factors.
- 2.30 Most of those who submitted on access to justice considered that class actions would improve access to courts, although this view was sometimes qualified. Several submitters commented that class actions would enable claims to be brought that would not be financially viable to bring individually.<sup>20</sup> Some submitters also commented on the financial barriers currently experienced by New Zealanders in bringing legal proceedings.
- 2.31 Submitters also commented on ways that class actions could address barriers to accessing the courts.<sup>21</sup> These included:
- (a) Redressing the power imbalance between the plaintiff and defendant or 'levelling the playing field'.
  - (b) Removing or reducing claimants' costs exposure (particularly where a litigation funder is involved).
  - (c) Reducing the risk and uncertainty that claimants experience in the litigation process.
  - (d) Allowing class members to benefit from litigation without significant involvement.
  - (e) Providing class members with better access to legal advice and representation.
  - (f) Addressing issues such as social barriers and limited knowledge of rights.
- 2.32 Some submitters commented on the types of claims that class actions could enable, with consumer class actions being cited by several. Other submitters suggested a class actions regime could enable claims by investors, shareholders, prisoners, children and young people, and environmental groups.
- 2.33 Some submitters acknowledged that class actions would not be useful for all types of case. For example, Professor Vicki Waye (University of South Australia) said while class actions have their place, they are very expensive and some disputes could be resolved more efficiently and economically by other methods of collective redress. Dr Michael Duffy (Monash University) said class actions could assist where there are systemic or common problems across groups of people, including employment law, migration law, consumer rights, welfare law and product liability. He noted that many legal problems did not raise common issues across a class and might not involve a claim being brought (for example, an individual may require assistance with defending a claim, representation or negotiation). There were important areas of the law where class actions have probably

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<sup>19</sup> See Issues Paper at [5.12]–[5.14] and The Rules Committee *Improving Access to Civil Justice Further Consultation with the Legal Profession and Wider Community* (Further Consultation Paper, 14 May 2021) at [21]–[22].

<sup>20</sup> Association of Litigation Funders of Australia, Samuel Becher, Te Komihana Tauhokohoko | Commerce Commission, LPF Group, MBIE, Omni Bridgeway, Simpson Grierson and Nicole Smith.

<sup>21</sup> Barry Allan, Association of Litigation Funders of Australia, Samuel Becher, Jennifer Braithwaite, Te Komihana Tauhokohoko | Commerce Commission, Consumer NZ, GCA Lawyers (Supplementary Issues Paper submission), Maurice Blackburn/Claims Funding Australia, NZLS, Simpson Grierson and Kate Tokeley.

not increased access to justice, including criminal law, family law, estate law, neighbour disputes, defamation and personal insolvency.

- 2.34 Michael Duffy and Gilbert Walker commented that class actions would likely lead to more litigation, but this did not necessarily mean improved access to justice. The Insurance Council and Tom Weston QC expressed some scepticism about the extent to which class actions would improve access to justice.

### **Procedural access to justice**

- 2.35 If there is a fair and transparent process and meaningful participation rights, a class action can provide procedural access to justice for class members. In the Issues Paper we said procedural access to justice should not be assessed solely from the perspective of the plaintiff and class members – it must also include consideration of the interests of the defendant and the public at large.<sup>22</sup>
- 2.36 Several submitters agreed that access to justice should be considered from the perspective of the defendant as well as the plaintiff.<sup>23</sup>
- 2.37 Chapman Tripp commented that justice is achieved when meritorious claims can be heard and resolved in a cost-effective and timely manner.

### **Substantive access to justice**

- 2.38 A final aspect of access to justice in class actions is obtaining a substantively just result.<sup>24</sup> This can be achieved if the litigation adequately compensates class members for any harm they have experienced. We noted in the Issues Paper there was limited evidence from other jurisdictions on the extent to which class members achieve compensation or other forms of substantive justice through class actions.<sup>25</sup>
- 2.39 We consider the tikanga Māori concept of *ea*, which indicates a state of balance and the restoration of relationships, is relevant to this aspect of access to justice.<sup>26</sup> Te Hunga Rōia Māori o Aotearoa | Māori Law Society (Te Hunga Rōia) suggested the concept of *ea* could be highly relevant to a class actions regime. It referred to Tā Hirini Moko Mead's framework of *take-utu-ea* for redressing breaches of tikanga or responding to harm and attaining a state of balance. Under this framework, there is a take or cause that requires a resolution of some kind and there is often an appropriate *utu* or recompense or other gesture given to the wronged party. The desire is to reach a resolution that satisfies all parties so the matter is resolved and a state of *ea* is achieved.<sup>27</sup> Te Hunga Rōia commented that central to this framework was not only considering who was implicated in the breach and the reasons for it, but also which relationships need to be restored to reach a state of *ea* and what process would achieve resolution for all involved. We think the concept of *ea* supports a view of access to justice that is broader than simply access

<sup>22</sup> Issues Paper at [5.22]–[5.23]. See also *Houghton v Saunders* [2020] NZHC 1088 at [70].

<sup>23</sup> Bell Gully, Michael Duffy, Gilbert Walker and Tom Weston QC.

<sup>24</sup> See Issues Paper at [5.24]–[5.28] and Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 51 and 70.

<sup>25</sup> Issues Paper at [5.25].

<sup>26</sup> See Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 31 and 35–36.

<sup>27</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 31.

to the courts and also considers what the substantive outcome is for those involved. A class action promotes the achievement of ea for a wider group of people than would be possible if claims could only be taken individually.

- 2.40 Several submitters questioned whether class members would receive substantive access to justice if the litigation funder and lawyer receive a significant proportion of any award.<sup>28</sup> For example, Gilbert Walker commented “...if the litigation represents claims being harvested from unknowing participants, generating profits for the lawyers and funders with no meaningful return to the participants, one may fairly question whether the litigation genuinely services access to justice”. Similarly, Tom Weston QC commented there was little to suggest that class actions provide real returns to claimants and many simply result in wealth transfers from defendants to funders. However, Professor Vicki Wayne noted that because class actions were driven by private lawyers and funders, the emphasis was on compensation. This could be contrasted with regulator action which was generally driven by other agendas such as deterrence.

### Enabling economy and efficiency of litigation

- 2.41 In the Issues Paper we suggested that class actions may enable efficiency and economy of litigation by allowing the court to hear multiple claims together, which can free up judicial resources.<sup>29</sup> Where individual class member claims are economically viable to litigate separately, a class action can avoid what would otherwise be multiple individual proceedings. In such a case, a class action is likely to be much more efficient for a court and a defendant. However, such cases are likely to be rare and class actions are more likely to consist of claims by individuals who would otherwise be practically unable to bring their own claim. The counterfactual to a class action in such a circumstance is therefore likely to be no claims rather than multiple claims, so, in that sense, a class action would increase the burden on the court system. Despite this, a class action can still be regarded as an efficient use of court time given how many individual claims may be resolved in one proceeding. Class actions can also contribute to greater efficiency and economy of litigation by reducing the risk of inconsistency from multiple judgments.
- 2.42 Some submitters considered class actions could alleviate the burden on court resources by avoiding unnecessary multiplicity of court proceedings.<sup>30</sup> Submitters also noted that class actions could reduce the risk of inconsistent judgments on the same issue.<sup>31</sup> Several submitters suggested class actions could have efficiency and cost benefits for defendants by allowing multiple claims to be defended at the same time.<sup>32</sup>
- 2.43 Other submitters critiqued the idea that class actions would improve the economy and efficiency of litigation.<sup>33</sup> These submitters noted that class actions were complex, time-

<sup>28</sup> We also received submissions on this issue in response to our question on whether funder profits are a concern: see Chapter 17.

<sup>29</sup> For detailed discussion, see Issues Paper at [5.29]–[5.37]

<sup>30</sup> Barry Allan, Association of Litigation Funders of Australia, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS and Kate Tokeley.

<sup>31</sup> Association of Litigation Funders of Australia, NZLS and Kate Tokeley.

<sup>32</sup> Barry Allan, Association of Litigation Funders of Australia, LPF Group and Vicki Wayne. Carter Holt Harvey said although this was a “theoretical” advantage, in practice it could be “illusory” because of acute problems with class actions more generally.

<sup>33</sup> BusinessNZ, Insurance Council, IBA Antitrust Committee, Simpson Grierson and Tom Weston QC.

consuming and expensive, judgments would often be subject to appeal and introducing a class actions regime was unlikely to result in fewer cases overall. Some submitters commented that if competing class actions were not adequately managed, this might undermine the efficiency and economy advantages of class actions.

### Strengthening incentives for compliance with the law

- 2.44 In the Issues Paper, we explained that class actions can play a role in enforcing the law and ensuring defendants internalise the costs of their wrongdoing. This may result in the defendant modifying its behaviour, as well as other potential wrongdoers being deterred by the prospect of a class action. We noted there was some debate as to whether behaviour modification and deterrence should be an objective of class actions or simply a by-product, with compensatory redress as the main goal.<sup>34</sup>
- 2.45 A number of submitters saw deterrence as a potential benefit of class actions.<sup>35</sup> Some noted that paying compensation and legal costs and suffering reputational harm could sanction wrongdoers and lead to a higher standard of corporate behaviour. One commented that deterrence is consistent with access to justice, as preventing behaviour in the first place would be even better than having to come to court.
- 2.46 Other submitters doubted that class actions would have a deterrent effect, said that any deterrent effect would only be incidental or did not see this as an appropriate role for class actions.<sup>36</sup> Some submitters commented that their clients took their compliance obligations seriously and pointed to existing incentives for compliance with the law. Several submitters said deterrence was not an appropriate role for class actions, with some commenting that ensuring compliance with the law was the role of regulators rather than private legal action.
- 2.47 Hīkina Whakatutuki | Ministry of Business, Innovation and Employment (MBIE), while not specifically commenting on deterrence, said that class actions could improve the effectiveness of regulatory regimes. It agreed there was a role for both class actions and regulatory action when defendants are alleged to have caused harm to a group. The Commerce Commission considered that class actions could complement regulatory action and that enhanced access to redress could deter breaches of the law. However, it also said that class actions could hamper regulatory enforcement if they discouraged parties from reporting breaches to regulators or settling with regulators.
- 2.48 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) said it was inherently difficult to measure whether class actions strengthened incentives for compliance with the law. If so, this would be a positive effect of a class actions regime, but it should not be a driving principle behind a class actions regime. Michael Duffy noted that optimum deterrence might not be achieved if class actions targeted defendants with “deep pockets” or who were insured rather than wrongdoers and those most culpable.

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<sup>34</sup> Issues Paper at [5.38]–[5.63].

<sup>35</sup> Barry Allan, Association of Litigation Funders of Australia, LPF Group, Maurice Blackburn/Claims Funding Australia, Vince Morabito, NZ Shareholders' Association, Omni Bridgeway, Nicole Smith, Kate Tokeley, Vicki Waye and Tom Weston QC.

<sup>36</sup> BusinessNZ, Chapman Tripp, IBA Antitrust Committee and Insurance Council.

## POTENTIAL DISADVANTAGES OF CLASS ACTIONS

- 2.49 In the Issues Paper we identified four potential disadvantages of a class actions regime:<sup>37</sup>
- (a) Negative impacts on the court system.
  - (b) Negative impacts for defendants, including pressure to settle claims and increased costs.
  - (c) Broader negative impacts on the business and regulatory environment.
  - (d) Insufficient protection of class member interests.
- 2.50 We asked submitters whether they had any concerns about class actions, including the four issues we identified. We received 26 submissions on this question.<sup>38</sup>

### Negative impacts on the court system

- 2.51 In the Issues Paper we said one criticism of class actions is the risk of a ‘flood’ of cases that could overload the courts and cause delays for other litigation. Class action litigation is also likely to be time-consuming for judges because of the size and complexity of class actions and the court’s role in ensuring that class member interests are protected. However, we noted that in overseas jurisdictions class action cases make up a relatively small proportion of all cases. We also suggested that criticising a class actions regime because it may increase the amount of litigation missed the point that class actions aim to facilitate greater access to justice.
- 2.52 We noted there are overseas examples of class actions litigating what might seem like trivial individual claims and that this might not be an effective use of the court system. However, we suggested the risk of trivial claims is likely to be lower in Aotearoa New Zealand, including because of the smaller population size (which means such class actions may not be economically feasible) and the adverse costs regime.
- 2.53 Some submitters did not consider that class actions would pose a significant burden on the court system.<sup>39</sup> Other submitters acknowledged that class actions may increase the courts’ workload but saw this as justified by access to justice considerations and/or considered the impacts on courts could be mitigated.<sup>40</sup> A third group of submitters expressed concern about the impact of class actions on the court system, with some noting that additional court resources would be required.<sup>41</sup>

### Negative impacts on defendants

- 2.54 In the Issues Paper we said the negative impacts of class actions would be felt most keenly by defendants and their insurers. A defendant will incur legal costs regardless of

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<sup>37</sup> Issues Paper at Chapter 6.

<sup>38</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Te Komihana Tauhokohoko | Commerce Commission, Consumer NZ, Te Tari Ture o te Karauna | Crown Law Office, Michael Duffy, Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Michael Legg, LPF Group, Marsh, Maurice Blackburn/Claims Funding Australia, NZLS, NZX, Omni Bridgeway, Simpson Grierson, Vicki Waye and Tom Weston QC.

<sup>39</sup> IBA Antitrust Committee, LPF Group and Simpson Grierson.

<sup>40</sup> Association of Litigation Funders of Australia, Consumer NZ, Maurice Blackburn/Claims Funding Australia and NZLS.

<sup>41</sup> BusinessNZ, Gilbert Walker and Tom Weston QC.



- whether it is ultimately found to be liable. There will also be indirect costs such as the time spent defending the litigation and potential reputational harm.
- 2.55 We noted that defendants in class actions may face strong incentives to settle because of the high transaction costs and the potential for a large and uncertain financial liability. While a high settlement rate may simply indicate a rational response to litigation risk, it is possible that defendants will feel compelled to settle meritless class actions or that they will overpay in settlement because the risks and costs of class actions are so high.
- 2.56 We also noted that the impact of a settlement or damages award on a defendant would depend on the size of the payment, the defendant's financial position and any insurance arrangements. We also noted that the legal position of defendants is determined by the existing right to compensation and obligations to redress, not the procedures for enforcing those rights.
- 2.57 Several submitters noted the significant impact of class actions on defendants, including cost, time and effort in defending proceedings, increased insurance costs (or loss of cover), banks withdrawing credit and negative reputational harm.<sup>42</sup> However, several submitters commented that a class action could be an efficient way for defendants to deal with a legal issue that affects a number of people.<sup>43</sup>
- 2.58 Some submitters expressed concern about meritless or large and amorphous class actions being filed to pressure a defendant and their insurer into a settlement.<sup>44</sup> Submitters suggested this risk could be combated through rigorous case management, adverse costs awards (including increased or indemnity costs), certification, adequately particularised pleadings and strike-out applications.<sup>45</sup> However, Carter Holt Harvey said in practice, plaintiffs sometimes framed claims in ways that precluded a defendant from seeking strike-out or summary judgment and that courts sometimes discouraged defendants from seeking strike-out of novel claims. Tom Weston QC said courts were reluctant to strike out representative actions. Professor Vicki Waye and the Association of Litigation Funders of Australia thought the risk of defendants being pressured into settling meritless claims was low, noting this had not been the Australian experience. The Association of Litigation Funders of Australia commented that company directors owe fiduciary duties to act in the best interests of the company and to act with due care, skill and diligence, and it was highly unlikely that an insurer would consent to settling a "flimsy suit".

### Negative impacts on the business and regulatory environment

- 2.59 In the Issues Paper we discussed several ways in which the risk of class action litigation could have a broader impact on the business and regulatory environment. These included potential impacts on the insurance market, difficulties in recruiting directors, risk aversion and the impact on the overall business environment.

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<sup>42</sup> Claims Resolution Service, Gilbert Walker, Johnson & Johnson, NZLS, Simpson Grierson, Tom Weston QC.

<sup>43</sup> Barry Allan, Association of Litigation Funders of Australia and Crown Law Office (though the latter noted class actions can give rise to practical difficulties for defendants, including cutting across other steps a defendant may be taking to address a legal issue).

<sup>44</sup> Carter Holt Harvey, Chapman Tripp, Institute of Directors, Insurance Council and Simpson Grierson,

<sup>45</sup> Chapman Tripp, Insurance Council, NZLS and Vicki Waye.



### *Potential impacts on the insurance market*

- 2.60 In Australia, stakeholders such as insurers, brokers and company directors have claimed the increase in shareholder class actions has had a significant impact on the pricing and availability of directors' and officers' liability insurance (D&O insurance). In the Issues Paper we commented that we had not yet seen robust evidence in support of claims that funded class actions were contributing to a hardening of the insurance market.<sup>46</sup>
- 2.61 A number of submitters expressed concern about the impact of class actions on the availability and cost of insurance.<sup>47</sup> Insurance broker Marsh submitted that the market was not currently in a position to sustain multiple class actions within a single policy period. It said a material increase in class actions following implementation of a new class actions regime could lead to higher retention levels, lower limits, increased premiums and potentially more insurers exiting the D&O insurance market. The Insurance Council said losses arising from D&O claims had exceeded the total insurance market premium pool by a significant margin, which meant insurers were having to increase D&O premiums. It also predicted that class action litigation would contribute to ongoing increases.
- 2.62 Other submitters considered that class actions had not led to a decrease in the availability or cost of D&O insurance or that there were other contributing factors.<sup>48</sup> These included significant regulatory action, capital markets activities, historical underpricing of D&O insurance and global trends in the corporate insurance market. The Association of Litigation Funders of Australia said there was reason to think that class actions are separately priced by insurers. It said if there was concern about the impact of securities class action settlements on D&O insurance, insurers could offer this cover separately.

### *Potential to deter directors*

- 2.63 Several submitters expressed concern that class actions could cause difficulties in recruiting or retaining directors.<sup>49</sup> Some suggested difficulties in obtaining appropriate D&O insurance might play a role in this.

### *Risk aversion*

- 2.64 In the Issues Paper we commented that the fear of a class action might cause defendants to become overly risk averse. For example, if Government agencies fear class actions and become more risk averse this could slow down decision making or cause a retreat from certain areas of regulation. We also commented that the cost of class actions against the government would ultimately be borne by the public.
- 2.65 Johnson & Johnson submitted that class actions have had a "chilling effect" on companies' willingness to innovate and take risks. The International Bar Association (IBA) Antitrust Committee said there was a risk that businesses would treat the potential for a class action as a cost of doing business, which might lead them to overcompensate such

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<sup>46</sup> Issues Paper at [6.32]–[6.33] and [17.36]–[17.49].

<sup>47</sup> Bell Gully, Chapman Tripp, Institute of Directors, Insurance Council, Johnson & Johnson, Marsh and Simpson Grierson. We also received submissions on the potential impact of litigation funding on insurance, which we discuss in Chapter 13.

<sup>48</sup> Association of Litigation Funders of Australia, NZ Shareholders' Association and Omni Bridgeway.

<sup>49</sup> Bell Gully, BusinessNZ, Institute of Directors, Marsh and Simpson Grierson.

as with higher pricing to consumers or more stringent terms and conditions. However, it did not think this factor should be heavily weighted because businesses would also be likely to factor in regulatory or compliance risk, reducing the incentive to tax specifically for class actions.

### ***Impact on business and regulatory environment***

- 2.66 In the Issues Paper we commented that where businesses face greater exposure to litigation, this may create additional compliance and legal costs. Class actions could therefore negatively impact the overall business environment. Conversely, class actions might have a positive impact on the business environment because stricter enforcement could lead to greater transparency and integrity of the market.
- 2.67 Claims Resolution Service raised concerns that class actions might deter people from engaging in business activities. BusinessNZ commented that class actions can create considerable uncertainty for businesses. There was also concern that recent changes to continuous disclosure rules would make it much easier to bring claims against listed companies.<sup>50</sup> NZX cautioned against adopting a class actions regime similar to Australia, which it said had a negative effect on defendants and the broader market without significantly improving investor protection. It was concerned about the effects on issuers and the economy if the class actions regime was not correctly calibrated. NZX said the impact on defendants may be exacerbated in Aotearoa New Zealand because a number of corporate and securities liability offences are strict liability offences, which was sometimes necessary to ensure the efficient operation of capital markets.
- 2.68 Other submitters considered that class actions could have a positive impact on the business and regulatory environment such as leading to greater corporate responsibility and market integrity. Maurice Blackburn/Claims Funding Australia commented that the economic impact of class actions made up a very small proportion of economic activity overall. It noted that, in 29 years, over AU\$4 billion had been recovered in class actions settlements or judgments, representing approximately 0.01 per cent of total economic activity in that period. Omni Bridgeway submitted there is no credible, independent evidence that class actions are having a negative impact on the economy in Aotearoa New Zealand or Australia.

### ***Insufficient protection of class member interests***

- 2.69 In the Issues Paper we said that if a class actions regime was poorly designed, there was a risk that class actions would insufficiently protect class member interests.<sup>51</sup> One issue is that class members will be bound by the outcome of a case, potentially even in circumstances where they were unaware of the litigation. Even where class members are aware of the class action, they may have limited knowledge of the case and few opportunities to meaningfully participate in the litigation. Another issue is that conflicts of interest may arise in class actions, whether between class members, with the representative plaintiff or between the class and the lawyer or litigation funder.

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<sup>50</sup> Bell Gully and the Institute of Directors urged the Commission to review New Zealand's continuous disclosure settings. Conversely the NZ Shareholders' Association submitted that issues associated with introducing class actions or litigation funding regimes should not be conflated with changes to the continuous disclosure liability regime.

<sup>51</sup> Issues Paper at [6.42]–[6.61].

- 2.70 Issues raised by submitters included class member compensation being diminished by payments to lawyers and funders, the risk of class members being bound to a decision they are unaware of, the potential for conflicts of interest and uncertainty and delay for class members. Several submitters indicated that class member interests could be protected by a properly designed class actions regime, which included court supervision. Issues relating to class member interests were also raised in response to other questions in the Issues Paper.

## A STATUTORY CLASS ACTIONS REGIME FOR AOTEAROA NEW ZEALAND

- 2.71 In the Issues Paper we expressed the preliminary view that it would be desirable to have a statutory class actions regime in Aotearoa New Zealand. We confirmed this view in the Supplementary Issues Paper.<sup>52</sup>
- 2.72 We asked submitters whether Aotearoa New Zealand should have a statutory class actions regime and why. We received 39 submissions on whether Aotearoa New Zealand should have a statutory class actions regime, with 35 of those in favour.<sup>53</sup> Key reasons for supporting a statutory class actions regime included:
- (a) It would be preferable to relying on HCR 4.24, which was seen as inadequate for modern group litigation.
  - (b) It would result from a more considered policy and legislative process, rather than piecemeal judicial development.
  - (c) It would provide greater clarity and certainty.
  - (d) Class actions have the potential to increase access to justice.
  - (e) In modern society, where there is the potential for mass harm, there must be a procedural mechanism through which such harms can be addressed.
  - (f) Regulatory action alone may be an insufficient response to harm caused to a large group.
  - (g) A regime could be designed in a way that mitigates many of the potential disadvantages of class actions.
- 2.73 Carter Holt Harvey and Joint Action Funding were opposed to a statutory class actions regime.<sup>54</sup> Carter Holt Harvey doubted that good design could mitigate the substantial risks of class actions. Joint Action Funding preferred retaining HCR 4.24 and the body of case law that had developed under it, noting the flexibility provided by the rule.

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<sup>52</sup> Issues Paper at Chapter 7 and Supplementary Issues Paper at [22].

<sup>53</sup> 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, Crown Law Office, Michael Duffy, Te Mana Tatai Hokohoko | Financial Markets Authority, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Jasminka Kalajdzic, Michael Legg, LPF Group, Marsh, Maurice Blackburn/Claims Funding Australia, Meredith Connell, NZ Shareholders' Association, NZLS, NZX, Omni Bridgeway, Russell Legal (Supplementary Issues Paper submission), Simpson Grierson, NZLS, Nicole Smith, Kate Tokeley, Tom Weston QC and Woodsford Litigation Funding. While not expressly endorsing a statutory class actions regime, Hikina Whakatutuki | Ministry of Business, Innovation and Employment said our proposals would improve the situation and should consequentially improve the effectiveness of those regulatory regimes. Similarly, Te Komihana Tauhokohoko | Commerce Commission said a statutory class actions regime could allow affected parties to better access remedies.

<sup>54</sup> BusinessNZ considered it was difficult to answer the question definitively.

- 2.74 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 earlier in this chapter, 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 relying on the representative actions rule. Some submitters indicated that their support for a statutory class actions regime was conditional on certain risks being effectively managed, such as conflicts of interest and meritless litigation.

## Recommendations

**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.

- 2.75 We consider that Aotearoa New Zealand should have a statutory class actions regime, with a Class Actions Act as the principal source of law in relation to class actions. As we discuss in Chapter 4, we consider the High Court will generally be the appropriate court to hear class actions. Given the complexity of class action proceedings, we think specific class actions rules in the High Court Rules are also needed to address more detailed matters of procedure.
- 2.76 Our key reasons for a statutory class actions regime are:
- (a) Group litigation is beneficial but current mechanisms and alternatives are inadequate.
  - (b) Class actions will improve access to justice.
  - (c) Class actions can be an efficient way of managing multiple claims.
  - (d) Many of the potential disadvantages of class actions can be mitigated by the design of the regime.
  - (e) A statutory regime will be clearer, more certain and more accessible than the existing law based on HCR 4.24.

### *Group litigation is beneficial but current mechanisms and alternatives are inadequate*

- 2.77 Group litigation can enable the courts to deal with an issue affecting a large group of people at the same time and allow the costs of litigation to be shared among a larger group. It can therefore have benefits of access to justice and efficiency.
- 2.78 We consider that current mechanisms for group litigation are insufficient for contemporary Aotearoa New Zealand. The overwhelming feedback we received was that HCR 4.24 is not suitable for modern group litigation because the lack of rules leads to uncertainty, additional cost and delay. While there are some alternative mechanisms for aggregating claims, some are more suitable where there is a small number of claims (such

as joinder of plaintiffs) and others are rarely used.<sup>55</sup> We think it is desirable to have a class actions regime to provide a clear set of rules for bringing group litigation that can be used for a wide variety of cases.

- 2.79 While regulators do have some powers to bring group litigation, this does not remove the need for a class actions regime. These powers are limited to certain legislation, and regulators are constrained by their resources. In addition, the objective of regulatory action will often be different to that of private litigants. For example, it may focus on deterrence rather than compensation.

### *Class actions will improve access to justice*

- 2.80 We consider that class actions will improve access to justice by allowing claims to be litigated that would not be economically viable for an individual litigant to bring. Class actions can also help to address social and psychological barriers that may prevent individuals from coming to the courts.
- 2.81 Class actions will not increase access to justice for all types of legal problems. There will need to be a substantive legal claim and a common issue of fact or law shared by a large group of people. Another significant limitation is that many class actions will be unable to proceed without litigation funding. In the Issues Paper we discussed how litigation funders select cases to fund and noted that fewer than 10 per cent of cases considered by litigation funders proceeded to a due diligence phase.<sup>56</sup> Because class actions are likely to be expensive to run, the total claim size may need to be significant to attract a litigation funder. This may require either a very large class or each individual claim being a substantial size. In Chapter 18 we recommend that a class action fund be established. We envisage this could provide funding for legal costs and an indemnity against adverse costs for claimants in cases of public interest. The fund would be able to select meritorious cases that are unlikely to proceed without funding and should enable a greater range of class actions to be brought.
- 2.82 In Australia, consumer class actions are now the most common type of new class action, and we expect to see consumer class actions also being brought in Aotearoa New Zealand.<sup>57</sup> A number of consumer representative actions have been brought under HCR 4.24.<sup>58</sup> Surveys of unmet legal needs have found that consumer issues are the most prevalent legal problem experienced by New Zealanders but people are less likely to seek

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<sup>55</sup> For example, the group litigation procedures in the Companies Act 1993, s 173; Health and Disability Commissioner Act 1994, s 50; Human Rights Act 1993, ss 92B(2) and 90(1)(c); and Privacy Act 2020, s 97(6). We discuss these in the Issues Paper at [3.68]–[3.71].

<sup>56</sup> Issues Paper at [14.17]–[14.21].

<sup>57</sup> In Australia, of the 63 class actions filed in 2020/2021, 24 were consumer claims: King & Wood Mallesons *The Review: Class Actions in Australia 2020/2021* (2021) at 6.

<sup>58</sup> In the Issues Paper we identified six representative actions involving consumer claims: Issues Paper at [3.19]. We are aware of two additional funded consumer representative actions that have been commenced (but where there is not yet a decision as to whether leave should be granted under HCR 4.24). One of these cases relates to building cladding, with the causes of action including alleged breaches of the Consumer Guarantees Act 1993 and the Fair Trading Act 1986: *Body Corporate Number DPS 91535 v 3A Composites GmbH* [2022] NZHC 985. In addition, a proceeding has been brought against ANZ and ASB banks with respect to alleged breaches of the Credit Contracts and Consumer Finance Act 2003: see [www.bankingclassaction.com](http://www.bankingclassaction.com).

help in resolving these issues than other legal issues.<sup>59</sup> Consumers currently face barriers to enforcing their legal rights, including lack of knowledge of rights, power imbalances and the low value of individual claims.<sup>60</sup> Bringing a consumer claim as a class action can help to address some of these issues as it does not rely on an individual consumer being motivated to enforce their rights themselves.

- 2.83 We also expect that a class actions regime will result in funded shareholder and investor class actions being brought, based on the experience of other jurisdictions and the representative actions that have been brought to date.<sup>61</sup> Some shareholder and investor claims will involve class members with significant individual claims, including institutional shareholders. Such litigants may not face barriers to bringing their own claim so class actions may not provide an access to justice benefit. However, many of these will also involve ‘mum and dad investors’ who have lost significant savings and in practice would be unable to bring a claim without a class action.
- 2.84 A class actions regime may also enable compensatory claims following regulatory action, sometimes known as ‘follow on’ or ‘piggyback’ claims.<sup>62</sup> For example, where there is a finding of breach in a case brought by a regulator and this finding can be relied on in subsequent proceedings.<sup>63</sup>
- 2.85 We note all these types of cases can currently be brought as representative actions under HCR 4.24. However, as discussed above, the lack of detailed rules for representative actions leads to increased expense and delay, which is likely to deter some cases from being brought. We think the increased procedural certainty provided by a statutory class actions regime will make it easier to bring claims and to attract litigation funding.
- 2.86 We do not anticipate that class actions are likely to be brought with respect to some areas of legal need, including tenancy, welfare, family, immigration and debt issues. Nor do we expect class actions to be used in proceedings involving a single claim brought on behalf of a collective rather than numerous individual claims. For these types of claims, there are existing procedures that are likely to be more straight-forward and involve less cost and delay. For this reason, we think it is unlikely that class actions will commonly be used for Māori collective litigation, which often involve a single claim on behalf of an iwi

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<sup>59</sup> See Pokapū Ratonga Ture | Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (November 2006) at 1, 35 and 68, and Colmar Brunton *Legal needs among New Zealanders* (13 April 2018) at 3 and 6. See also Issues Paper at [4.33].

<sup>60</sup> See Issues Paper at [4.30]–[4.32].

<sup>61</sup> We noted in the Issues Paper that there have been seven investor representative actions and four shareholder representative actions, with six of these cases being funded: see Issues Paper at [3.15], [3.17] and [14.26]. Since the Issues Paper, another shareholder case has been allowed to proceed on a representative basis: see *Fullarton v Arowana International* [2021] NZHC 931 at [150] and [163]. We are also aware that a shareholder representative action has been commenced against the a2 Milk Company Ltd: see <[www.a2milkclassaction.com](http://www.a2milkclassaction.com)>. For statistics on securities class actions in other jurisdictions see Issues Paper at [5.17]. In Australia, the number of securities class actions has declined in recent years, with eight securities class actions filed in the year to 30 June 2021 compared with over 20 in the year to 30 June 2018: King & Wood Mallesons *The Review: Class Actions in Australia 2020/2021* (2021) at 19.

<sup>62</sup> See Issues Paper at [4.38]–[4.43] discussing these types of class action. Since the date of the Issues Paper, a representative action has been filed against ANZ and ASB banks with respect to alleged breaches of the Credit Contracts and Consumer Finance Act 2003, following on from a settlement reached with Te Komihana Tauhokohoko | Commerce Commission: see <[www.bankingclassaction.com](http://www.bankingclassaction.com)>.

<sup>63</sup> There are provisions in both the Fair Trading Act 1986 and the Financial Markets Conducts Act 2013 which allow a finding of breach to be relied on in a subsequent civil proceeding: Fair Trading Act 1986, s 46 and Financial Markets Conducts Act 2013, s 487.

or hapū.<sup>64</sup> However, individual Māori litigants may benefit from class actions. Class actions could also be useful in a Māori context to enable iwi or hapū litigation without the need for a corporate body to represent claimants or to avoid difficult questions concerning the legal standing of iwi and hapū.<sup>65</sup>

- 2.87 Because of the limitations on the types of class action that will be brought, we think it is important to view class actions as only one tool among many for improving access to justice in Aotearoa New Zealand. We also anticipate that as a class actions regime becomes more familiar and the law becomes more settled, lawyers and funders may be willing to bring a broader range of claims. In Australia, while consumer and securities cases have been dominant, recent class actions have included claims in relation to recovery of wages for indigenous workers.<sup>66</sup>
- 2.88 As we have discussed earlier in this chapter, access to justice is more than access to the courts. To improve access to justice, a class actions regime also needs to provide a fair and transparent process for all parties, provide meaningful participation rights for class members and facilitate substantively fair results. A number of features of our proposed class regime are designed to achieve this.

### *Class actions can be an efficient way of managing multiple claims*

- 2.89 The aggregation of claims based on a common issue can promote the efficient use of judicial resources. This efficiency argument is clear with respect to class actions that would otherwise be brought as hundreds of individual claims, although we think such class actions are likely to be rare. In many cases, no litigation would be brought absent a class actions regime because of the barriers faced by individual litigants. We think class actions can still be considered an efficient use of court time in such cases because a number of claims can be determined in a single proceeding.

### *Many of the potential disadvantages can be mitigated by the design of the regime*

- 2.90 Class actions may increase the courts' workload in two respects. First, they may result in an increase in the number of cases being brought. Given that class actions are designed to increase access to the court system, it is hard to avoid this impact. However, we note that class actions are likely to make up a very small proportion of civil litigation overall.<sup>67</sup> Second, class actions are resource-intensive to manage. They include significant steps such as certification and court approval of notices and settlements to make sure that class member interests are not overlooked.
- 2.91 It will be important to understand the impact of class actions on the court system. We suggest Te Tāhū o te Ture | Ministry of Justice collect data on the numbers of class actions filed and the judicial resources needed for each proceeding to allow analysis of the impact of class actions on the court system.
- 2.92 We consider that having a class actions regime with clear rules will minimise interlocutory applications, although we anticipate there may be some initial litigation about how the

<sup>64</sup> We discuss this issue in the Supplementary Issues Paper at [1.91].

<sup>65</sup> See Issues Paper at [3.95]–[3.96].

<sup>66</sup> King & Wood Mallesons *The Review: Class Actions in Australia 2020/2021* (2021) at 30.

<sup>67</sup> In 2020, there were 2173 new civil proceedings filed in Te Kōti Matua | High Court: Te Kōti Matua o Aotearoa | The High Court of New Zealand 2020 – *The Year in Review* (25 June 2021) at 13.



Class Actions Act should be interpreted. Our proposed regime is designed to allow the court to manage class actions in an efficient way. For example, the court may decline to certify a case as a class action if not satisfied that a class action would be an appropriate procedure for the efficient resolution of class member claims. When the court decides whether to certify concurrent class actions, we recommend it should consider which approach would best allow class member claims to be resolved in a just and efficient way. We have also proposed powers for the court to appoint experts, counsel to assist the court and an administrator to assist with judgment distribution or settlement implementation to support parties and the court at different stages of proceedings.

- 2.93 Some submitters expressed a concern that defendants would face meritless class actions and feel pressure to settle them. We think the risk of meritless claims is low given the expense of bringing a class action and our recommendations for court supervision. Several of our recommendations are intended to deter meritless actions, including the recommendations to have class actions certified (which will require a reasonably arguable cause of action to be disclosed) and to retain the adverse costs rule for class actions. In addition, most class actions will require litigation funding and there is little incentive for funders to fund meritless litigation. We also recommend a rebuttable presumption that funded representative plaintiffs will provide security for costs in funded class actions.
- 2.94 The class actions regime is a procedural device, and it is ultimately the underlying substantive law that will give rise to a class action against a defendant. If there are concerns about certain types of class action being brought then these would be better addressed by reforms to the substantive area of law. While some submitters urged us to consider changes to continuous disclosure laws, as noted in Chapter 1, this is outside the scope of our project.
- 2.95 We do not consider class actions are likely to have a significant negative impact on the overall business and regulatory environment. Feedback from regulators was that class actions may complement and strengthen existing regulatory regimes. We have reflected on the concern expressed by insurers that an increase in class actions may have negative impacts on the insurance market, particularly in relation to D&O insurance. As we noted in the Issues Paper, there are other factors that may be contributing to changes to the insurance market such as increased regulatory activity and historic under-pricing of this type of insurance.<sup>68</sup> In our view, the potential impact of class actions on the insurance market is not a compelling argument against class actions provided there are mechanisms in place to discourage meritless litigation. Any impact class actions have on the insurance market will then arise primarily from meritorious cases that are presently being hindered by current barriers to access to justice. We discuss the impact of litigation funding specifically in relation to D&O insurance in Chapter 13 and reach the same conclusion.
- 2.96 If a class actions regime or litigation funding does correlate to increased pressure on the D&O market and a reluctance to take on directorship roles, this does not necessarily mean it is a disadvantage directly attributable to class actions or litigation funding. Barriers to access to justice may have operated to hinder the effective enforcement of current liability settings. If it appears that those liability settings are untenable because of the impact they have on companies and their directors, the principled response is to review those liability settings rather than remove a means of bringing claims.

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<sup>68</sup> See Issues Paper at [17.48].



- 2.97 Some disadvantages of a class actions regime may not be apparent until the regime is underway.<sup>69</sup> Several submitters suggested there could be a review mechanism in the legislation.<sup>70</sup> The Ministry of Justice may wish to consider reviewing the operation of the Class Actions Act at an appropriate interval. Te Komiti mō ngā Tikanga Kooti | Rules Committee will also be able to consider any issues that arise with respect to class actions provisions in the High Court Rules. Although some submitters suggested a statutory requirement for Te Aka Matua o te Ture | Law Commission to review class actions legislation, we do not recommend this because of the inflexibility of statutory review clauses.<sup>71</sup>

***A statutory regime will be clearer, more certain and more accessible***

- 2.98 A key advantage of having a statutory class actions regime is that it will be clearer, more certain and more accessible than the existing law based on HCR 4.24. We think this will minimise interlocutory applications, which should reduce costs for the parties and reduce the burden on the courts.
- 2.99 We recommend a Class Actions Act as the principal source of law on class actions, rather than having all of the class actions regime contained in the High Court Rules. This will appropriately reflect the policy significance of the class actions regime and avoid the possibility of aspects of it being declared ultra vires. In Canada, the Ontario Law Reform Commission recommended that a class actions regime be enacted through statute rather than through civil procedure rules.<sup>72</sup> One reason was the risk that class actions rules could be challenged as ultra vires because of the extent to which they make substantial alterations to the existing law, such as those dealing with certification, aggregate assessment and distribution of monetary relief, statistical evidence and costs. Further, class actions raised many important and controversial issues that needed to be fully debated by Parliament. In Victoria, Australia, the class actions regime was initially introduced through civil procedure rules.<sup>73</sup> It was then challenged as being ultra vires because of a provision enabling the court to award damages on an aggregate basis.<sup>74</sup> This led to the Victorian class actions regime being inserted into the Supreme Court Act 1986 as Part 4A.
- 2.100 The Legislation Guidelines published by the Legislation Design and Advisory Committee set out matters that should generally be addressed in primary legislation. These include matters of significant policy; the granting or changing of appeal rights; and procedural matters if they, in effect, set the fundamental policy of a legislative scheme.<sup>75</sup> Matters that may be appropriate for secondary legislation include the mechanics of implementing an

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<sup>69</sup> A related point was made by Michael Legg, who noted that the way a regime has been designed will not necessarily reflect exactly how it will work in practice.

<sup>70</sup> Samuel Becher, Gilbert Walker (Supplementary Issues Paper submission) and Maurice Blackburn/Claims Funding Australia (Supplementary Issues Paper submission).

<sup>71</sup> See Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019), Recommendation 1, where we recommended repealing the provision requiring periodic reviews of the operation of the Evidence Act 2006. This recommendation is reflected in the Statutes Amendment Bill 108-1 (2021), cl 37.

<sup>72</sup> Ontario Law Reform Commission *Report on Class Actions* (1982) vol I at 306.

<sup>73</sup> Supreme Court (General Civil Procedure) Rules 1996 (Victoria), rr 18A.01–18A.30.

<sup>74</sup> *Schutt Flying Academy v Mobil Oil* [2000] VSCA 103. By a majority of 3:2, the court held that the rules were valid.

<sup>75</sup> Legislation Design and Advisory Committee *Legislation Guidelines 2021 Edition* (September 2021) at 68–69.

Act, technically complex matters, subject matter that requires flexibility or updating in light of technological developments and material that requires input from experts or key stakeholders.<sup>76</sup>

- 2.101 In light of this guidance, we think aspects of a class actions regime that should be in statute include:
- (a) The certification test.
  - (b) Provisions relating to suspension of limitation periods.
  - (c) The court's powers with respect to concurrent class actions.
  - (d) The binding effect of a class action judgment on class members.
  - (e) The power to assess and order monetary relief on an aggregate basis.
  - (f) The power to order alternative distribution of monetary relief.
  - (g) Appeal rights.
  - (h) Requirements for approval of a settlement.
  - (i) The requirement for court review of a litigation funding agreement.
- 2.102 It will be necessary to have some aspects of a class actions regime in the High Court Rules, particularly those dealing with detailed procedural matters or those that may need to be regularly updated. These include the requirements for notices to class members, pleadings requirements (such as the contents of an application for certification or settlement approval), matters to be considered at a case management conference and costs schedules. The Rules Committee may wish to consider having a class actions part of the High Court Rules.
- 2.103 In our recommendations, where applicable, we indicate whether we envisage a recommendation being implemented in the Class Actions Act or the High Court Rules.

## OBJECTIVES OF CLASS ACTIONS

### R3

The statutory objectives of class actions should be improving access to justice and managing multiple claims in an efficient way.

- 2.104 As we outlined in the Supplementary Issues Paper, we consider that the objectives of class actions should be improving access to justice and managing multiple claims in an efficient way. We see these as equal objectives rather than access to justice being the primary objective.<sup>77</sup>
- 2.105 We do not consider strengthening incentives for compliance with the law (or 'deterrence') 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. For example, it might allow a class action to be certified where the main benefit would be

<sup>76</sup> Legislation Design and Advisory Committee *Legislation Guidelines 2021 Edition* (September 2021) at 69.

<sup>77</sup> See Issues Paper at [9.4]–[9.11] and Supplementary Issues Paper at [23]–[28].

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.

- 2.106 We suggest that improving access to justice and managing multiple claims in an efficient way should be reflected as the stated objectives of class actions in the Class Actions Act. The purpose of the Act would be to provide a clear framework for enabling class actions consistent with these objectives.

## PRINCIPLES FOR DESIGNING A CLASS ACTIONS REGIME

- 2.107 In the Issues Paper we proposed a list of principles to guide development of a class actions regime. We refined these principles slightly in the Supplementary Issues Paper following the feedback we received from submitters.<sup>78</sup>
- 2.108 We consider 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.
  - (d) Strike an appropriate balance between flexibility and certainty.
  - (e) Be appropriate for contemporary Aotearoa New Zealand.
  - (f) Recognise and reflect relevant tikanga Māori.
  - (g) Not adversely impact on other methods of group litigation.
  - (h) Provide clarity on issues arising in funded litigation.
- 2.109 These principles have influenced our work in developing proposals for a class actions regime.

### The interests of both plaintiffs and defendants

- 2.110 A class actions regime needs to be fair to all parties in the proceeding. In the Issues Paper we commented that a class actions regime should enable groups with meritorious legal claims to bring them before the court, while protecting defendants from meritless or vexatious claims.<sup>79</sup>
- 2.111 We asked submitters which features of a class actions regime are essential to ensure the interests of plaintiffs and defendants are balanced. There were 20 submissions addressing this question.<sup>80</sup> Submitters agreed with the importance of this principle. Many submitters focused on features to protect defendants, particularly those which might

<sup>78</sup> See Issues Paper at [9.12]–[9.49] and Supplementary Issues Paper at [31]–[37].

<sup>79</sup> Issues Paper at [9.12]–[9.15].

<sup>80</sup> Barry Allan, Bell Gully, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Crown Law Office, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, NZX, Omni Bridgeway, Simpson Grierson, Vicki Waye and Tom Weston QC.

prevent meritless or vexatious litigation.<sup>81</sup> Other submitters identified features that could protect the interests of plaintiffs,<sup>82</sup> or of both parties.<sup>83</sup>

- 2.112 Both plaintiffs and defendants have an interest in ensuring that multiple claims are managed in an efficient way. We have considered the interests of plaintiffs and defendants when developing our recommendations. For example, the certification test we recommend seeks to prevent meritless class actions from proceeding while ensuring that the test is not so onerous that it deters legitimate class action claims. It is inevitable that either plaintiffs or defendants will dislike some individual aspects of a class actions regime. However, taken as a whole, we consider the regime we recommend strikes a fair balance between the interests of plaintiffs and defendants.

### Safeguarding class member interests

- 2.113 In the Issues Paper we said that a class actions regime must contain safeguards to protect the interests of class members. We referred to the role of courts in protecting class member interests as well as the role of lawyers and the representative plaintiff. We identified several mechanisms for protecting class members, including notice requirements, the opportunity to opt into or opt out of the claim and court approval of settlement.<sup>84</sup>
- 2.114 We asked submitters which features of a class actions regime were essential to ensure that class member interests are protected. Twenty-two submitters addressed this question directly.<sup>85</sup> Issues relating to class member interests also came up in submitters' responses to other questions. Many submitters agreed with the importance of protecting class member interests and made suggestions about how that could be done at various stages of the litigation. Some key themes in submissions were:
- (a) Active court supervision is an important way of protecting class member interests.
  - (b) Clarity is needed on the role of lawyers with respect to class members.
  - (c) There needs to be mechanisms to manage potential conflicts of interest, whether with the representative plaintiff, lawyer or funder.
  - (d) Class members need adequate information that is clearly and effectively communicated to them.

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<sup>81</sup> These included: ensuring a defendant has a clear idea of the potential scope of liability, certification process, early examination of the merits of the case, retaining adverse costs, ability to strike out meritless cases, requiring a plaintiff's lawyer to personally certify the claim has a proper basis in law, regulation of litigation funding, allowing a defendant to communicate with the class about individual settlements, and managing competing class actions closely.

<sup>82</sup> These included: minimal requirements for commencing class actions, striking out improperly brought interlocutory proceedings brought to delay proceedings, the ability to claim the funder's fee as a disbursement if a defendant rejects a Calderbank offer, and the ability to seek security for costs from the defendant.

<sup>83</sup> These included: the court having a supervisory role, clear certification process, mechanisms for managing competing class actions, adverse costs to deter proceedings and interlocutory applications that are unlikely to be successful, and procedural certainty.

<sup>84</sup> Issues Paper at [9.16]–[9.23].

<sup>85</sup> Barry Allan, Bell Gully, Buddle Findlay, BusinessNZ, Colin Carruthers QC, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Crown Law Office, Michael Duffy, Insurance Council, IBA Antitrust Committee, Jasminka Kalajdzic, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, NZLS, Omni Bridgeway, Ross Asset Management Investors' Group, Simpson Grierson, Nicole Smith and Tom Weston QC.

- 2.115 The feedback we received on our survey of group members in representative actions is also relevant. The main problem identified by group members – by a wide margin – was the long and slow process. Other problems raised by group members included: a concern that lawyers and funders would take a large share of any compensation; the confusing process and legalistic information; lack of control and direct involvement in proceedings; lack of information, communication and transparency; and uncertainty of outcome and returns.
- 2.116 It is essential that a class actions regime protects the interests of class members, given that the litigation is being brought on their behalf and for their benefit. Active court supervision is an essential part of this, and the courts have already recognised their important supervisory role in representative actions. There are several points at which court supervision can occur, including the requirement for a class action to be certified in order to proceed, judicial approval of notices to class members, case management and judicial approval of settlement. Lawyers have a key role to play in protecting class member interests, and we recommend that rules be developed on the obligations of lawyers towards the class. Similarly, we make recommendations about the obligations of the representative plaintiff towards class members. We also think it is essential that class members have adequate information that is clearly and effectively communicated to them.<sup>86</sup>

## Proportionality

- 2.117 In the Issues Paper we explained that the overarching goal of our civil procedure system, as reflected in HCR 1.2, is to achieve the “just, speedy and inexpensive determination” of proceedings and applications. This objective may require consideration of proportionality in litigation, meaning that the time and expense of litigation should be proportionate to what is at stake.<sup>87</sup> The Rules Committee has subsequently proposed that proportionality should be added to HCR 1.2.<sup>88</sup> We noted that in some jurisdictions, proportionality is relevant to whether a matter should be allowed to proceed as a class action. In other jurisdictions, proportionality is relevant to the way in which proceedings are conducted.<sup>89</sup>
- 2.118 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. Fifteen submitters addressed this question,<sup>90</sup> with 12 of these agreeing that proportionality was

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<sup>86</sup> We discuss these matters in Chapters 3, 7 and 8.

<sup>87</sup> Issues Paper at [9.24]–[9.25].

<sup>88</sup> Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Improving Access to Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at [72].

<sup>89</sup> See Issues Paper at [9.27]–[9.29]. An Australian Parliamentary report published shortly after the Issues Paper recommended that procedural proportionality in class actions should be improved and suggested that proportionality should be a factor to be considered at the outset of a class action: Australian Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [6.78]–[6.80].

<sup>90</sup> Association of Litigation Funders of Australia, Barry Allan, Bell Gully, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

an appropriate principle for a class actions regime.<sup>91</sup> Some referred to proportionality as “essential”. The other three submitters did not express a clear view or indicated some limitations of a proportionality requirement.

- 2.119 We think it is important to ensure that the cost and burden of a class action is proportionate to the potential benefits. However, a focus on proportionality should not come at the expense of other important interests, such as safeguarding rights. We note that HCR 1.2 refers to proceedings being determined in a way that is “just” as well as speedy and inexpensive.
- 2.120 The clearest reflection of proportionality in the class actions regime we recommend is in the certification test, which would require the court to consider whether the likely time and cost of the proceeding is proportionate to the remedies sought. Another example is our approach to concurrent class actions, where we recommend the court consider which approach would best allow class member claims to be resolved in a just and efficient way.

### Balancing flexibility and certainty

- 2.121 We noted in the Supplementary Issues Paper that several submitters had referred to the need to ensure a court has flexibility and discretion when dealing with class actions. At the same time, 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 suggested that the appropriate degree of flexibility or prescription would depend on the aspect of the class actions regime at issue.<sup>92</sup>
- 2.122 We think the class actions regime should be flexible enough to accommodate different kinds of claims. We have also considered the appropriate degree of flexibility and prescription required with respect to each aspect of the proposed regime. For example, we consider the certification requirements should be prescribed in legislation so that potential plaintiffs can assess the prospects of a case being certified. Our proposed certification test still allows some flexibility, for example, by providing discretionary factors that a court may consider when determining whether the proposed mechanism for determining class membership is appropriate.

### Appropriate for contemporary Aotearoa New Zealand

- 2.123 In the Issues Paper we said a class actions regime needs to be appropriate for contemporary Aotearoa New Zealand so care is needed when considering features of overseas regimes. We noted relevant features of Aotearoa New Zealand, including the role of tikanga Māori and our small population size. We also referred to aspects of our procedural and substantive law that would affect class actions such as the adverse costs rule, the inability to bring personal injury claims and the existence of specialist courts and tribunals.<sup>93</sup>
- 2.124 We asked submitters whether there are any unique features of litigation in Aotearoa New Zealand that need to be considered when a class actions regime is designed. Eight

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<sup>91</sup> Association of Litigation Funders of Australia, Bell Gully, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

<sup>92</sup> Supplementary Issues Paper at [37].

<sup>93</sup> Issues Paper at [9.30]–[9.32].

submitters directly addressed this question.<sup>94</sup> Many of these referred to implications of Aotearoa New Zealand's small population size such as fewer class actions being economically viable, less likelihood of competing class actions and a smaller insurance premium pool. Other features identified by submitters included the existence of other 'class action' mechanisms for certain areas of the law, more conservative damages awards due to the lack of civil jury trials, inability to bring personal injury claims, adverse costs rules and tikanga Māori.

- 2.125 When considering each aspect of a class actions regime, we have considered what might be appropriate for contemporary Aotearoa New Zealand. While we have drawn on other jurisdictions, we have not modelled our entire regime on one particular jurisdiction. Rather, we have considered each aspect of a regime on a case-by-case basis. For example, our recommended approach to concurrent class actions draws on the Canadian and Australian approaches, while our proposed lawyer-class relationship draws on the "lawyer for the class" approach used in the United States.

### Tikanga Māori

- 2.126 In the Issues Paper we suggested that core tikanga Māori could be engaged by a class actions regime. We identified the tikanga concepts of whanaungatanga (relationships), kaitiakitanga (guardianship/stewardship) and mana (spiritually sanctioned authority) as being potentially relevant.<sup>95</sup> We suggested that whanaungatanga might emphasise the interests of all class members and their responsibilities towards each other. Relatedly, kaitiakitanga might oblige the class (and the representative plaintiff in particular) to act in the collective interest of the class. We suggested the representative plaintiff should have sufficient mana to bring the claim on behalf of the class and undertake the relational responsibilities of the role.<sup>96</sup>
- 2.127 We asked submitters to what extent and in what ways tikanga Māori should influence the design of a class actions regime. Eleven submitters addressed this question, with most seeing tikanga as relevant to the development of a class actions regime.<sup>97</sup> The most extensive submission we received on this question was from Te Hunga Rōia, which submitted that tikanga should play a central role in the design of a class actions regime. Te Hunga Rōia agreed with our preliminary view that whanaungatanga, kaitiakitanga and mana were likely to be particularly relevant. In addition, it considered that the tikanga concepts of utu and ea could be relevant to the design of a class actions regime.
- 2.128 We have considered how tikanga might be incorporated in a class actions regime. One option would be to refer to tikanga Māori in the Class Actions Act as a general guiding principle. However, there are some potential risks and difficulties with this approach, including:

<sup>94</sup> BusinessNZ, Nikki Chamberlain, Chapman Tripp, Insurance Council, LPF Group, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

<sup>95</sup> We drew on the discussion of the central values that underpin the totality of tikanga Māori in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [125].

<sup>96</sup> See Issues Paper at [9.33]–[9.43].

<sup>97</sup> Barry Allan, Jennifer Braithwaite, BusinessNZ, Chapman Tripp, Crown Law Office, Insurance Council, LPF Group, Omni Bridgeway, Simpson Grierson, Te Hunga Rōia o Aotearoa and Tom Weston QC.



- (a) Introducing uncertainty. This is undesirable because one of the reasons for developing a class actions regime is to provide greater certainty and clarity. It may also lead to additional litigation, an issue raised by one submitter.
- (b) The potential for inconsistencies between class actions and other civil litigation, given the lack of general reference to tikanga Māori in the High Court Rules.
- (c) It may be less meaningful than giving specific consideration to which elements of a class actions regime might engage tikanga Māori.
- (d) The risk of tikanga Māori being inappropriately raised by litigants in order to win procedural points.
- (e) Making it the responsibility of individual litigants to consider tikanga Māori rather than making tikanga an integral part of the policy process in the development of the legislation.

2.129 We think the preferable approach in this context is for tikanga Māori to be considered as an integral part of the policy process, and this is the approach we have followed in our work. The aspect of the statutory class actions regime that we think most engages tikanga Māori is who can fulfil the role of the representative plaintiff. We discuss how the Class Actions Act should recognise and reflect tikanga in relation to this issue in Chapter 6.

### Avoiding adverse impacts on other forms of group litigation

- 2.130 In the Issues Paper we said a class actions regime should not conflict with other means of bringing group litigation or make other legal claims more difficult to run. We gave the examples of Māori collective legal claims and judicial review proceedings. We also said it was important to consider whether a class actions regime would have any detrimental impact on regulatory action.<sup>98</sup>
- 2.131 We asked submitters whether they had any concerns about how a class actions regime could impact on other kinds of group litigation or regulatory action and how any concerns could be managed. We received 16 submissions on this issue.<sup>99</sup> Submitters did not indicate any significant concerns about the way in which class actions might impact on other group litigation. Submitters also made suggestions about how any issues could be managed. These included judicial supervision and case management, retaining existing group-based litigation procedures, allowing the court to determine the appropriate procedure for group litigation regardless of how it was commenced and ensuring that class actions legislation clearly identifies the scope and applicability of the class actions regime.
- 2.132 Several submitters expressed concern about the potential impact of having regulatory action and a class action over the same matter.<sup>100</sup> Suggestions for managing this included giving the court a power to stay the class action until the regulatory action is completed,

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<sup>98</sup> See Issues Paper at [9.44]–[9.47].

<sup>99</sup> Barry Allan, Bell Gully, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Te Komihana Tauhokohoko | Commerce Commission, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, MBIE, NZLS, NZ Shareholders' Association, Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

<sup>100</sup> Barry Allan, Bell Gully and Insurance Council.



allowing the court to hear the claims together, allowing the regulator to be heard on a certification application or addressing the issue in the regulatory regime.

- 2.133 MBIE said it was important that a class actions regime did not affect existing powers that allow regulators to act on behalf of other persons. The Commerce Commission commented that follow-on class action litigation might reduce the incentive on businesses to proactively report contraventions or potential breaches to regulators and to reach settlements with regulators. The Commission explained it currently operates a leniency programme where the first party to report cartel conduct can request leniency from Commission-initiated civil proceedings and its recommendation that the Solicitor-General grants immunity from criminal prosecution. However, this would not prevent customers or other parties from taking civil proceedings such as a class action against the party who self-reports. It recommended that any statutory class actions regime provide appropriate protections for leniency applicants, self-reporting entities and parties entering into settlements.

### Recommendation

**R4**

The Class Actions Act should clarify that it only applies to class actions and not to other forms of litigation.

- 2.134 We do not think the detailed requirements we have developed for class actions should apply to other types of group litigation without express consideration of whether this is appropriate. We recommend that the Class Actions Act clarify that it only applies to class actions proceedings and not to any other forms of litigation.<sup>101</sup>
- 2.135 Where there is a class action and regulatory action over the same matter, the appropriate response will depend on the case. We do not think it would be fair to class members to have a general presumption that the class action must be stayed pending the regulatory action, as this could cause considerable delay. However, in some situations a plaintiff might prefer to seek a stay of the class action until there is a decision in the regulatory proceedings. For example, section 46 of the Fair Trading Act 1986 provides that a finding of a breach of the Act in regulatory proceedings may be used as evidence in subsequent proceedings. It may be more efficient to stay a class action pending the outcome of regulatory action if a finding of breach from the regulatory action could be relied upon in the class action.
- 2.136 The Commerce Commission submitted that class actions legislation should enable the use of findings of breaches of the Commerce Act 1986, Credit Contracts and Consumer Finance Act 2003, Telecommunications Act 2001 and Fuel Industry Act 2020 in follow on civil proceedings. While we acknowledge the benefits of provisions such as section 46 of the Fair Trading Act, we think it would be preferable to address this in the substantive legislation rather than through class actions legislation.
- 2.137 We acknowledge the Commerce Commission's concern that a class actions regime could reduce incentives on businesses to self-report or to reach settlements with regulators because of the risk that this could lead to a class action. In our view, it would be

<sup>101</sup> The Ontario class actions legislation provides that it does not apply to other proceedings brought in a representative capacity: see Class Proceedings Act SO 1992 c 6 (Ontario), s 37.

inappropriate to address this issue through the Class Actions Act and we are not aware of other jurisdictions taking this approach. Our proposed class actions regime is procedural and designed to enable groups of litigants to bring claims they could otherwise bring as an individual proceeding. If it is desirable to limit the possible civil consequences of being a cartel informant, we think it would be more appropriate to provide for this in substantive legislation such as the Commerce Act. This would enable consideration of whether any limitations should apply to other forms of civil action.

### Providing clarity on issues arising in funded litigation

2.138 In the Issues Paper we said that if litigation funding continues to be available in Aotearoa New Zealand, a class actions regime should provide some clarity on issues associated with litigation funding. We suggested what these issues might include and asked submitters which issues arising in funded cases needed to be addressed in a class actions regime. Fourteen submissions addressed this question directly.<sup>102</sup> Many submitters also identified issues arising in funded class actions in other parts of their submissions, or in response to our questions specifically on litigation funding. We discuss these matters in detail in Chapters 13–17.

### RETAINING THE REPRESENTATIVE ACTIONS RULE

2.139 In the Issues Paper we asked submitters whether the representative actions rule should be retained and, if so, for which types of cases.<sup>103</sup> In the Supplementary Issues Paper, we discussed the submissions we had received on this issue and explained our conclusion that HCR 4.24 should be retained.<sup>104</sup>

### Results of consultation

2.140 Two submitters on the Supplementary Issues Paper commented on our conclusion. Omni Bridgeway said that retaining HCR 4.24 may lead to confusion and it would be preferable for the court to have a general power to make whatever orders it thinks fit in the circumstances of the case. Gilbert Walker agreed with our conclusion.

### Recommendations

**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.

<sup>102</sup> Association of Litigation Funders of Australia, Buddle Findlay, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Vicki Waye and Tom Weston QC.

<sup>103</sup> We discussed this issue in the Issues Paper at [8.28]–[8.33].

<sup>104</sup> See Supplementary Issues Paper at [38]–[40].

- 2.141 We confirm our view that the representative actions rule in HCR 4.24 should be retained. We anticipate there will be cases that are unsuitable to be brought as a class action, but where it would still be efficient for the court to consider multiple claims together. We also consider that rule 4.24 of the District Court Rules (DCR) should be retained for this reason, although we acknowledge the provision has not been used in Te Kōti-ā-Rohe | District Court to date.<sup>105</sup>
- 2.142 One category of cases that may be efficient to bring under HCR 4.24 is defendant representative actions, given our conclusion that defendant class actions should not be allowed. Overseas jurisdictions that do not allow defendant class actions have generally retained a representative actions rule.<sup>106</sup> The Australian Law Reform Commission recommended the rule should be retained to enable defendant representative actions to be brought in appropriate circumstances.<sup>107</sup> It may also be appropriate to use HCR 4.24 to appoint representative respondents. In *Re Halifax New Zealand Ltd*, the Court appointed representative respondents to represent different classes of investor.<sup>108</sup> Two submitters mentioned *Re Halifax* as an example of the value of the representative actions rule.<sup>109</sup>
- 2.143 The representative actions rule might also be used in cases involving a small number of group members. There are examples of representative actions brought on behalf of a small group, such as trusts and estates cases, and it would seem unnecessary to bring these types of cases as class actions.<sup>110</sup> As part of the certification test we recommend, when the court considers whether a class action is an appropriate procedure for the efficient resolution of class member claims, it must consider the potential number of class members. It must also consider whether there is another procedure available to class members that would be a more appropriate means of dealing with their claims.<sup>111</sup> We anticipate there may be cases with small classes that the court declines to certify on the basis that a representative action would be more appropriate.
- 2.144 A representative action might also be more appropriate than a class action in a case involving a non-monetary remedy such as an injunction or declaration. Such a case might be more straight-forward, and it may be unnecessary to rely on the detailed requirements of a class actions regime such as provisions for determining individual issues, aggregate monetary relief and settlement distribution.
- 2.145 However, we also want to ensure that the representative actions rule cannot be used as a parallel regime by litigants wanting to avoid the requirements and protections of the class actions regime. This includes our proposed requirement for litigation funding

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<sup>105</sup> Issues Paper at [8.15].

<sup>106</sup> Issues Paper at [8.27] and [8.32].

<sup>107</sup> Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [6]. The ALRC did not make any recommendations with respect to defendant class actions and said the issue required a separate study.

<sup>108</sup> *Re Halifax New Zealand Ltd (in liq)* [2021] NZHC 1113 at [13]–[21]. While HCR 4.24 is not mentioned in the judgment, submitters on the Issues Paper indicated this was the basis upon which the representation orders were made.

<sup>109</sup> NZLS and Simpson Grierson.

<sup>110</sup> For example, see *Vlaar v van der Lubbe* [2016] NZHC 2398, (2016) 4 NZTR 26-022 (which involved a representative plaintiff representing five beneficiaries of an estate), and *Cadman v Visini* (2011) 3 NZTR 21-011 (which involved two trustees bringing a proceeding on behalf of all three trustees).

<sup>111</sup> See Chapter 6.

agreements to be subject to court approval in class actions, which we discuss in Chapter 17.

- 2.146 If a class actions regime is introduced, we think it is relatively unlikely that litigants will attempt to bring claims seeking monetary relief on behalf of a large number of people as a representative action. Submitters expressed a strong desire for a statutory class actions regime to avoid the uncertainty caused by relying on HCR 4.24, and the resulting expense and delay. The experience of other jurisdictions that have retained a representative actions rule indicates that litigants prefer to use the class actions regime.<sup>112</sup>
- 2.147 At the same time, to avoid the risk of the representative actions rule being used to circumvent the protections of a class actions regime, we think it would be desirable for HCR 4.24 and DCR 4.24 to be amended to provide they should not be used when a proceeding is more appropriately brought as a class action.

## DEFENDANT CLASS ACTIONS

- 2.148 Defendant class actions involve a plaintiff bringing a case against a group of potential defendants who are represented by a representative defendant.<sup>113</sup> In the Supplementary Issues Paper, we discussed the feedback we had received on this issue and explained our conclusion that a class actions regime should not provide for defendant class actions.<sup>114</sup>

## Results of consultation

- 2.149 Two submitters on the Supplementary Issues Paper commented on defendant class actions. Gilbert Walker agreed with our conclusion that a class actions regime should not provide for defendant class actions. Professor Vince Morabito (Monash University) disagreed with our conclusion, which he thought treated such cases as an inferior category of group litigation that would be regulated by an inferior regime. He said there should be additional legislative provisions to deal with the special features of defendant class actions.

## Recommendation

**R7**

The Class Actions Act should only apply to plaintiff class actions and not defendant class actions.

- 2.150 We confirm our view that the Class Actions Act should only apply to plaintiff class actions and not defendant class actions. A class action involving a representative defendant serves a different purpose to a plaintiff class action. A central reason for allowing a representative plaintiff to act on behalf of a class is to improve access to justice by overcoming barriers to accessing the courts that would otherwise exist for individual class members. We think defendant class actions are less likely to widen the group of claimants who can access the court system.

<sup>112</sup> See Issues Paper at [8.28].

<sup>113</sup> We discuss defendant class actions in the Issues Paper at [8.19]–[8.27].

<sup>114</sup> Supplementary Issues Paper at [43].

- 2.151 There are significant differences between plaintiff class actions and defendant class actions which mean a single class actions regime cannot easily apply to both. These differences include:<sup>115</sup>
- (a) A representative defendant is usually selected by the plaintiff and may be unwilling to perform the role.
  - (b) Defendant class members are likely to opt out if given the option.
  - (c) Proceedings against a representative defendant expose class members to liability, including orders to pay damages.
  - (d) The effect of any suspension of limitation periods applying to claims.<sup>116</sup> In a plaintiff class action, the suspension of the limitation period operates for the benefit of class members. In a defendant class action, the suspension of the limitation period benefits the plaintiff rather than defendant class members.
- 2.152 If defendant class actions were allowed, it would be necessary to develop some specific provisions for them, particularly with respect to commencement and certification.<sup>117</sup> However, we are not convinced this would be justified, since the experience of overseas jurisdictions that allow defendant class actions is that such cases are rare.<sup>118</sup> We think it would be preferable for cases against a representative defendant to proceed under HCR 4.24, which will enable courts to have flexibility with respect to procedure.
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<sup>115</sup> Issues Paper at [8.23].

<sup>116</sup> We discuss limitation periods in Chapter 4.

<sup>117</sup> See discussion of provisions that may require modification in Issues Paper at [8.25].

<sup>118</sup> Issues Paper at [8.24].

## CHAPTER 3

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# Key actors in a class action

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## INTRODUCTION

- 3.1 In this chapter, we discuss:
- (a) The role of class members.
  - (b) The role of the representative plaintiff.
  - (c) The role of a defendant in a class action.
  - (d) The court's supervisory role in a class action.

## THE ROLE OF CLASS MEMBERS

- 3.2 A defining feature of a class action is the presence of class members. They are not parties to the litigation and have little control over how the class action is conducted but will be bound by the outcome. In an opt-out class action, all persons who fall within the class definition become class members unless they actively opt out. It is possible in such cases that a class member will become bound by a proceeding they are unaware of.
- 3.3 It is essential that a class actions regime includes safeguards to protect the interests of class members. There are many features of our recommended class actions regime that provide this, including:
- (a) A statutory duty on the representative plaintiff to act in what they believe to be the best interests of the class, which we discuss later in this chapter.
  - (b) The representative plaintiff's lawyer becoming the lawyer for the class upon certification.
  - (c) The requirement to give notice to class members at certain stages in a class action.
  - (d) Court approval of settlement, which requires the court to consider whether a settlement is fair, reasonable and in the best interests of the class.
  - (e) Clarifying that a class member does not have adverse costs liability, except in limited circumstances.
  - (f) Requiring court approval of litigation funding agreements in class actions.
- 3.4 While class members generally have a passive role in the litigation, at certain stages there are opportunities, or requirements, to take an active step in the litigation. The key stages are:
- (a) The opportunity to opt into or opt out of the class action.
  - (b) Where the court requires a class member to provide discovery.

- (c) The ability for a class member to apply to replace the representative plaintiff.
- (d) When class member participation is required to determine an individual issue, such as giving evidence at a hearing.
- (e) The opportunity for class members to object to a settlement.
- (f) Where a class member must take steps to receive a benefit from the settlement.

## THE REPRESENTATIVE PLAINTIFF

### Role of the representative plaintiff

- 3.5 In every class action, as in ordinary litigation, there is a plaintiff. In a class action, the plaintiff is a representative plaintiff. There are two important dimensions to the representative plaintiff's role. The first is that the representative plaintiff, like an ordinary plaintiff, is a party to the proceeding and has a claim against the defendant. As such, they commence and conduct the proceeding and carry liability for adverse costs. Second, the representative plaintiff also represents the other class members.
- 3.6 Decisions that the representative plaintiff makes in relation to the proceeding will inevitably impact on class members. For this reason, in some jurisdictions, the role of the representative plaintiff carries fiduciary obligations.<sup>1</sup> In the Supplementary Issues Paper, we said it would be desirable to clarify the obligations of the representative plaintiff and suggested the role should carry the following obligations:<sup>2</sup>
- (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 is likely to include retaining and instructing a lawyer and meeting any evidential obligations.
  - (c) Being liable for adverse costs or ensuring that an indemnity is in place.
  - (d) Making decisions on any settlement, including applying for court approval of settlement.
- 3.7 We acknowledged these may be substantial obligations and discussed ways of supporting representative plaintiffs to meet them. These included having a litigation committee to assist with governance of the class action, ensuring the representative plaintiff understands the role, and paying an honorarium to recognise the time spent undertaking it.<sup>3</sup>
- 3.8 We asked submitters what obligations the representative plaintiff should have and whether these obligations should be set out in statute. We also asked how a representative plaintiff could be supported to meet their obligations.

### Representative plaintiff model

- 3.9 Some of the feedback we received raised a more fundamental question about whether the representative plaintiff should be responsible for governance and decision-making in a class action, or whether this should be vested in a group such as a litigation committee.

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<sup>1</sup> Supplementary Issues Paper at [3.1]–[3.8].

<sup>2</sup> Supplementary Issues Paper at [3.13].

<sup>3</sup> Supplementary Issues Paper at [3.17]–[3.21].

This is an issue that goes to the heart of the class action model. We therefore discuss this issue first, before considering the obligations of the representative plaintiff.

### *Results of consultation*

- 3.10 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) suggested we consider the conceptual footing of a class action. It said instead of focusing on the status and obligations of the representative plaintiff, we should identify the following roles:
- (a) The lead plaintiff, whose name appears first on court documents. Their case might be considered the most representative or to be a suitable test case.
  - (b) The person or persons responsible for conducting the litigation, who would be responsible for managing the claim.
  - (c) The person or persons responsible for funding the litigation, who may be responsible for adverse costs orders and paying security for costs.
  - (d) The lawyers engaged to run the claim, who should receive instructions from those responsible for conducting the litigation but owe duties to the class as a whole.
  - (e) The class as a whole, who benefit from the class action but are not generally involved in making decisions relating to the litigation.
- 3.11 NZLS said we should consider whether the lead plaintiff should be solely responsible for conducting the litigation. It said this might result in the lead plaintiff being someone with time and organisational skill, rather than the person with the best-placed claim, which may not be strategically advantageous overall. It was also concerned the heavy responsibilities of the representative plaintiff role may be a disincentive to taking it on.
- 3.12 It proposed the class actions statute create a statutory concept of a person or persons responsible for conducting a class action. In some cases, this might be a litigation committee. It said a litigation committee should include at least one class member but could include non-class members (although this might only be appropriate in unusual or exceptional cases). However, a litigation funder should not be part of the litigation committee (or other group responsible for conducting a class action) because it would have a contractual arrangement with it. The duties owed by the person or persons responsible for conducting the litigation should be set out fully in the legislation as a code so there was no confusion or ambiguity as to what those duties are.
- 3.13 NZLS saw its proposal as preferable to having a representative plaintiff delegate their decision-making responsibility through a web of non-public side agreements or understandings. It said it would be more efficient and transparent to create a litigation committee that could have an express relationship with lawyers and funders as well as direct accountability to the court. It said traditional concerns about “officious intermeddling” should be weighed against the reality that a large-scale modern class action would likely be too overwhelming for a plaintiff to run without assistance.
- 3.14 To ensure that the persons with responsibility for conducting the class action had authority to represent the class, it proposed:
- (a) In an opt-in class action, the authority could be approved by agreement of the class members.
  - (b) In opt-out class actions, the court would need to confer this authority.
- 3.15 Several other submitters raised related points. In its submission on the Issues Paper, Meredith Connell said there was 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 the 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. Simpson Grierson said the primary role of a litigation committee should not be assisting the representative plaintiff to meet their obligations but acting in a governance capacity.

- 3.16 Gilbert Walker said in its experience, the role of the litigation committee was not merely to “support” the representative plaintiff in their decision-making role but to replace them. In opt-in representative actions, the litigation committee was constituted under the agreement each class member signed when opting in, which meant each group member gave the litigation committee decision-making authority on the conduct and settlement of the claim. It said there was nothing inherently objectionable in someone other than a plaintiff having decision-making authority in relation to a claim and every subrogated claim involved this dynamic. If class actions were to have a governance structure involving litigation committees, questions arose as to the scope of the powers, duties and liabilities of committee members. It said it seemed wrong for the responsibilities to fall solely on the plaintiff for actions of a committee, particularly where the plaintiff was not a member of the committee.
- 3.17 In her submission on the Issues Paper, Professor Vicki Waye (University of South Australia) identified governance as a key issue for plaintiffs and class members in Australia and said a representative plaintiff was often out of their depth when managing a multimillion-dollar class action. She said a possible issue with the Australian class actions regime was the presumption that a lead plaintiff is needed and that the existence of a plaintiff committee can be a factor in favour of allowing a competing class action to proceed.
- 3.18 Chapman Tripp said a representative plaintiff should not delegate the decision-making required. They may and should take advice from legal counsel and suitable experts, but the decisions required to instruct the lawyer should be non-delegable. It said the interests of justice were not well served if the representative plaintiff is acting as a figurehead, with decision-making delegated to legal counsel or experts. It said establishing a litigation committee did not remove or reduce a representative plaintiff’s obligations.
- 3.19 The conceptual framework for class actions was also discussed at our consultation workshops. Some participants preferred a model where the decision-making and governance role of a class action would be vested in a body like a litigation committee rather than a single representative plaintiff. Reasons given included:
- (a) In reality, the lawyer and/or litigation funder drives the case rather than the representative plaintiff.
  - (b) The burden is too heavy for representative plaintiffs, who may be in a vulnerable position themselves. Taking on fiduciary obligations exposes the representative plaintiff to risk and may lead to conservatism.
  - (c) Representative plaintiffs can be out of their depth with respect to managing class actions and giving instructions so it may be difficult for them to act in the best interests of the class.
  - (d) The focus should be on ensuring that litigation is being run properly and the best interests of all class members are considered. Imposing fiduciary duties and costs liability on a single representative plaintiff is inconsistent with this.

- (e) Matters such as understanding the legal issues and negotiating with litigation funders are best done by those with expertise. The litigation committee is best able to hold the lawyer to account, negotiate a favourable deal with litigation funders and act in the best interests of the class.
- 3.20 Other participants thought the decision-making and governance role should remain with the representative plaintiff. Reasons given included:
- (a) The representative plaintiff has ‘skin in the game’ and consequently will best preserve the interests of the class.
  - (b) There are many representative plaintiffs who take their responsibilities seriously and perform their job well, even when ‘unskilled’. We should not underestimate people.
  - (c) A litigation committee can lead to unfairness if it can make decisions without having responsibility for adverse costs.

### Recommendation

**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.

- 3.21 We have carefully considered the proposal that responsibility for the conduct of the litigation should be held by an entity such as a litigation committee rather than a representative plaintiff. However, we consider this responsibility should remain with the representative plaintiff, supported by their lawyer. While a litigation committee may be an effective way of supporting the representative plaintiff in their role, we do not favour transferring responsibility for the conduct of the class action to the committee and leaving the representative plaintiff with a more nominal role.<sup>4</sup> We recommend the representative plaintiff should be responsible for making decisions about the conduct of a class action and giving informed instructions to their lawyer. We think this should be reflected in the *Rules of conduct and client care for lawyers*. We recommend NZLS consider what amendments may be required to provide clarity on who a lawyer should take instructions from in a class action. This falls within the broader recommendation we make in Chapter 7 that NZLS should consider what amendments may be needed to the Lawyers and Conveyancers Act 2006 and the *Rules* to clarify the obligations of lawyers acting in class actions.
- 3.22 We do not support an approach that would vest responsibility in non-class members to make decisions and give instructions about a class action. In Chapter 4, we recommend the representative plaintiff must be a class member. We consider this approach will

<sup>4</sup> When developing its draft Class Actions Bill, Te Komiti mō ngā Tikanga Kooti | Rules Committee considered and rejected the suggestion that a litigation committee rather than the lead plaintiff could take responsibility for important decisions in the conduct of a class action: see Te Komiti mō ngā Tikanga Kooti | The Rules Committee *Minutes of meeting held on Friday 6 March 2009* (March 2009) at [14], discussing Te Kāhui Ture o Aotearoa | New Zealand Law Society *Letter to the Rules Committee on second class actions consultation paper, draft Bill and High Court Amendment (Class Actions) Rules 2008* (20 November 2008).

ensure the class action is supported by a genuine claimant who is motivated by a desire to resolve their legal issue and has similar motivations to other class members. In our view, it would be a significant departure from normal standing rules to have a person or organisation without its own claim to act as representative plaintiff. It is also possible that a non-class member representative plaintiff would have different objectives to class members such as clarifying the law or deterring a defendant.<sup>5</sup> As we explained in Chapter 2, we do not think that deterrence should be an objective of class actions. We think it is more appropriate for this objective to sit with regulators, with class actions primarily serving a compensatory role. Allowing a litigation committee with non-class members to be responsible for conduct of the litigation would have the same risks as allowing non-class member representative plaintiffs. There is also a risk of conflicts of interest if the litigation committee includes a representative of the litigation funder, who has a financial interest in the litigation.

- 3.23 We see a class action as a procedure that can enable claimants to resolve an issue of importance to them. While we acknowledge that it will sometimes be the lawyer and the funder who seek to find a representative plaintiff for a potential class action they have identified, rather than the other way around, we think the plaintiff must still be at the centre of the proceeding.<sup>6</sup> We do not favour a model of class action litigation where the lawyer, funder and litigation committee are responsible for the conduct of the proceeding and the representative plaintiff is relegated to a nominal role. We consider that claimants can and should make decisions about their litigation rather than those without their own claim. Our conception of access to justice includes meaningful participation rights for class members.<sup>7</sup> We think this will be enhanced by having a representative plaintiff, who is themselves a class member, is engaged in the litigation and is not just a nominal plaintiff.
- 3.24 As a party to the litigation, the representative plaintiff will have liability for adverse costs (although they may be indemnified for this by a litigation funder). We think it would be problematic if a litigation committee could make decisions about the litigation, but the representative plaintiff ultimately had to bear the responsibility for those decisions because of their liability for adverse costs. Similarly, we do not favour a model in which a litigation committee makes decisions about any settlement, without having their claims extinguished by that settlement. The representative plaintiff will also have obligations to meet discovery and other requirements (such as responding to interrogatories or a notice to admit facts) and cannot delegate these obligations to a litigation committee.
- 3.25 Members of a litigation committee, if chosen for their expertise, may expect to be remunerated for their time at a professional rate.<sup>8</sup> Any expenses associated with the committee would then have to be deducted from compensation awarded to class members. If the committee membership is approved by the court, as suggested by NZLS for opt-out class actions, this would also add further time and cost to the proceeding.

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<sup>5</sup> See the Issues Paper at [11.24]–[11.33] and the Supplementary Issues Paper at [1.12]–[1.15]. We discuss an exception for government entities in Chapter 4.

<sup>6</sup> See Issues Paper at [6.52], discussing the issue that class action litigation may be driven by lawyers rather than individuals seeking access to justice.

<sup>7</sup> See Chapter 2.

<sup>8</sup> While we consider an honorarium can be paid to a representative plaintiff, we expect it would be at a more modest level than the professional fees of litigation committee members.

- 3.26 We acknowledge it will not always be easy to find a suitable representative plaintiff and the facts of the person's case as well as their aptitude for the role will be relevant. However, given that class actions typically involve hundreds or thousands of class members, we do not see this task as insurmountable. In other jurisdictions, selecting an appropriate representative plaintiff is a normal part of class action litigation, and litigation committees are not commonly used. We do not think a representative plaintiff necessarily needs to have legal or financial expertise to carry out the role. Lawyers are regularly required to take informed instructions from clients without this kind of expertise. Later in this chapter, we discuss ways to support the representative plaintiff in their role and the possibility of having multiple representative plaintiffs in the same case.

### **Duty and responsibilities of the representative plaintiff**

- 3.27 In this section we discuss the duty and responsibilities of the representative plaintiff and whether these should be set out in statute.

### **Results of consultation**

- 3.28 As noted above, in the Supplementary Issues Paper we proposed the representative plaintiff should have certain obligations towards the class. We received 16 submissions on what obligations a representative plaintiff should have.<sup>9</sup> There were 10 submitters who broadly agreed with our proposed obligations, with some suggesting additional obligations.<sup>10</sup> The other submitters commented on aspects of the obligations without expressing an overall view on our proposal.
- 3.29 Bell Gully said our proposed obligations were an important protection for class members, particularly in opt-out class actions. From the defendant's perspective, it was important that claims were brought in a responsible manner and it was clear who had costs liability and authority to settle.
- 3.30 Some submitters drew attention to obligations they saw as important for the representative plaintiff to have, including:<sup>11</sup>
- (a) Having sufficient knowledge of the facts of the case and seeking appropriate legal and expert advice so they can make the necessary decisions and give informed instructions.<sup>12</sup>
  - (b) Making decisions in the class action and not delegating this responsibility.
  - (c) Ensuring the class is adequately informed, such as on the key facts and the conduct of the class action.

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<sup>9</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Te Tari Ture o te Karauna | Crown Law Office, Michael Duffy, Gilbert Walker, Institute of Directors, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Tom Weston QC.

<sup>10</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia (although with respect to the common issues only), Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Tom Weston QC.

<sup>11</sup> Chapman Tripp, Crown Law Office, Insurance Council, Institute of Directors and Johnson & Johnson.

<sup>12</sup> Crown Law Office suggested that difficulties could arise if a self-represented representative plaintiff were able to bring a class action and that a court might decline to certify a class action where a representative plaintiff had not obtained legal representation.

- (d) Ensuring there is a workable plan for the proceeding.
  - (e) Fairly and adequately representing the interests of the class.
  - (f) Acting in the best interests of the class.
  - (g) Avoiding conflicts of interest.
  - (h) Being liable for any adverse costs order.
- 3.31 Simpson Grierson said there should be clarity around what “acting in the best interests of the class” and “ensuring the case is properly prosecuted” mean in practice. Tom Weston QC said while our proposed obligations were good in theory, it was important to consider how they would work in practice. In reality, the litigation would be run by the lawyer and litigation funder and a representative plaintiff may have little knowledge of the matter and no real control. Maurice Blackburn/Claims Funding Australia suggested the representative plaintiff’s obligations should only arise with respect to the common issue.
- 3.32 Several submitters commented on whether the representative plaintiff should be regarded as having fiduciary obligations. Philip Skelton QC saw the representative plaintiff as having a fiduciary duty to act in the best interests of the class as a whole.<sup>13</sup> Gilbert Walker agreed it was likely that the representative plaintiff’s role has a fiduciary aspect to it and also probably imports a duty of care. However, it said the difficulty was identifying the scope of the duties and ensuring the representative plaintiff understands and can fulfil them. Carter Pearce did not consider the representative plaintiff’s duty to act in the best interests of the class was fiduciary.
- 3.33 Simpson Grierson said it was important to clarify what recourse class members or the defendant would have if the representative plaintiff did not comply with their obligations, such as whether they could apply to remove or replace the representative plaintiff. Gilbert Walker asked whether plaintiffs would be permitted to limit their liability for breach of duties to class members and suggested this could only be done by statute in an opt-out class action. In a joint submission, Philip Skelton QC, Kelly Quinn and Carter Pearce said if the obligations were breached, the appropriate remedy was for the court to make orders under its supervisory jurisdiction to decertify the class action or remove or substitute the representative plaintiff.
- 3.34 Seven submitters were in favour of putting the obligations of a representative plaintiff in statute.<sup>14</sup> Reasons given by submitters were:
- (a) This will assist the representative plaintiff to be aware of their obligations.
  - (b) The obligations are a central aspect of the class actions regime and should not be left to case law development. It is undesirable to have potentially parallel common law fiduciary duties.
  - (c) It would provide clarity on the obligations.
  - (d) The statute can confirm the obligations take priority over contractual commitments.

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<sup>13</sup> While Philip Skelton QC, Kelly Quinn and Carter Pearce made a joint submission, there were some issues on which these submitters expressed separate views.

<sup>14</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Insurance Council, NZLS (although as discussed above, it thought the obligations should be held by an entity such as a litigation committee), Rhonson Salim and Simpson Grierson.

- 3.35 Maurice Blackburn/Claims Funding Australia and Philip Skelton QC, Kelly Quinn and Carter Pearce (in a joint submission) disagreed with having the obligations in statute.<sup>15</sup> Reasons given were:
- (a) The obligations exist independently of statute.
  - (b) The court should have flexibility to manage issues that arise with respect to a representative plaintiff's obligations by considering the circumstances of the case.
  - (c) It could lead to litigation over the relationship between the obligations and contractual commitments.
  - (d) The list of obligations may become outdated if the obligations are reframed over time.
  - (e) The obligations should not be overly prescriptive as this could deter plaintiffs from taking on the role. The Australian experience suggests it is not necessary to identify and formulate each obligation with clarity.

### Recommendation

**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.

- 3.36 In our view, it is helpful to conceptualise the role of the representative plaintiff as involving both an overarching duty to the class and some key responsibilities. We discuss the responsibilities further below.
- 3.37 We think the representative plaintiff should have a duty to act in what they believe to be the best interests of the class. We also think it is desirable for this duty to be specified in the Class Actions Act. It is an important safeguard for class members, and it is desirable to make this duty clear.
- 3.38 Providing this clarity will help to ensure that:
- (a) The representative plaintiff is aware of the duty before agreeing to take on the role.
  - (b) A lawyer can advise the representative plaintiff on what is required by the duty.
  - (c) When the court considers an application for certification, it can consider whether the representative plaintiff has received independent legal advice on, and demonstrated an understanding of, this aspect of its role.
  - (d) Litigation funding agreements can be drafted in a way that avoids conflicting with the representative plaintiff's overarching duty to the class.
- 3.39 The duty we recommend has a subjective element to it, "to act in what they [the representative plaintiff] believe to be the best interests of the class", which allows focus on the exercise of judgement by the representative plaintiff. The duty means a representative plaintiff should:

<sup>15</sup> Shine Lawyers thought it was unnecessary to have the obligations in statute as they exist as a matter of course but did not have a strong view.

- (a) Avoid any conflicts of interest that could prevent them from fulfilling this duty, or ensure any conflicts are properly managed (for example, by supporting the appointment of a sub-class representative plaintiff).
  - (b) Carry out their responsibilities diligently and with reasonable care.
  - (c) Consider the interests of the class when fulfilling their role and responsibilities, including when making decisions about the conduct of the class action, giving instructions to their lawyer or entering into legal or funding arrangements.
- 3.40 We have not limited the duty to apply only while the representative plaintiff is carrying out their role and the responsibilities that attach to it. We recommend that it should apply generally so that, for example, providing information to the defendant to assist the defendant's case could constitute a breach. Some aspects of the duty will also survive the representative plaintiff ceasing to hold that role. For example, if a representative plaintiff is replaced during proceedings, they should provide all relevant information about the proceedings to the new representative plaintiff. They should not disclose the information to the defendant, or to any other person if that would be contrary to the interests of the class.
- 3.41 We think it is likely that the relationship between the representative plaintiff and class members has a fiduciary aspect to it. When a representative plaintiff participates in a class action, they are doing so on behalf of themselves as well as class members. While class members have little control over the class action, they will be affected by decisions made by the representative plaintiff about the class action and will be bound by any judgment or settlement. An analogy can be drawn to a trustee who is also a beneficiary under a trust. While we highlight the potential fiduciary nature of this relationship, this is ultimately not something we need to resolve given our recommendation to create a statutory duty on the representative plaintiff. However, for the sake of legal certainty, we think the Class Actions Act should specify that the representative plaintiff does not owe fiduciary duties to class members.

### *Key responsibilities of the representative plaintiff*

- 3.42 The representative plaintiff's responsibilities primarily arise from being a party to the proceeding. However, the extent of their responsibilities is amplified because they are bringing the litigation on behalf of a large group of class members as well as themselves. For this reason, it is important for the representative plaintiff to carry out their responsibilities diligently and with reasonable care, in accordance with their overarching duty to act in what they believe to be the best interests of the class.
- 3.43 We consider that a representative plaintiff's key responsibilities are to:
- (a) Enter into any necessary arrangements for legal representation and funding.
  - (b) Give informed instructions to their lawyer as to the conduct of the proceeding.
  - (c) Progress the case as plaintiff in the proceedings.
  - (d) Meet any order for adverse costs (or arrange an adequate indemnity for any adverse costs, such as from a litigation funder or class members).
  - (e) Make decisions in relation to any settlement of the class action and be a party to the settlement agreement.
- 3.44 We think it is unnecessary to set out the responsibilities of a representative plaintiff in statute, given these largely arise from being a party to litigation. It is also not possible to

set out the responsibilities of the representative plaintiff entirely, as the steps a plaintiff needs to take in litigation will differ in each case. This is why we have referred to the “key responsibilities” of the representative plaintiff. Later in this chapter we recommend an intending representative plaintiff should receive independent legal advice on the overarching duty and responsibilities of the role so they are fully informed before agreeing to become representative plaintiff.

### Arrangements for legal representation and funding

- 3.45 The representative plaintiff’s responsibilities will include entering into any necessary arrangements for legal representation. We think it would be highly undesirable for a representative plaintiff to be self-represented, given that class members’ legal claims are at stake. If the representative plaintiff intends to be self-represented, this could lead the court to decline to certify the proceeding as a class action on the basis there is not a suitable representative plaintiff who will fairly and adequately represent the class.<sup>16</sup>
- 3.46 The costs of bringing a class action will include legal fees, court fees and disbursements such as expert witness fees. We think the representative plaintiff’s responsibilities should include ensuring there are arrangements in place to meet these costs. This does not mean the representative plaintiff must enter into an agreement with a litigation funder. Alternatives might include a lawyer agreeing to act pro bono, class members all agreeing to share the costs, the case being funded through donations, or obtaining funding from a class action fund.<sup>17</sup>

### Informed instructions

- 3.47 In ordinary litigation, a lawyer is required to obtain and follow a client’s informed instructions on significant decisions in the conduct of the litigation (subject to their overriding duty to the court).<sup>18</sup> In a class action, we think these instructions should come from the representative plaintiff.<sup>19</sup> Significant decisions in a class action will include whether to make certain interlocutory applications, whether to appeal an interlocutory or final decision and whether to accept a settlement offer.
- 3.48 In order to provide informed instructions, the representative plaintiff will need to have a general understanding of the facts and issues involved in the class action. When instructions are needed on a particular decision in the class action, the representative plaintiff will need to understand what the options are and the consequences of each for the class.<sup>20</sup> The lawyer for the class will need to ensure the representative plaintiff is appropriately advised so they can make the necessary decisions and give informed instructions.

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<sup>16</sup> We discuss certification in Chapter 6.

<sup>17</sup> In Chapter 18 we recommend a class action fund should be established.

<sup>18</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008), r 13.3. In addition, a lawyer cannot file a document on behalf of a party unless they are authorised to file that document by (or on behalf of) the party: High Court Rules 2016, r 5.36(1)(a).

<sup>19</sup> In Chapter 7, we suggest that some references to a “client” in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 should be read as referring to the representative plaintiff, while other references to a “client” should be regarded as referring to the class.

<sup>20</sup> A lawyer should take instructions after the client is informed of the nature of the decisions to be made and the consequences of them: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008), r 13.3.



### Progress the case as plaintiff in the proceedings

- 3.49 As a party to the litigation, the representative plaintiff will need to meet obligations such as providing discovery, answering interrogatories and responding to a notice to admit facts.
- 3.50 The representative plaintiff also needs to ensure the class action is being progressed, which requires a range of active steps to be taken. Many of these are the standard steps required of a plaintiff in any civil litigation, such as ensuring documents are filed and giving evidence to prove their case. There are also some steps specific to class actions, such as providing the defendant with information on class members who have opted into or out of the proceeding.<sup>21</sup> In many cases, the representative plaintiff will simply need to give instructions to their lawyer (such as to confirm that a document can be filed). However, there may be situations where the representative plaintiff must take a certain action themselves, such as providing an undertaking as to damages when an interlocutory injunction is sought or attending a judicial settlement conference.<sup>22</sup>

### Liability for adverse costs

- 3.51 The general rule in Aotearoa New Zealand is that the unsuccessful party must pay costs to the successful party in a proceeding or interlocutory application (adverse costs).<sup>23</sup> In Chapter 12 we recommend this rule should apply in class actions, which means that the representative plaintiff will normally be liable for a costs order in favour of the defendant if the claim is unsuccessful. Because of the scale of a class action, the representative plaintiff's potential liability is likely to be considerably larger than in individual litigation. We think it is essential for a representative plaintiff to understand their potential adverse costs liability. Accordingly, our proposed certification test requires the representative plaintiff to demonstrate an understanding of their potential liability for costs. As we discuss in Chapters 12 and 15, in funded litigation a representative plaintiff would usually obtain an indemnity for adverse costs from a litigation funder.<sup>24</sup> We also recommend establishing a public class action fund, which could provide a representative plaintiff with an indemnity against adverse costs.<sup>25</sup>

### Being a party to any settlement

- 3.52 The representative plaintiff is responsible for giving instructions as to whether to settle a class action with the defendant and will be a party to any settlement agreement. Our draft settlement provision requires the representative plaintiff to make the application for court approval of a settlement. If the settlement is approved, the agreement will bind class members as well as the parties.

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<sup>21</sup> We discuss this in Chapter 8.

<sup>22</sup> High Court Rules 2016, rr 7.54 and 7.79.

<sup>23</sup> High Court Rules 2016, r 14.2(1)(a).

<sup>24</sup> We also recommend in Chapter 15 that costs orders in funded proceedings may be made directly against a funder.

<sup>25</sup> We discuss this in Chapter 18.

## Supporting the representative plaintiff

- 3.53 In this section we discuss how the representative plaintiff can be supported to fulfil their duty to class members and the responsibilities of their role. We received 12 submissions on this issue.<sup>26</sup>

### Results of consultation

- 3.54 As discussed above, we do not support the idea of litigation committees having statutory functions as proposed by some submitters. However, other submitters discussed a different role for litigation committees of supporting the representative plaintiff.
- 3.55 Several submitters commented that litigation committees can be useful in some cases but thought they should be optional.<sup>27</sup> It was noted that establishing a litigation committee would not remove or reduce a representative plaintiff's obligations.<sup>28</sup> Dr Michael Duffy (Monash University) suggested the court should have the power to appoint a litigation committee, including of its own motion. Similarly, Johnson & Johnson said it should not be up to a representative plaintiff and their lawyer whether a litigation committee was needed and pointed to the risk of a "compliant" representative plaintiff being selected by lawyers. Philip Skelton QC, Kelly Quinn and Carter Pearce (in a joint submission) noted an alternative to a litigation committee was for class members to provide support and guidance to the representative plaintiff.
- 3.56 Omni Bridgeway and Simpson Grierson did not think it was necessary to have legislative rules on litigation committees. Chapman Tripp did not think legislative rules were needed on the establishment and process of litigation committees, but supported minimum statutory requirements, such as a requirement to hold quarterly meetings. One Crown agency preferred clarifying the role and limits of a litigation committee in the High Court Rules 2016 (HCR).<sup>29</sup> In its submission on the Issues Paper, Ross Asset Management Investors' Group said there should be rules to ensure the selection of a litigation committee occurred in an open and transparent manner.
- 3.57 Several submitters noted the importance of ensuring the representative plaintiff understands their obligations.<sup>30</sup> Consumer NZ suggested there could be guidance for lawyers on this. Gilbert Walker suggested a proposed representative plaintiff could be required to confirm in an affidavit that they understood and agreed to comply with a basic list of obligations. Alternatively, the representative plaintiff's lawyer could certify that the obligations had been explained. Bell Gully and Chapman Tripp agreed with our proposal for the court to consider whether the representative plaintiff understands their obligations. However, Maurice Blackburn/Claims Funding Australia said it did not support

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<sup>26</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>27</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Insurance Council, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson.

<sup>28</sup> Chapman Tripp and Insurance Council. Gilbert Walker noted there was a view in Australia that litigation committees are not helpful because the obligations still sit with the representative plaintiff.

<sup>29</sup> Crown Law Office said this was the view of one Crown agency (unnamed).

<sup>30</sup> Bell Gully, Chapman Tripp and Gilbert Walker. Some submitters commented on this point in their submissions on our certification test.

the representative plaintiff having their suitability and understanding of the role scrutinised by a court as part of certification.

- 3.58 Several submitters referred to the role of the lawyer in supporting the representative plaintiff.<sup>31</sup> Maurice Blackburn/Claims Funding Australia also thought the representative plaintiff would be supported by the court exercising its supervisory and case management powers in a just, flexible and efficient way.
- 3.59 Some submitters supported paying an honorarium to the representative plaintiff, to recognise the time spent on the role.<sup>32</sup> Bell Gully and Chapman Tripp did not support a representative plaintiff receiving an additional payment at settlement because of the risk this might create a conflict of interest.<sup>33</sup> Other submitters were comfortable with the representative plaintiff receiving a payment as part of settlement.<sup>34</sup> Shine Lawyers commented that payments are relatively modest in comparison to the time and energy spent representing the class, so they are unlikely to lead to a conflict of interest during settlement negotiations.

## Recommendations

### 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 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.

- 3.60 We recognise that a plaintiff in ordinary civil litigation does not have a statutory duty to act in the interests of others in the manner we have proposed for representative plaintiffs in class actions. We also recognise that the responsibilities of a representative plaintiff are more extensive than a plaintiff would face in normal litigation. While the representative plaintiff's individual claim may be modest, they may have to give instructions on a multi-million-dollar claim. Their potential costs exposure, and exposure to publicity, could be significant. Given this, some submitters expressed concern that it would not be possible to find a class member who would be willing to fulfil the role of representative plaintiff.
- 3.61 The experience of other jurisdictions indicates that it is possible to find persons who are willing and able to fulfil the role, despite the greater burden. There are several factors that can motivate a person to become the representative plaintiff. The person might only

<sup>31</sup> Consumer NZ, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>32</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Vince Morabito and Shine Lawyers (at settlement).

<sup>33</sup> Michael Duffy said possibly this should not be allowed, but it may be that a payment is reasonable if fully disclosed.

<sup>34</sup> Nikki Chamberlain, Vince Morabito and Shine Lawyers.

be able to get funding for their case if taken on behalf of a class, or they might genuinely feel the defendant should also have to answer to others who have suffered the same loss.<sup>35</sup> It has been noted that while few class actions make economic sense to the individual plaintiff, people do come forward for the role “whether motivated by politics, principle, litigiousness, crankiness or desire for fame or empowerment”.<sup>36</sup>

- 3.62 We discuss below some ways of supporting the representative plaintiff that we think will encourage suitable class members to take on the role.

### Statutory immunity from liability

- 3.63 It is possible the risk of facing a legal claim from a class member might deter a person from agreeing to become the representative plaintiff. We think it is undesirable to have another disincentive to taking on what is a voluntary and largely unpaid role, which already carries the risk of being ordered to pay adverse costs if the class action is unsuccessful.
- 3.64 The proposed statutory duty to act in what the representative plaintiff believes to be the best interests of the class is intended to clarify an uncertain area of the law. It is intended to make it clear for prospective representative plaintiffs what is expected of them and help ensure the right people take on the role. While submitters supported this clarity, none expressly suggested it was needed to facilitate legal claims by class members against representative plaintiffs. For these reasons, we recommend a representative plaintiff should have statutory immunity from claims by class members for breach of their statutory duty.
- 3.65 At the same time, class members should not be without recourse against a representative plaintiff who fails to act in their best interests through dishonesty, careless disregard for the consequences of their actions or inactions or taking significant and unjustified risks. We therefore recommend an exception to the statutory immunity where the representative plaintiff has acted recklessly or in wilful default or bad faith. A class member could also apply to have the representative plaintiff substituted with another class member if they are not adequately fulfilling their role.<sup>37</sup> The court’s supervisory role will also help to protect class members if the representative plaintiff has not acted in their best interests. For example, even if the representative plaintiff has entered into an agreement to settle the class action, the court could decline to approve the settlement if it is not satisfied the settlement is fair, reasonable and in the interests of the class.

### The role of the lawyer and need for independent legal advice

- 3.66 When a person is considering becoming a representative plaintiff, it is important they receive advice on the duty and responsibilities of the role. The advice needs to come from a lawyer independent of the class action. This is because the lawyer working on the class action has an incentive to have a person agree to become the representative plaintiff, as otherwise the case cannot go ahead as a class action. They may also have

<sup>35</sup> Edward Sherman “Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Actions” (2002) 52 DePaul L Rev 401 at 409.

<sup>36</sup> David Crerar “The Restitutionary Class Action: Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments” (1998) 56 U Toronto Faculty L Rev 47 at 92. In some cases the representative plaintiff could be a corporate entity and different considerations may apply.

<sup>37</sup> We discuss replacement of the representative plaintiff in Chapter 6.

been working with a funder to develop the class action. An independent lawyer will be able to give advice about whether it is appropriate for the proposed representative to fulfill the role considering solely the interests of that person. We envisage the cost of this advice will be modest relative to the other litigation costs involved.<sup>38</sup>

- 3.67 In Chapter 6, we recommend that the Class Actions Act require a proceeding to be certified to proceed as a class action. We recommend that, as part of the certification test, the court must be satisfied the proposed representative plaintiff has received independent legal advice on the duty and responsibilities of the role. This is an important protection for the intended representative plaintiff and will help ensure they make an informed decision about whether they should take on the role. It may also assist them, at an early stage, to anticipate and manage any potential conflicts of interest, including conflicts of interest that may arise in their relationships with any other representative plaintiffs, the lawyer acting for them in the class action, any litigation funder or class members.
- 3.68 We also recommend in Chapter 6 that as part of the certification test, the court should consider whether the proposed representative plaintiff has a reasonable understanding of the duty and responsibilities attached to being the representative plaintiff. The proposed representative plaintiff could state in their affidavit whether they have had the duty and responsibilities of the role explained to them by an independent lawyer. This will assist the court, for the purpose of deciding whether to certify the class action, to assess the proposed representative plaintiff's understanding of their role.
- 3.69 As well as advising on the duty and responsibilities of the role, the independent lawyer could advise the intending representative plaintiff on the implications for their own individual claim and on the terms of any retainer agreement or litigation funding agreement they have been asked to enter into.<sup>39</sup> Once the person has decided to become the representative plaintiff, they would be represented by the lawyer acting in the class action and work with them to prepare the application for certification.
- 3.70 In Chapter 7, we recommend the representative plaintiff's lawyer and the lawyer for the class should be the same person and have a duty to act in the best interests of the class. The roles of the representative plaintiff and lawyer for the class are therefore broadly aligned. A lawyer's professional obligations will provide protection for the representative plaintiff. For example, the lawyer must take informed instructions on significant decisions, which requires them to inform their client of the nature of the decisions to be made and the consequences of them.<sup>40</sup>
- 3.71 The representative plaintiff's lawyer will also significantly reduce the burden on the representative plaintiff because practically speaking, it is the lawyer who will carry out most of the tasks required to prosecute the litigation. The lawyer can also advise the

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<sup>38</sup> In Chapter 18 we recommend that Te Tāhū o te Ture | Ministry of Justice produce accessible online information about class actions. This could also help to inform prospective representative plaintiffs about the role.

<sup>39</sup> In Chapter 17 we recommend that court approval of a litigation funding agreement should depend, among other things, on whether the representative plaintiff received independent legal advice on the agreement. This advice could be given by the same lawyer who advises the proposed representative plaintiff on the duty and responsibilities attached to that role.

<sup>40</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.3. In Chapter 7, we suggest that when a lawyer is acting for the class, the reference to "client" in this rule should mean the representative plaintiff.

representative plaintiff of any steps they need to take such as complying with discovery obligations.

### **Supervisory role of the court**

- 3.72 The court's supervisory role in a class action will assist the representative plaintiff. As part of the certification test we recommend in Chapter 6, the court needs to consider whether the proposed representative plaintiff is suitable for the role and will fairly and adequately represent the class. This will include consideration of whether the person understands the duty and responsibilities of the role, including their potential liability for costs.
- 3.73 A key aspect of the court's supervisory role is to ensure that the interests of class members are protected, which provides an important check on decisions made by the representative plaintiff. For example, in Chapter 11 we recommend the court must approve any settlement of a class action, which will involve consideration of whether the settlement is fair, reasonable and in the interests of the class.
- 3.74 In Chapter 17 we recommend that litigation funding agreements in class actions must be subject to court approval. This will also provide protection for a representative plaintiff. We recommend that a court must not approve a litigation funding agreement unless it is satisfied that the representative plaintiff has received independent legal advice on the agreement and that the agreement is fair and reasonable.

### **Indemnity for adverse costs**

- 3.75 While liability for adverse costs will normally fall on the representative plaintiff, in funded class actions the litigation funder will generally provide the representative plaintiff with an indemnity against this liability.<sup>41</sup> In Chapter 15, we recommend a presumption in funded class actions that the litigation funder will provide security for costs, which will provide some reassurance to the representative plaintiff as well as the defendant.<sup>42</sup>
- 3.76 In Chapter 18, we recommend a new class action fund which could provide funding for a class action as well as indemnify a representative plaintiff against adverse costs.

### **Honorarium**

- 3.77 We consider the representative plaintiff should be able to receive payment for carrying out their role in a class action. The role may be time-consuming and prevent the person from taking up other paid opportunities. We think a representative plaintiff should be entitled to receive modest compensation for the role, but it should not be set at a level that causes the role to be viewed as a money-making venture. We also think it is preferable for periodic payments to be made during the class action, rather than being paid as a lump sum at settlement. This is because of the risk of a conflict of interest, since the representative plaintiff stands to receive an additional benefit from the settlement.<sup>43</sup>

### **Having multiple representative plaintiffs**

- 3.78 Our draft commencement and certification provisions allow for the possibility of multiple representative plaintiffs. Multiple representative plaintiffs will be required in some class actions because of our recommendation that there must be a representative plaintiff with

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<sup>41</sup> See Chapter 12.

<sup>42</sup> We also recommend that costs orders in all funded proceedings may be made directly against a funder.

<sup>43</sup> We discuss this issue in Chapter 11.

a claim against each defendant.<sup>44</sup> It is also likely to be desirable to have multiple representative plaintiffs where there are issues that apply to some, but not all, claims.<sup>45</sup> This will allow the representative plaintiffs' individual claims to be used as a vehicle for determining those issues at the initial hearing. Having multiple representative plaintiffs may also allow the duty and responsibilities of the role to be shared among representative plaintiffs.

- 3.79 However, difficulties may arise in proceedings with multiple representative plaintiffs if there is a disagreement among them on what instructions to give to the lawyer. We suggest it will be important for a dispute resolution process to be agreed at the outset, and before a person decides to become a representative plaintiff.<sup>46</sup> Earlier in this chapter we recommend that an intended representative plaintiff receive independent legal advice on the duty and responsibilities of the role. In proceedings with multiple representative plaintiffs, the advice should also address the risk of disputes and the proposed dispute resolution process.

### Litigation committee

- 3.80 A practice has developed in Aotearoa New Zealand of using litigation committees to assist with the conduct of representative actions. In some cases, these include non-class members with relevant expertise. Submitters indicated that litigation committees are sometimes appropriate but will not be necessary in all cases. Our research has indicated that litigation committees are not commonly used in overseas class actions.
- 3.81 Earlier in this chapter, we explained why we think the representative plaintiff should not simply have a nominal role, with the litigation committee having responsibility for decision making and giving instructions. We consider this should be the role of the representative plaintiff since they are a party to the litigation, have a duty to act in what they believe to be the best interests of the class and ultimately bear the risk of adverse costs. While it would be less problematic to have class members on a litigation committee making decisions since they have their own claim, they would not have the same obligations as a representative plaintiff or liability for adverse costs.
- 3.82 We think litigation committees can serve a useful advisory role. They can help the representative plaintiff to make the best decisions possible and give informed instructions to the lawyer. They could also assist with matters such as keeping class members updated of progress in the proceeding or obtaining class member views on issues. We see the role of a litigation committee as supporting and advising the representative plaintiff in their role rather than taking on the duty and responsibilities we have outlined. For these reasons, we consider that litigation committees should be permitted but do not recommend any rules about how they should function.

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<sup>44</sup> We discuss this in Chapter 4.

<sup>45</sup> In some cases, it may be necessary to create a sub-class, but this will not always be required. We discuss the issue of sub-classes in Chapter 8.

<sup>46</sup> It may be desirable for the retainer agreement to set out the procedures with respect to giving instructions where there are multiple representative plaintiffs. A lawyer may act for more than one party in respect of the same matter where the prior informed consent of all parties is obtained and there is not a "more than negligible risk" that the lawyer may be unable to discharge the obligations owed to one or more of the clients: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6.1.1.

## THE ROLE OF A DEFENDANT IN A CLASS ACTION

- 3.83 The role of a defendant in a class action does not differ substantially from normal litigation. However, the nature of a class action can give rise to challenges in responding to the litigation and can increase the financial risks and potential liability for defendants, as we discuss in Chapter 15.
- 3.84 The defendant may not know the identity of all class members or have details of their claims. This can make it difficult for a defendant to quantify their potential liability, identify possible defences or third-party claims and make decisions about settlement. We recommend some measures to respond to this issue, including enabling a defendant to obtain information on class members who have opted in or opted out and an express provision in the High Court Rules on class member discovery.<sup>47</sup> We also suggest it may be relevant for a court to consider whether a defendant would be unfairly prejudiced in running its defence by either an opt-in or opt-out mechanism when considering the appropriate mechanism for determining class membership.<sup>48</sup>
- 3.85 The defendant and their lawyer may be unsure whether they can contact individual class members directly, given that many class members will not have signed a legal retainer with the lawyer for the representative plaintiff. We make some recommendations to provide clarity on this issue. In Chapter 7, we recommend the representative plaintiff's lawyer should become lawyer for the class once a proceeding is certified as a class action, and that a defendant's lawyer then should direct class member communications to the lawyer for the class. While we consider a defendant itself should be able to communicate with individual class members about settlement, we recommend the communication must include standard text about the class action that has been approved by the court.<sup>49</sup>
- 3.86 If the defendant is successful in defending a class action, there is a presumption they will be entitled to an order for costs. While liability for adverse costs will normally fall on the representative plaintiff, an individual is unlikely to have the means to meet a substantial adverse costs order in a class action. In Chapter 17, we recommend a court's review of a litigation funding agreement should consider the extent of any adverse costs indemnity provided to the representative plaintiff. We also recommend a presumption in funded class actions that a litigation funder will provide security for costs and that a court may order non-party costs directly against a funder.<sup>50</sup> These measures will provide some protection to the defendant in funded class actions. Where a class action is not supported by a litigation funder, a defendant could seek an order for security for costs against the representative plaintiff under the existing security for costs provisions.<sup>51</sup>

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<sup>47</sup> We discuss these recommendations in Chapter 8.

<sup>48</sup> We discuss this in Chapter 6.

<sup>49</sup> We discuss this in Chapter 11.

<sup>50</sup> We discuss security for costs in funded litigation in Chapter 15.

<sup>51</sup> High Court Rules 2016, r 5.45. One of the grounds for ordering security for costs is that there is reason to believe a plaintiff will be unable to pay the defendant's costs if the plaintiff is unsuccessful: r 5.45(1)(b).



## THE COURT'S SUPERVISORY ROLE IN A CLASS ACTION

### Recommendation

**R12**

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

3.87 The court will have a more active role in class actions than in most other litigation, because of the need to ensure the interests of class members are adequately protected.<sup>52</sup> In Chapter 2, we explained that active court supervision is an important way of safeguarding the interests of class members. As we discuss later in this report, features of our proposed class actions regime that involve additional court oversight compared to other litigation include:

- (a) Requiring a proceeding to be certified in order to proceed as a class action.
- (b) Court approval of notices to class members.
- (c) Court approval of settlement.
- (d) Court approval of litigation funding agreements.

3.88 The recommended active supervision will, in many cases, require extensive judicial resources. In this report we make various recommendations to allow the court to manage class actions in an efficient way. We also envisage that the courts will develop creative processes for managing class actions and will be able to draw on techniques used in other complex litigation. It may be useful to provide guidance that can be drawn on by the judiciary when managing class actions, such as in the Senior Courts Bench Book. We note that in the United States, the Federal Judicial Center has developed a guide for judges on managing class action litigation.<sup>53</sup> We recommend Te Kura Kaiwhakawā | Institute of Judicial Studies consider whether to produce guidance for judges on class actions.

<sup>52</sup> See Issues Paper at [2.19].

<sup>53</sup> Barbara J Rothstein and Thomas E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed, Federal Judicial Center, 2010).

## CHAPTER 4

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# Commencing a class action

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## INTRODUCTION

- 4.1 In this chapter, we discuss:
- (a) The desirability of having a general class actions regime.
  - (b) Which courts a class actions regime should apply to.
  - (c) Our proposed requirements for commencing a class action.
  - (d) Limitation periods and class actions.
- 4.2 At the end of this chapter, we set out some draft legislative provisions that could give effect to our recommendations for commencing a class action.

## A GENERAL CLASS ACTIONS REGIME

- 4.3 Many class actions regimes apply across all substantive areas of law, including those in the United States, Canada and Australia.<sup>1</sup> Other jurisdictions have chosen to apply their class actions regime to certain sectors only, such as the United Kingdom regime, which only applies to competition law claims.<sup>2</sup> In the Issues Paper we expressed the preliminary view that a general rather than sectoral class actions regime would be preferable for Aotearoa New Zealand. We noted that the representative actions rule is general in its application and that a sectoral approach to class actions is unlikely to address all the issues that have been identified with the status quo. Given Aotearoa New Zealand's small size, it would be difficult to build up a body of case law if class actions were restricted to one area of the law.<sup>3</sup>
- 4.4 In the Issues Paper we also explained that a general class actions regime could expressly exclude certain types of legal claims. For example, in Australia a federal migration proceeding may not be brought as a class action.<sup>4</sup> We discussed whether judicial review claims should be excluded from a class actions regime, given that judicial review is designed to be a straightforward and efficient process. However, we expressed the

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<sup>1</sup> Issues Paper at [8.3].

<sup>2</sup> Issues Paper at [8.4]–[8.8].

<sup>3</sup> Issues Paper at [8.9].

<sup>4</sup> Issues Paper at [8.10].

preliminary view this was unnecessary and suggested a court could consider this issue when deciding whether a claim should be certified as a class action.<sup>5</sup>

## Results of consultation

- 4.5 We asked submitters whether a class actions regime should be general in scope or whether it should be limited to particular areas of the law. Twenty-three submitters addressed this issue.<sup>6</sup>
- 4.6 Eighteen submitters supported a general regime.<sup>7</sup> Reasons included:
- (a) There is no principled basis or compelling reason for creating a distinction between which claims can be run as a class action.
  - (b) Access to justice will be better enhanced by a general regime.
  - (c) A sectoral approach could lead to arguments over whether a particular proceeding is within the scope of the class actions regime. It could also cause a plaintiff to frame their claim in an artificial way.
  - (d) Claims are often pleaded with several causes of action and difficulties may arise if only some can be brought as a class action.
  - (e) Given the size of Aotearoa New Zealand, a general class actions regime will mean the jurisprudence on the framework develops more quickly.
- 4.7 Two submitters suggested a sectoral approach to class actions should be considered further. Bell Gully said class actions could be limited to areas where there might be efficiencies in grouping smaller claims together, such as consumer law. Professor Samuel Becher (Te Herenga Waka | Victoria University of Wellington) suggested an incremental approach, where class actions could first be introduced in certain markets or contexts.
- 4.8 Several submitters commented on whether judicial review claims and other claims for non-monetary relief are suitable to bring as a class action. Te Kāhui Ture o Aotearoa | New Zealand Law Society said existing group litigation procedures that are working well may not need to be captured by any class actions regime, citing judicial review as an example. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said a requirement for a class action to be the preferable procedure would be essential if judicial review claims were included in the class actions regime. It also proposed that the objective of a class actions regime should be to allow claims that are primarily compensatory in nature. Gilbert Walker suggested a class actions regime should apply to private law actions for damages and that other forms of group action such as judicial review or iwi claims could continue under HCR 4.24.

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<sup>5</sup> Issues Paper at [8.11]–[8.13].

<sup>6</sup> Barry Allan, Samuel Becher, Bell Gully, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Michael Duffy, Gilbert Walker, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, International Bar Association (IBA) Antitrust Committee, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), NZ Shareholders' Association, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Tom Weston QC and Woodsford Litigation Funding

<sup>7</sup> Barry Allan, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Insurance Council, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, Meredith Connell, NZLS, NZ Shareholders' Association, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Tom Weston QC and Woodsford Litigation Funding.

## Recommendation

**R13**

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

- 4.9 In our view, the Class Actions Act should not be limited in its application to certain areas of the law or types of claim. We think a sectoral class actions regime would be very limiting and would not sufficiently address the problems we have identified with current group litigation procedures. There was little support from submitters for a sectoral class actions regime. While not all claims are suitable to be brought as a class action, we think this can be addressed through the certification test we recommend. As part of this test, a court will need to consider whether there is another procedure that would be a more appropriate means of dealing with class member claims and whether the likely time and cost of a class action is proportionate to the remedies sought.
- 4.10 We have considered whether a class actions regime should be limited to claims seeking damages or other monetary relief. Given many class actions will require the support of a litigation funder, which will generally be paid a commission from any damages or settlement sum, there is unlikely to be a significant number of class actions seeking solely non-monetary relief. In addition, other procedures may be more appropriate for a claim seeking only non-monetary relief. For example, a claim seeking a declaration could be brought as an ordinary judicial review proceeding or a proceeding under the Declaratory Judgments Act 1908. It would be unnecessary to resort to the expense and complexity of a class actions regime in such a case.
- 4.11 Although we think class actions seeking solely non-monetary relief would be rare, we do not recommend restricting class actions to claims seeking damages or other monetary relief. A class action could be an efficient way of seeking non-monetary remedies such as specific performance or relief from an obligation on behalf of a large group. While it is unlikely to be necessary to bring a class action to obtain a declaration or injunction which would have a general effect regardless of who is part of the proceeding, a class action might be appropriate where a remedy would be more narrowly confined to class members.<sup>8</sup> Although our research has found few Australian or Canadian class action cases where an injunction has been granted, we would not want to rule out this possibility entirely.
- 4.12 None of our main comparator jurisdictions prevent class actions seeking non-monetary relief. In Australia, class actions regimes provide that a class action may be commenced whether or not the relief includes equitable relief or damages.<sup>9</sup> The United States regime

<sup>8</sup> For example, in one Canadian copyright class action, the defendant operated a website which posted obituaries and photographs, which had been authored by the representative plaintiff and class members, without permission. One of the remedies sought was an injunction preventing the defendant from continuing and repeating the infringement of the copyright of the representative plaintiff and of each class member: *Thomson v Afterlife Network Inc* 2019 FC 545.

<sup>9</sup> See, Federal Court of Australia Act 1976 (Cth), s 33C. The Court's powers include granting equitable relief and making any other order it considers just: Federal Court of Australia Act 1976 (Cth), s 33Z. The Act also refers to the court's discretion to dispense with notice requirements when the relief sought does not include a claim for damages: Federal Court of Australia Act 1976 (Cth), s 33X(2).

has a specific category for class actions seeking declaratory or injunctive relief.<sup>10</sup> The Canadian regimes do not prohibit claims seeking non-monetary relief, although the relief sought may be relevant to whether the class actions would be the preferable procedure.<sup>11</sup> Under the certification test we recommend, a court could decline to certify a class action seeking a non-monetary remedy if it considers a class action is not an appropriate procedure for the resolution of class member claims.<sup>12</sup>

## APPROPRIATE COURTS FOR CLASS ACTIONS

- 4.13 In the Issues Paper we said Te Kōti Matua | would be the primary court for class action proceedings, as with representative actions. However, we said it might also be appropriate for class actions to be available in other courts.<sup>13</sup>
- 4.14 We noted that while civil cases can be brought in Te Kōti-ā-Rohe | District Court, they make up a very small proportion of the Court's workload. It is possible to bring a representative action in the District Court under rule 4.24 of the District Court Rules (DCR), but we were not aware of this ever having occurred. We noted that the District Court has a jurisdictional threshold of \$350,000 and many class action claims would exceed this. Claims below \$350,000 are also unlikely to attract litigation funding. For all these reasons, we anticipated that if class actions were available in the District Court, such proceedings would be rare.<sup>14</sup>
- 4.15 In the Issues Paper we noted that representative actions may be brought in Te Kōti Take Mahi | Employment Court, relying on HCR 4.24. We said that cases had taken different approaches as to whether HCR 4.24 applies on its own, by analogy or in combination with other provisions in the Employment Relations Act 2000, and that it may be beneficial to clarify the law. We said a class action may be an efficient way to deal with an employment issue affecting many employees and that in overseas jurisdictions, employment class actions are common.
- 4.16 We observed that only one representative action had been brought in Te Kōti Taiao | Environment Court (relying on DCR 4.24) and said this may indicate a lack of demand for this kind of procedural device in this court. We noted that group claims in the Environment Court are often brought by an incorporated society and that the outcome of proceedings in this court will generally affect a wide group without needing to have a class of people bound by the judgment.
- 4.17 In the Issues Paper we expressed the preliminary view that it would be inappropriate for a class actions regime to apply in Te Kooti Whenua Māori | Māori Land Court. We noted the Māori Land Court already has the power to determine the most appropriate representatives of a class or group of Māori. We expressed concern that class actions could interfere with current approaches to determining representation and said we were not aware of any demand for a class actions regime in the Māori Land Court.

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<sup>10</sup> United States Federal Rules of Civil Procedure, r 23(b)(2).

<sup>11</sup> For example, see Class Proceedings Act RSBC 1996 c 50 (British Columbia), s 4(2)(e).

<sup>12</sup> We discuss certification in Chapter 6.

<sup>13</sup> Issues Paper at [8.14]–[8.18].

<sup>14</sup> See Issues Paper at [3.30] and [8.15].

## Results of consultation

- 4.18 We asked if a class actions regime should be available in the District Court, Employment Court, Environment Court or Māori Land Court, in addition to the High Court. We received 13 submissions on this question.<sup>15</sup>
- 4.19 Four submitters said class actions should only be available in the High Court.<sup>16</sup> Reasons for this included the procedural complexity of class actions; the existing expertise that High Court judges have with managing group litigation; and the High Court's inherent jurisdiction, which can provide additional assistance when addressing procedural issues. Another submitter said class actions commenced in other courts should be transferred to the High Court, which could have specialist expertise in class actions.
- 4.20 LPF Group submitted that while the High Court was the most suitable court for class actions, there was no reason not to allow class actions in other courts or tribunals where that was the appropriate jurisdiction to bring the claim.

## District Court

- 4.21 Six submitters said class actions should not be available in the District Court.<sup>17</sup> Reasons given by submitters included:
- (a) It would not be economic or cost efficient to have class actions in the District Court.
  - (b) Because of its extensive criminal jurisdiction and use of jury trials, the District Court may lack the capacity to manage class actions without significant additional resourcing.
  - (c) There would be an additional layer of appeals, which would make a class action commenced in the District Court more expensive and less efficient.
  - (d) If a procedure is required for small claims, the representative actions rule in DCR 4.24 could be retained.
- 4.22 At a consultation workshop, it was suggested that the District Court's current workload is high and it may not have the resourcing capacity for class actions.
- 4.23 Jennifer Braithwaite supported class actions in the District Court. She considered this could benefit children and young people, whose disputes are more likely to involve smaller sums of money. She gave the example of students bringing a class action against a university or training establishment, involving individual fees of under \$5,000. In addition, LPF Group was generally supportive of class actions being brought in other courts, where appropriate.

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<sup>15</sup> Barry Allan, Jennifer Braithwaite, BusinessNZ, Nikki Chamberlain, Chapman Tripp, Insurance Council, LPF Group, NZLS, Omni Bridgeway, Simpson Grierson, Nicole Smith, Tom Weston QC and Woodsford Litigation Funding. In addition, the submission from Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner discussed the application of class action rules to tribunals.

<sup>16</sup> Insurance Council, Omni Bridgeway, Simpson Grierson and Tom Weston QC. In addition, NZLS said there were advantages to Te Kōti Matua | High Court having sole jurisdiction over class actions and said the default position should be that the High Court has jurisdiction over class action proceedings.

<sup>17</sup> Nikki Chamberlain, Chapman Tripp, Insurance Council, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

## Employment Court

- 4.24 Five submitters were opposed to having class actions in the Employment Court.<sup>18</sup> Chapman Tripp said large collective claims are likely to be brought by a union and otherwise the representative actions procedure is sufficient. Simpson Grierson said there were likely to be relatively few employment class actions, so developing a specific framework or rules is not warranted.
- 4.25 Five submitters were more supportive of allowing class actions in the Employment Court.<sup>19</sup> Associate Professor Barry Allan (Te Whare Wānanga o Otāgo | University of Otago) said there was a high likelihood of unmet need, given only a small proportion of Employment Court litigation was brought with union support. He suggested employment class actions could be useful in cases involving mass redundancies, workplace related harm to mental health and health and safety issues where the desired outcome is a change in employer behaviour. Jennifer Braithwaite said employment class actions could benefit young people, who are often vulnerable employees and may not have the confidence to challenge an employer. She noted many young people are employees of large retail and hospitality companies, and it was easy to see the potential for an employer's actions to affect a large group. Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland) said specific consideration of the use of class actions in the Employment Court was needed, including the interaction with relevant provisions in the Employment Relations Act 2000.
- 4.26 Some participants at our consultation workshops considered it could be beneficial to have class actions in the Employment Court, because an employment issue can sometimes affect many employees. Other participants queried whether it would be difficult for a court to manage class actions without the use of the inherent jurisdiction.

## Environment Court

- 4.27 Four submitters said class actions should not be available in the Environment Court.<sup>20</sup> Simpson Grierson noted that the Environment Court was mostly a *de novo* decision maker on resource consent and district appeals, as well as having an enforcement function, and it did not grant compensatory relief. It also noted group proceedings were possible under the Resource Management Act (RMA) because incorporated and unincorporated bodies (such as residents' associations) could initiate and participate in proceedings. It considered current law and practice adequately provided for 'class actions' in the Environment Court, although it noted the current RMA reform process that was underway. Nikki Chamberlain thought class actions should be available in the Environment Court.

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<sup>18</sup> Chapman Tripp, Insurance Council, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

<sup>19</sup> Jennifer Braithwaite, BusinessNZ and Nikki Chamberlain all expressly supported having class actions in the Employment Court. Barry Allan's submission discussed situations where employment class actions could be used, though he did not expressly submit that class actions should apply in the Employment Court. LPF Group was generally supportive of class actions being available in other courts, but did not discuss the Employment Court specifically.

<sup>20</sup> Insurance Council, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

## Māori Land Court

- 4.28 Six submitters said a class actions regime should not be available in the Māori Land Court.<sup>21</sup> Some of these submitters said it was unnecessary to change existing practice for determining representation in the Māori Land Court.

## Tribunals

- 4.29 Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner (OPC) suggested a class actions regime could expressly include a mechanism for specialist jurisdictions, such as Te Taraipiunara Mana Tangata | Human Rights Review Tribunal, to adopt certain aspects to supplement its own procedures as necessary and appropriate. If there was a statutory class actions regime with access to justice as a guiding principle, the OPC was likely to draw on it when determining the best way to proceed with a representative privacy complaint. The OPC said a statutory class actions regime could provide a useful benchmark by which the Privacy Act 2020 representative complaints regime could be assessed and further developed, if necessary.
- 4.30 Nikki Chamberlain noted the Privacy Act allows an “aggrieved individual” to bring a proceeding on behalf of a class in the Human Rights Review Tribunal. She said the procedure used in the Tribunal should be consistent with the class actions regime.

## Recommendations

**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.

- 4.31 We consider the High Court will generally be the appropriate court to hear class actions. To commence a claim as a class action, the High Court must have jurisdiction over that type of claim. A class action is a procedural device and should only enable claims that could otherwise be brought as individual proceedings in the High Court. We recommend the Class Actions Act specify that class actions may be commenced in the High Court, with respect to claims where the High Court has existing jurisdiction.<sup>22</sup>

## District Court

- 4.32 We do not recommend class actions be available in the District Court and note there was little support from submitters for this. Given the costs of bringing a class action and the District Court’s current jurisdictional limit of \$350,000, we think class actions are unlikely to be economic in this jurisdiction. While a class action in the District Court could simply

<sup>21</sup> Nikki Chamberlain, Chapman Tripp, Insurance Council, Omni Bridgeway, Simpson Grierson and Tom Weston QC. In addition, NZLS’ submission indicates that it may be unnecessary to have class actions in the Māori Land Court.

<sup>22</sup> Draft legislation, cl 1 (heading) and cl 1(4).



seek a declaration of liability, followed by individual claims for damages (each under \$350,000), we think this approach is likely to be time-consuming and may not be an efficient way of managing multiple claims. Later in this report, we recommend mechanisms to avoid a court having to determine issues on an individual basis, including the ability to order aggregate monetary relief.<sup>23</sup>

- 4.33 Class actions are generally complex and time-intensive. We are concerned about the impact class action litigation would have on the District Court, which primarily hears criminal cases.<sup>24</sup> If class actions were allowed in the District Court, there might also be disagreement about whether a case should be removed to the High Court.<sup>25</sup>
- 4.34 Litigants will still have the option of bringing a claim as a representative action in the District Court under DCR 4.24 and we do not recommend this rule should be repealed. In Chapter 2, we recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee consider amending DCR 4.24 to clarify that it should not be used where a class action would be more appropriate.

### Employment Court

- 4.35 We consider there is merit in enabling class actions for employment claims, given that an employment issue could affect many individuals working for the same employer. Allowing employment class actions could improve access to justice, particularly where there is a significant power imbalance between employee and employer.<sup>26</sup> Employment class actions are common in other jurisdictions. There are a number of examples of employment cases being taken on a representative basis in Aotearoa New Zealand.<sup>27</sup>
- 4.36 We think further consideration is needed of how class actions could work in the employment jurisdiction. The policy behind the Employment Relations Act is to favour quick and informal dispute resolution, with a focus on mediation.<sup>28</sup> The Employment Relations Authority is the first instance decision maker in many cases.<sup>29</sup> It is an investigative body with extensive control over its own procedures, and many of the detailed rules we propose for class actions would be inappropriate.<sup>30</sup> While class actions rules might be more appropriate for the Employment Court, this sits in an appellate role for many employment disputes and is only a first instance decision maker in some

<sup>23</sup> We discuss ways of determining individual issues in Chapter 8 and discuss aggregate monetary relief in Chapter 10.

<sup>24</sup> We note the Rules Committee has made proposals for improving civil justice in the District Court: see Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at [52]–[63]. The paper comments on the under-utilisation of the District Court for civil disputes compared to the Disputes Tribunal and High Court, and proposes reforms to strengthen the institutional competency of the District Court's civil jurisdiction.

<sup>25</sup> District Court Act 2016, ss 86–89.

<sup>26</sup> The object of the Employment Relations Act 2000 acknowledges that there is an inherent inequality of power in employment relationships: s 3.

<sup>27</sup> See Issues Paper at [3.28].

<sup>28</sup> The object of the Act refers to promoting mediation as the primary problem-solving mechanism (other than for enforcing employment standards) and reducing the need for judicial intervention: Employment Relations Act 2000, s 3(a).

<sup>29</sup> Employment Relations Act 2000, s 161.

<sup>30</sup> Employment Relations Act 2000, ss 157(1) and 160. See also ss 179(5)(a)–(b) and 184, which restrict the ability to review procedural decisions of the Authority.

situations.<sup>31</sup> It would be a significant policy shift to require all class actions to start in the Employment Court. The further policy consideration required on this issue is outside the scope of our project. We therefore recommend the Government should consider whether class actions rules should be developed for the employment jurisdiction.

### ***Environment Court and Māori Land Court***

- 4.37 We do not think it is desirable for class actions rules to apply to the Environment Court or Māori Land Court. We think this would disrupt existing practices for bringing group litigation. We are unaware of any demand or support for class actions in those jurisdictions.

## **COMMENCEMENT REQUIREMENTS**

- 4.38 In the Issues Paper we discussed who should be allowed to commence a class action. This included whether a representative plaintiff must be a class member and whether government entities could bring class actions.<sup>32</sup>
- 4.39 The Supplementary Issues Paper discussed the submissions we had received on these issues and set out draft commencement provisions.<sup>33</sup> Key features of our proposed commencement provisions were as follows:
- (a) There must be two or more class members represented by a representative plaintiff.
  - (b) Each class member must have their own claim, reflecting the fact that a class action is a form of aggregate litigation. Each claim must have a common issue, but class members do not need to have the same cause of action.
  - (c) The representative plaintiff should ordinarily be a class member.
  - (d) A state entity can be representative plaintiff where it is a class member or where another statute provides it with the ability to bring a proceeding on behalf of two or more people.
  - (e) There must be at least one representative plaintiff with a claim against each defendant. It is not necessary for each class member or representative plaintiff to have a claim against every defendant.

## **Results of consultation**

- 4.40 We asked submitters whether they agreed with our draft commencement provisions and if not, how they should be amended.

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<sup>31</sup> Employment Relations Act 2000, s 187.

<sup>32</sup> See Chapter 11 of the Issues Paper.

<sup>33</sup> Supplementary Issues Paper at [1.1]–[1.25].

- 4.41 We received 15 submissions on this question.<sup>34</sup> Eleven submitters indicated broad agreement with the provisions as drafted or suggested only limited amendments.<sup>35</sup> The other four submitters commented on more limited aspects of the commencement provisions.<sup>36</sup> Most of the participants at our consultation workshops indicated general agreement with our commencement provisions.
- 4.42 We discuss the feedback we received on specific issues below.

### *Claims with a common issue*

- 4.43 Four submitters commented on the requirements that each class member must have their own claim and that the claims must have a common issue.<sup>37</sup> There were two suggestions for change. The International Bar Association (IBA) Antitrust Committee suggested a more detailed definition of “common issue,” such as “the same, similar or related issues of fact and law”.<sup>38</sup> Chapman Tripp said there may be cases involving claimants whose claims are sufficiently related on factual or legal issues to justify one class action, even if there is not strictly a common issue across sub-classes.

### *Minimum class size*

- 4.44 Six submitters commented on the requirement to have two or more class members (in addition to the representative plaintiff).<sup>39</sup> Three submitters agreed with our proposed minimum class size, with one (Gilbert Walker) noting that the wider group interest in the proceeding should still be considered at certification.<sup>40</sup> Two submitters thought the minimum class size was too small. Johnson & Johnson said three people was not a class in the ordinary sense and it was difficult to see why the benefits (and detriments) of a class actions regime should be afforded to such a small group of claimants. Maurice Blackburn/Claims Funding Australia thought setting a minimum class size of three could create inefficiencies and practical problems. It suggested a minimum of five persons.
- 4.45 Consultation workshop participants did not express any real concern about the minimum class size, with some noting that commercial concerns would dictate what class size would be viable.

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<sup>34</sup> Bell Gully, Chapman Tripp, Michael Duffy, Te Mana Tatai Hokohoko | Financial Markets Authority (FMA), Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>35</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>36</sup> Michael Duffy, FMA, IBA Antitrust Committee and Vince Morabito.

<sup>37</sup> Chapman Tripp, Michael Duffy, IBA Antitrust Committee and Omni Bridgeway.

<sup>38</sup> This suggested definition of common issue comes from The Competition Appeal Tribunal Rules 2015 (UK).

<sup>39</sup> Gilbert Walker, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson.

<sup>40</sup> Gilbert Walker, Omni Bridgeway and Simpson Grierson.

### *Representative plaintiff must be a class member*

- 4.46 Five submitters addressed this issue.<sup>41</sup> Of these, four agreed that the representative plaintiff should be a class member.<sup>42</sup> The IBA Antitrust Committee said without this requirement, there was a risk of speculative claims being brought by special purpose vehicles, litigation funders or representatives who may not have an incentive to act in the best interests of the class.
- 4.47 Professor Vince Morabito (Monash University) considered ideological plaintiffs should be allowed and disagreed that requiring a representative plaintiff to have a claim against the defendant would protect class member interests. He noted that in Australia, a class action proceeding can be brought where a person has legislative standing, even where they have no special interest in the litigation in question and their rights have not been affected by the challenged conduct. He noted this had enabled several worthy class actions to be filed. He commented that if none of the victims of illegal conduct were willing to assume the onerous role of representative plaintiff, no class action would be brought. This was most likely to occur where potential class members were disadvantaged and vulnerable.
- 4.48 Some consultation workshop participants suggested that ideological plaintiffs such as consumer organisations or trade unions should be able to bring class actions.

### *State entity as representative plaintiff*

- 4.49 Three submitters addressed this issue.<sup>43</sup> Maurice Blackburn/Claims Funding Australia and Simpson Grierson agreed with our proposal for allowing state entities to fulfil the role of representative plaintiff. However, Simpson Grierson thought caution was needed with respect to any suggestion that the state entity would be responsible for funding the class action or for any adverse costs award.
- 4.50 Te Mana Tatai Hokohoko | Financial Markets Authority (FMA) raised the following issues that could result from allowing the FMA to commence or take over a class action as representative plaintiff:
- (a) It would not realise benefits of a class action such as sharing legal costs, resources and adverse costs risk as the FMA would likely carry these costs and risks rather than obtaining litigation funding or sharing costs with class members.
  - (b) Running a class action would be a complicated way for the FMA to achieve compensation for affected parties and there are simpler ways for it to do this.
  - (c) Bringing a claim as a class action would likely mean the FMA would have less freedom in how it runs the claim because of the obligations of a representative plaintiff.
  - (d) Allowing the FMA to bring class actions could signal a willingness for government to advance and fund claims on behalf of private interests, which could lead to claimants failing to look after their own interests. There could be pressure on the FMA to step in where class actions have become economically unviable.

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<sup>41</sup> Michael Duffy, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Vince Morabito and Simpson Grierson.

<sup>42</sup> Michael Duffy, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>43</sup> FMA, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

- 4.51 The FMA submitted it should not be included by default in a class actions framework and that detailed and targeted policy analysis was needed. It suggested the proposed class action framework could, for the time being, make it clear that the FMA is not able to commence or take over class actions beyond what is specified in the Financial Markets Authority Act 2011 and financial markets legislation.
- 4.52 At the consultation workshops, it was noted that regulators have finite resources, and it may be an area that is best left to private claims. If regulators did have a power to bring a class action, it was unlikely to be exercised very often.

### *A representative plaintiff must have a claim against each defendant*

- 4.53 Four submitters commented on this issue.<sup>44</sup> They all agreed that for each defendant there should be at least one representative plaintiff with a claim against the defendant. Maurice Blackburn/Claims Funding Australia thought this approach would give the parties certainty, while allowing for nuances in different claims. The Insurance Council thought it would give the defendant greater certainty about the case it was facing. It also agreed it would be overly burdensome to require every class member or representative plaintiff to have a claim against every defendant.

## Recommendations

**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.

### *Documents to be filed when commencing a class action*

- 4.54 As with other civil proceedings, a class action proceeding will be commenced by filing a statement of claim and notice of proceeding.<sup>45</sup> The statement of claim should meet the

<sup>44</sup> Michael Duffy, Gilbert Walker, Insurance Council and Maurice Blackburn/Claims Funding Australia.

<sup>45</sup> High Court Rules 2016, rr 5.22 and 5.25.

general requirements of the High Court Rules (HCR), as well as outlining how it meets the commencement requirements we recommend in this section.<sup>46</sup>

- 4.55 In other chapters of this report, we recommend a representative plaintiff should also file the following documents when commencing a class action:
- (a) An interlocutory application for an order certifying the proceeding as a class action and appointing one or more representative plaintiff, with a supporting affidavit.<sup>47</sup>
  - (b) A ‘Summary of Class Action’ form, to enable other lawyers and funders to know whether another proceeding would be considered a concurrent class action.<sup>48</sup>

### ***Two or more class members***

- 4.56 We recommend a class action may be commenced by a proposed representative plaintiff on behalf of a class comprising at least two other class members.<sup>49</sup> Only two submitters disagreed with this aspect of the proposal, on the basis that it would be inefficient to have a class action with only three claimants. We agree that having a class action with a very small number of class members is unlikely to be consistent with the objectives of improving access to justice and managing multiple claims in an efficient way. However, we consider it is better for the class size to be considered as part of the certification test, rather than specifying an arbitrary number as part of commencement requirements. Under the certification test we recommend, when the court considers whether a class action is an appropriate procedure for the efficient resolution of class member claims, it must consider the potential size of the class.<sup>50</sup> We think this approach will allow the court to give more nuanced and case-specific consideration to class size and is preferable to specifying a particular number. We discuss the certification test in Chapter 6.

### ***Each class member must have a claim with a common issue***

- 4.57 A class action is a form of aggregate litigation, which can provide an efficient way for a court to consider multiple claims at the same time. Therefore, each class member must have an individual claim that will be determined by the class action. We do not consider it is necessary to use the class action procedure for litigation involving a single claim that will affect a large group.
- 4.58 We consider that each class member’s claim should raise a common issue of fact or law as this is the thread that ties all the class member claims together.<sup>51</sup> Requiring a common issue means that a single judgment will determine an issue for all class members and prevents disparate claims from being grouped together. The feedback we received on sub-classes indicated there was little support for class actions that did not have a common issue applying to each claim.<sup>52</sup>

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<sup>46</sup> The requirements for statements of claim are set out in High Court Rules 2016, rr 5.25–5.35.

<sup>47</sup> We discuss certification in Chapter 6.

<sup>48</sup> We discuss concurrent class actions in Chapter 5.

<sup>49</sup> Draft legislation, cl 1(5).

<sup>50</sup> Draft legislation, cl 4(4)(a).

<sup>51</sup> Draft legislation, cl 1(1), 1(5).

<sup>52</sup> We discuss sub-classes in Chapter 8.

- 4.59 We do not consider that class members must 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.<sup>53</sup> However, if the inclusion of multiple disparate causes of action would make a class action unwieldy and difficult to run, the court might decline certification on the basis that a class action would not be an appropriate procedure for the efficient resolution of the claims of class members.
- 4.60 We note that a class member's claim may include multiple causes of action. While the common issue must apply to each class member's claim, it does not necessarily have to apply to each cause of action.

### ***Representative plaintiff must be a class member***

- 4.61 We recommend a representative plaintiff must be a class member (subject to an exception for state entities, which we discuss below).<sup>54</sup> Allowing non-class member representative plaintiffs such as advocacy organisations 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. Our consultation did not indicate significant support for this wider approach. We note almost all representative actions under HCR 4.24 have been brought by representative plaintiffs who are class members.<sup>55</sup> None of the submissions we received on difficulties with using HCR 4.24 for group litigation identified that needing to find a class member plaintiff was preventing claims from being brought.
- 4.62 We think 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 who is motivated by a desire to resolve their legal claim. A class member representative plaintiff will also have similar motivations to class members, which will be beneficial at critical points such as settlement. A non-class member representative plaintiff might have a broader objective such as clarifying the law and could be less willing to settle than class members.
- 4.63 Having a class member representative plaintiff can provide some clarity and specificity to the defendant about the case it is facing. Where the claim is brought by a class member, their personal claim can be detailed in the statement of claim and determined at the stage one hearing.<sup>56</sup> It also ensures the defendant will be entitled to discovery from at least one class member.
- 4.64 We considered the approach used in some Canadian provinces, where a non-class member can be the representative plaintiff if this is necessary to avoid a substantial

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<sup>53</sup> Supplementary Issues Paper at [1.5].

<sup>54</sup> Draft legislation, cl 1(5).

<sup>55</sup> As noted in the Issues Paper, there are obiter comments about whether this is a requirement of HCR 4.24 in *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [651] and [657]. We are also aware of a representative action where two incorporated bodies were appointed to represent a number of age-related residential care service providers: *Healthcare Providers New Zealand Inc v Northland District Health Board* HC Wellington CIV-485-1814, 7 December 2007 at [27]–[28].

<sup>56</sup> As we explain in Chapter 8, a common method of managing common and individual issues in class actions is to have staged hearings (also known as split trials). The 'stage one' hearing will typically determine common issues (and sometimes the entirety of the representative plaintiff's claim) and the 'stage two' hearing will determine individual issues.



injustice to the class.<sup>57</sup> In Canada, such cases are rare.<sup>58</sup> While this approach would provide courts with flexibility to consider whether a non-class member representative plaintiff is necessary in the circumstances, it would also introduce uncertainty as to when this would be allowed. If a similar threshold such as “substantial injustice” was adopted, it is likely that few cases would qualify.<sup>59</sup>

- 4.65 We acknowledge the concern that it may be difficult to find an appropriate representative plaintiff in some cases. In Chapter 3, we discussed measures that may mitigate the burden on a representative plaintiff. In a case where all class members are children or persons considered to lack sufficient decision-making capacity with respect to the decisions required of a representative plaintiff, it may be appropriate to appoint a litigation guardian to act for the proposed representative plaintiff.<sup>60</sup> We are aware of Australian class actions where a representative plaintiff has commenced a claim through their litigation guardian.<sup>61</sup>

### **State entity as representative plaintiff**

- 4.66 Our draft provision on commencement of a class action allowed a state entity with the power under another Act to bring proceedings on behalf of two or more persons could commence a class action.<sup>62</sup> It also provided that commencing a proceeding would be subject to any limits or requirements in the empowering Act.<sup>63</sup> This would include, for example, the public interest criteria that the FMA must consider before exercising a person's right of action.<sup>64</sup>
- 4.67 We have reconsidered our proposal in light of the feedback we have received, particularly that provided by the FMA. The Supplementary Issues Paper had identified the FMA as an agency that would be able to use our proposed provision to bring a class action if it considered this was appropriate.

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<sup>57</sup> See Issues Paper at [11.31].

<sup>58</sup> For example, our research showed that the British Columbia provision has only been used to appoint a non-class member representative plaintiff in one case: see *Dominguez v Northland Properties Corp* 2012 BCSC 539, applying Class Proceedings Act RSBC 1996 c 50, s 2(4).

<sup>59</sup> In Canada, the threshold for allowing a non-class member representative plaintiff is high. See *Cantlie v Canadian Heating Products Inc* 2017 BCSC 286 at [364] where the court commented that while s 2(4) had received little judicial consideration, it was clear that the burden was high. See also *L(T) v Alberta (Director of Child Welfare)* 2009 ABQB 96 at [15]–[16] where the court suggested that “compelling evidence” would be required and said it was not convinced that counsel had made an “exhaustive search of its records” to identify an appropriate representative plaintiff from the class.

<sup>60</sup> See High Court Rules 2016, rr 4.29–4.31. We discuss the issue of class members are under 18 years or who are considered to lack sufficient decision-making capacity with respect to a step in a class action in Chapter 7.

<sup>61</sup> See *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523. The representative plaintiff and class members were workers with learning/intellectual disabilities who had been employed in an Australian Disability Enterprise and alleged discrimination with respect to their wages. The representative plaintiff commenced the proceeding through a litigation guardian, his mother. See also *Nojin (on behalf of Nojin) v Commonwealth* [2011] FCA 1066. This case also alleged discrimination with respect to wages paid by Australian Disability Enterprises to persons with learning/intellectual disabilities. The case was brought by Elizabeth Nojin on behalf of her son Michael. However, the court commented that it would have been more appropriate to name Michael Nojin as the applicant with his mother named as his “next friend” or appointed as his tutor for the purposes of the proceeding.

<sup>62</sup> Draft legislation, cl 1(3) (September 2021 version).

<sup>63</sup> Draft legislation, cl 1(4) (September 2021 version).

<sup>64</sup> Supplementary Issues Paper at [1.20].



- 4.68 We remain of the view that allowing a state entity to bring a class action is an appropriate exception to the rule that a representative plaintiff must be a class member. Some regulators have existing powers to seek compensation for affected individuals and allowing a regulator to bring a class action in these circumstances would simply provide another procedural tool rather than expanding their mandate. Having a state entity as a representative plaintiff might allow class actions to go ahead where a litigation funder would not consider them to be economically viable. Many submitters on the Issues Paper were comfortable with state entities fulfilling the role of representative plaintiff, although some stressed this should not be obligatory.<sup>65</sup>
- 4.69 We do, however, recommend some changes to the approach proposed in the Supplementary Issues Paper. On reflection, we consider that it was too general and could cause confusion about the interaction between the empowering Act and the requirements of the Class Actions Act. In some cases, it could be unclear whether a provision enables a state entity to bring proceedings on behalf of two or more persons. An example is section 43 of the Fair Trading Act 1993, which enables any person to seek compensation orders on behalf of others but does not specifically refer to the person acting on a representative basis.<sup>66</sup>
- 4.70 There could also be uncertainty as to whether procedures in the Class Actions Act or the empowering Act would take precedence. For example, the Financial Markets Authority Act 2011 provides that where the FMA takes over a proceeding, it cannot be settled, compromised or discontinued without court approval.<sup>67</sup> In the only case where this has occurred, the court considered the proposed settlement against the FMA's public function and its objective of promoting and facilitating the development of fair, efficient and transparent financial markets.<sup>68</sup> There could be uncertainty as to how these considerations would interact with the settlement test in the Class Actions Act we recommend in Chapter 11.
- 4.71 Therefore, we recommend that a state entity should be able to bring a class action as representative plaintiff where it is a class member or where another Act authorises it to bring a class action.<sup>69</sup> This will ensure there is specific policy consideration of whether it is necessary and appropriate to allow a state entity to bring a class action under a particular Act. It will also enable clarification of how any procedural requirements of that Act will interact with requirements of the Class Actions Act.

### ***Class actions against multiple defendants***

- 4.72 We consider the approach to class actions involving multiple defendants outlined in the Supplementary Issues Paper is appropriate. Submitters did not raise any concerns with our proposal.

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<sup>65</sup> We discuss the submissions we received on when a government entity should be able to fulfil the role of the representative plaintiff in the Supplementary Issues Paper at [1.16]–[1.17].

<sup>66</sup> This provision has been relied upon by the Commerce Commission to bring proceedings.

<sup>67</sup> Financial Markets Authority Act 2011, s 41.

<sup>68</sup> *Financial Markets Authority v Prince & Partners Trustee Company Ltd* [2017] NZHC 2059.

<sup>69</sup> Draft legislation, cl 1(3).

- 4.73 Where a claim is brought against multiple defendants, we recommend that for each defendant there must be a representative plaintiff with a claim against them.<sup>70</sup> This will help to provide some clarity to a defendant about the claim against them and will ensure a defendant is entitled to obtain discovery from at least one class member.<sup>71</sup> We also think 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.
- 4.74 It should not be necessary for class members or representative plaintiffs to have a claim against every defendant.<sup>72</sup> We think that would be too restrictive and could prevent a class action in situations where it might be an efficient way of dealing with multiple claims. However, there should be at least one representative plaintiff and two class members with a claim against each defendant.<sup>73</sup> There should also be a common issue that applies to all class member claims, even if there are different defendants.

## LIMITATION PERIODS

- 4.75 In ordinary litigation, a plaintiff must commence a proceeding before any relevant limitation period expires. In the Supplementary Issues Paper, we said a class actions regime should provide some clarity on how limitation periods will apply to class members, who do not technically commence a proceeding themselves.<sup>74</sup>
- 4.76 We outlined two possible approaches. One option was 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.<sup>75</sup> A narrower approach would only apply the suspension of limitation periods to certified class actions. This would mean if the class action is not certified, none of the proposed class members would have the benefit of suspension of limitation periods.<sup>76</sup>
- 4.77 Our preference was for the suspension of limitation periods to apply to all class actions that are commenced, not just those that are ultimately certified. We said the latter approach would cause considerable uncertainty and could lead to potential class members filing their own individual claims as a precaution. There could be a considerable delay between a proceeding being commenced and a court releasing its decision on certification, and a class member will likely have little control over these timeframes.<sup>77</sup>
- 4.78 We also said a class actions regime should specify when a limitation period would start running again for individual class members. We suggested a limitation period should start running again when any of the following applies:<sup>78</sup>

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<sup>70</sup> Draft legislation, cl 2(1)(a).

<sup>71</sup> While we recommend a specific provision on class member discovery in Chapter 8, this would require an application by a defendant and would not be available as of right.

<sup>72</sup> Draft legislation, cl 2(1)(b).

<sup>73</sup> Draft legislation, cl 2(1)(a).

<sup>74</sup> Supplementary Issues Paper at [1.112].

<sup>75</sup> Supplementary Issues Paper at [1.117].

<sup>76</sup> Supplementary Issues Paper at [1.118].

<sup>77</sup> Supplementary Issues Paper at [1.119].

<sup>78</sup> Supplementary Issues Paper at [1.122].

- (a) The court declines to certify a class action.
  - (b) The court makes an order that has the effect of removing or excluding a class member's claim from the proceeding.
  - (c) A class member decides not to opt into an opt-in class action.
  - (d) A class member decides to opt out of an opt-out class action.
  - (e) The proceeding otherwise ends without an adjudication on the merits, for example if the plaintiff discontinues the claim.
- 4.79 If there is a right of appeal from any of these circumstances, we said the suspension period should continue to run until the appeal period has expired or the appeal has been finally disposed of.

### Results of consultation

- 4.80 We asked submitters whether they agreed that the limitation periods applying to all proposed class members should be suspended when a class action is commenced. We also asked which events should start the limitation period applying to a class member running again. We received 12 submissions that addressed limitation periods.<sup>79</sup>

### *When should limitation periods be suspended?*

- 4.81 Nine submitters agreed with our proposal that limitation periods applying to proposed class members should be suspended when a class action is commenced, even if the class action is not ultimately certified.<sup>80</sup> The Insurance Council commented that this approach would provide certainty for the parties and was the fairest approach for class members, particularly if the class action was not certified. Shine Lawyers said this approach would be particularly relevant where there were competing class actions that might take months to resolve.
- 4.82 Two submitters thought a narrower approach to suspension of limitation periods was desirable. Bell Gully submitted that limitation periods should only suspend for class members if the class action is certified. It said the potential uncertainty for class members needs to be weighed against the uncertainty for defendants who have no control over the timing and merit of any class action.
- 4.83 Chapman Tripp considered it would be unfair to defendants to allow limitation periods to be suspended in all cases and not just those ultimately certified, and that this would undermine the policy of the Limitation Act 2010. Nonetheless, it acknowledged that it could be inefficient if class members filed their own claims as a precaution in case the class action was not certified. It said suspension of limitation periods should only apply to people who were within the potential class when the class action was commenced but ultimately were not class members, either because the case was not certified or they opted out or did not opt in. Chapman Tripp considered that suspension of limitation

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<sup>79</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Tom Weston QC.

<sup>80</sup> Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Tom Weston QC.

periods was not required beyond the point where it had become clear that the proceedings had been properly brought and on whose behalf.

### *When should limitation periods start running again?*

- 4.84 Seven submitters agreed with our proposed list of circumstances that should start limitation periods running again.<sup>81</sup> Two submitters broadly agreed with the list but disagreed that limitation periods should start running again after discontinuance. Chapman Tripp said if a class action is brought within a limitation period, class members should be bound by the result of those proceedings, including any decision of the representative plaintiff to discontinue the case. Simpson Grierson said limitation periods should not begin running again if the representative plaintiff discontinues the claim due to a settlement that compromises the claims of the representative plaintiff and class members.
- 4.85 Bell Gully said that if limitation periods are only suspended where a class action is certified, limitation periods would only need to recommence if a class member opted out (or did not opt in) or the claim is discontinued without a settlement. Maurice Blackburn/Claims Funding Australia disagreed with the approach of having a specific list and preferred the more general Australian approach to enable flexibility.<sup>82</sup>

### *Other limitation issues*

- 4.86 Tom Weston QC raised the issue of how limitation periods would work with competing class actions. He asked whether the first class action filed would suspend the limitation period for everyone, including those covered by competing class actions. Similarly, Maurice Blackburn/Claims Funding Australia said it was unclear how the limitation would interact with other procedural steps such as certification. For example, if the court declined to certify one class action but other competing claims had been stayed pending certification, it asked whether the limitation period on the competing claims would begin to run. It also queried how limitation periods would interact with the proposal that additional class members could opt into a proceeding at settlement. Maurice Blackburn/Claims Funding Australia also suggested that information about limitation periods should be provided in class member notices.
- 4.87 Shine Lawyers submitted that courts should have a general discretion to order that a general limitation defence does not apply, such as where the class member definition is amended at a late stage to include additional class members. It also said the parties should be entitled to agree not to raise a limitation defence.
- 4.88 Gilbert Walker commented on the impact of limitation rules on contribution claims. It said contribution claims could be lost or seriously prejudiced when many years have passed between the acts or omissions on which the claim is based and the defendant's ability to bring a contribution claim. A defendant may be unable to bring a contribution claim or put

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<sup>81</sup> Insurance Council, Johnson & Johnson, Omni Bridgeway, Shine Lawyers, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Tom Weston QC.

<sup>82</sup> As noted in the Supplementary Issues Paper, the Australian regimes take a relatively general approach, 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: Supplementary Issues Paper at [1.121].

a third party on notice until the identity of the claimants is known. In the meantime, a third party might take steps to render a contribution claim difficult or impossible.

## Recommendations

**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.

- 4.89 When a class action is commenced, we recommend that the limitation periods applying to claims of proposed class members should be suspended, regardless of whether the proceeding is ultimately certified as a class action. There was little support for only allowing the limitation periods to be suspended where the class action is ultimately certified. We think such an approach would cause considerable uncertainty and may lead to potential class members filing their own individual claims as a precaution. This does not seem consistent with the objectives of improving access to justice and managing multiple claims in an efficient way.
- 4.90 If the class definition is amended after a class action is commenced and this results in additional persons falling within the class definition, we consider that limitation periods applying to those persons should be suspended only from the date they fall within the class (and not from the date the class action was commenced). A change in the definition of the class should not be able to resurrect claims where the limitation period has already

expired. Our approach is broadly consistent with that of the Limitation Act, which requires proceedings to be filed within the applicable limitation period.

- 4.91 To provide clarity, we recommend the Class Actions Act should specify the situations which will lead to limitation periods starting running again. We think suspension of limitation periods should continue during the class action until one of the prescribed situations arises. Given that a class action can be lengthy, limitation periods might otherwise expire during a class action, leaving an individual class member with no recourse if a class action ends without an adjudication on the merits or a full and final settlement. An example might be where a litigation funder decides to withdraw from funding the class action, which leads to the representative plaintiff discontinuing the litigation.<sup>83</sup> In this situation, an individual class member might wish to bring their own individual proceeding after the class action is discontinued.
- 4.92 We think limitation periods should start running again in the following situations:
- (a) When the court dismisses an application for certification or decertifies the class action.
  - (b) When 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 or strikes out a cause of action.
  - (c) In an opt-in proceeding, where a potential class member does not opt into the class action by the date specified in the opt-in notice. Limitation would start running from the date specified in the opt-in notice as the last date for opting in.
  - (d) In an opt-out proceeding, where a potential class member opts out of the class action by the date specified in the opt-out notice. Limitation would start running from the date the class member opts out.
  - (e) When the proceeding is dismissed without an adjudication on the merits.
  - (f) When the proceeding is abandoned or discontinued.
- 4.93 This list includes the court dismissing an application for certification. This will occur where either the court finds the certification test is not met, or where the court decides that one or more concurrent class actions will not be certified. If the court decides that more than one concurrent class action will be certified and temporarily stays one of them (for example, so the other can be run as a test case), we propose that limitation periods will remain suspended.<sup>84</sup> In addition, we have added decertification of a class action to (a) to reflect our recommendation in Chapter 6 that the court should have a power to decertify a class action if it no longer meets the certification criteria.
- 4.94 In the Supplementary Issues Paper, we referred to the proceeding otherwise ending without an adjudication on the merits, instead of specifically referring to a proceeding being dismissed, abandoned or discontinued. For clarity, we have decided to spell these out.<sup>85</sup> We have not included a settlement in this list as it will result in class member claims being extinguished.<sup>86</sup> To the extent a settlement does not extinguish a claim (such as

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<sup>83</sup> In Chapter 11, we recommend a class action may only be discontinued with the leave of the court.

<sup>84</sup> We discuss concurrent class actions in Chapter 5.

<sup>85</sup> We have drawn on the approach in Class Proceedings Act SO 1992 c 6 (Ontario), s 28.

<sup>86</sup> We discuss settlement in Chapter 11.

where a settlement is only with some defendants or a sub-class), the litigation will continue and it is not necessary for limitation periods to start running again.

- 4.95 If there is the ability to appeal in any of the situations listed, the limitation period should not begin running until the expiry of any appeal period or until any appeal has been finally disposed of.

## DRAFT COMMENCEMENT PROVISIONS

- 4.96 Below we set out draft legislative provisions that could give effect to our recommendations on commencement.

### 1 Commencement of class action in High Court

- (1) A person may commence a class action proceeding against 1 or more defendants as the proposed representative plaintiff—
  - (a) on behalf of a proposed class; and
  - (b) if the claims of the members of the proposed class all raise a common issue.
- (2) A proceeding under **subsection (1)** may be commenced by more than 1 proposed representative plaintiff.
- (3) A State entity may commence a class action proceeding against 1 or more defendants as the proposed representative plaintiff on behalf of a proposed class if—
  - (a) it is itself a member of the proposed class and the claims of the members of the proposed class all raise a common issue; or
  - (b) another Act authorises it to bring a class action proceeding.
- (4) This section does not itself confer jurisdiction on the court to hear a proceeding, which must otherwise be within the jurisdiction of the court.
- (5) In this section,—
 

**class** means,—

  - (a) in the case of a proceeding brought under **subsection (1)**, at least 2 persons together with the proposed representative plaintiff, who must also be a class member;
  - (b) in the case of a proceeding brought under **subsection (3)**, at least 2 persons in addition to the State entity

**common issue** means a common issue of fact or law.

## 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 proposed representative plaintiff and at least 2 other persons with a claim against that defendant:
  - (b) if there are 2 or more proposed representative plaintiffs, it is not necessary for each of them 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 certification of class action

When a class action proceeding is commenced, it must be accompanied by an application for an order certifying the proceeding as a class action proceeding and appointing 1 or more representative plaintiffs for the proceeding.

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## CHAPTER 5

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# Concurrent class actions

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## INTRODUCTION

- 5.1 In this chapter, we discuss:
- (a) The need for a process to manage concurrent class actions.
  - (b) Defining concurrent class actions.
  - (c) The deadline for filing concurrent class actions.
  - (d) The timing of a hearing on concurrent class actions.
  - (e) The court's powers to manage concurrent class actions.
  - (f) Criteria to apply when assessing concurrent class actions.
  - (g) Defendant participation in concurrent class action hearings.
- 5.2 At the end of this chapter, we set out draft legislative provisions that could give effect to our recommendations on concurrent class actions.

## THE NEED FOR A PROCESS TO MANAGE CONCURRENT CLASS ACTIONS

- 5.3 As we observed in the Supplementary Issues Paper, having competing class actions relating to the same dispute is generally undesirable. It can cause increased costs for all parties, inefficient use of court resources, an increased burden on defendants, confusion for class members and the risk of inconsistent court rulings on common issues.<sup>1</sup> This was echoed in many of the submissions we received. A small number of submitters suggested competing class actions could have the benefits of lowering funding commissions and providing choice for class members.
- 5.4 In the Supplementary Issues Paper, we discussed the approaches taken by other jurisdictions to managing competing class actions. We suggested that Aotearoa New Zealand should have a legislative provision setting out a process to determine how competing class actions should be managed.<sup>2</sup> The experience of other jurisdictions indicated that without an express provision, the process of addressing competing class actions could be costly and drawn out. Although Aotearoa New Zealand is likely to have fewer competing class actions than other jurisdictions due to its smaller size, we remain of the view that it is desirable to have a clear process for managing any instances of

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<sup>1</sup> Supplementary Issues Paper at [2.1].

<sup>2</sup> Supplementary Issues Paper at [2.2]–[2.16].

competing class actions that occur. Many submitters were supportive of having a legislative provision to manage competing class actions.

- 5.5 Some submitters queried whether the term “competing” class actions is appropriate. For example, Maurice Blackburn/Claims Funding Australia commented that this term can be an unhelpful or pejorative description of what might be better described as overlapping class actions.
- 5.6 We accept that referring to multiple class actions as “competing” will not always be accurate or helpful. We therefore prefer the term “concurrent class actions” and this is the term we use in our draft legislative provisions and recommendations. However, this chapter uses the language of “competing class actions” when discussing what we said in the Supplementary Issues Paper and the submissions we received.

## DEFINING CONCURRENT CLASS ACTIONS

- 5.7 In the Supplementary Issues Paper, we said the class actions legislation should define what would be regarded as competing class actions and discussed two approaches.<sup>3</sup> One approach is to require some overlap in the class definition so that at least some people are members of more than one class. 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.
- 5.8 We thought a wide definition of competing class actions was appropriate as it would allow the court to respond to multiple class actions on the same issue, even if there was no overlap in class membership. We proposed the following definition of competing class actions:<sup>4</sup>

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

## Results of consultation

- 5.9 We asked submitters whether they agreed with our proposed definition of competing class actions. Fifteen submitters addressed this question.<sup>5</sup>
- 5.10 Eleven submitters agreed with our proposed definition.<sup>6</sup> Submitters commented that it would give the court sufficient flexibility to manage multiple class actions appropriately to avoid inefficiencies.
- 5.11 Four submitters preferred a different approach to the definition.<sup>7</sup> Two of these submitters queried whether it is necessary for the class actions to be against the same defendant. Dr Michael Duffy (Monash University) noted there may be cases where one class action

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<sup>3</sup> Supplementary Issues Paper at [2.18]–[2.20].

<sup>4</sup> Supplementary Issues Paper at [2.21].

<sup>5</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, IBA Antitrust Committee, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Simpson Grierson, Nicole Smith and Woodsford Litigation Funding.

<sup>6</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, LPF Group, Rhonson Salim, Simpson Grierson, Nicole Smith and Woodsford Litigation Funding. While Gilbert Walker did not comment specifically on most of the individual questions on competing class actions, it indicated general agreement with our proposals on this topic.

<sup>7</sup> Michael Duffy, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, and Omni Bridgeway.

names an auditor or financial advisor as a defendant and another class action does not. The International Bar Association (IBA) Antitrust Committee supported a wide approach, that focused on the dispute or subject matter rather than the identity of the defendants. At consultation workshops, it was noted that there could be two class actions on the same matter, where one is brought against the company and the other is brought against the directors.

- 5.12 Omni Bridgeway disagreed with our proposed definition and said it should be limited to a situation where more than one representative plaintiff seeks to represent the same class members. It said two class actions that do not have overlapping class membership are not in competition with each other. Maurice Blackburn/Claims Funding Australia preferred giving the court flexibility to determine whether class actions are competing on a case-by-case basis. It said the court might benefit from the guidance in the Federal Court of Australia Practice Note on this issue.<sup>8</sup>
- 5.13 Submitters also raised the issue of how to manage multiple cases on the same issue, where only one is a class action. Gilbert Walker referred to the recent situation of two cases against James Hardie going to trial, with one brought as a multi-party case and the other as a representative action. It noted these cases traversed the same issue in succession and involved many hearing weeks and the same experts on both sides, which was an inefficient use of court resources. At our consultation workshops, we were told that having a representative action or multi-party proceeding as well as a class action on the same issue could be burdensome for the defendant and the courts.

## Recommendation

### 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.

- 5.14 We remain of the view that a wide definition of a concurrent class action is appropriate and that it should not be limited to class actions that involve overlapping class membership. We think having more than one class action about the same matter is likely to be inefficient and burdensome for the courts and the defendant, and may cause confusion for class members, even if there is no overlap in class membership. Although a wide definition could capture class actions that are only peripherally related, this is something the court can consider when determining how the class actions should be managed.
- 5.15 At the same time, we think the definition needs to provide sufficient certainty for litigants as to what will be considered a concurrent class action. This is especially important

<sup>8</sup> The Practice Note defines a competing class action as “a class action in which the claims of group members in a class action (as that term is understood in s 33C of the Federal Court Act) are sought to be advanced in another class action (irrespective as to differences as to the time period to which the class actions relate or differences in the way any allegations of contraventions are made in each class action)”. See: *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [8.1].

because of our recommendation later in this chapter that any concurrent class action must be filed within 90 days of the first class action being commenced. For this reason, we do not think it should be simply left up to the courts to determine on a case-by-case basis whether two class actions are concurrent.

- 5.16 We have considered whether it is necessary to refer to cases being against the same defendant or whether the definition could simply refer to class actions being on the same dispute, matter or issue. However, we consider this latter approach would be too wide, could lead to preliminary disputes about whether class actions are concurrent, and may not give potential litigants enough clarity about which class actions need to be filed within the 90-day timeframe. A key reason for regulating concurrent class actions is to reduce the burden on defendants of having to respond to the same issues in multiple proceedings. The requirement for the same defendant also means that one party will be aware of the existence of concurrent class actions and can bring this to the court's attention at a case management conference.
- 5.17 We acknowledge that class actions could be brought against multiple defendants, and that two class actions might not share all the same defendants. We have therefore amended our proposed definition of concurrent class actions to require at least one common defendant. We have also amended our definition to require the first class action to be currently before the court. If a proceeding is filed, but later dismissed, abandoned or discontinued, this should not prevent further class actions from being brought on the same or similar issues against the same defendant.
- 5.18 We recommend a concurrent class action be defined as:<sup>9</sup>
- A class action proceeding that has the following in common with another class action proceeding currently before the court:
- (a) the same or substantially similar issues in dispute; and
- (b) at least one defendant.
- 5.19 Our definition only refers to class action proceedings. It will not prevent cases being brought as representative actions or as ordinary proceedings with numerous plaintiffs. We agree with submitters that having multiple proceedings that traverse the same matters is unlikely to be efficient for the court and for a defendant. However, given our recommendation in Chapter 2 that the Class Actions Act should only apply to class actions, our provision on concurrent class actions can only address the issue of multiple class actions. This reflects the principle for developing a class actions regime that there should not be adverse impacts on other forms of group litigation.
- 5.20 We therefore think it would be preferable to manage this issue through other mechanisms in the High Court Rules 2016 (HCR). The court has powers to order two or more proceedings to be consolidated, tried at the same time or tried successively, or to stay one proceeding until another is heard.<sup>10</sup> We also recommend in Chapter 2 that Te Komiti mō ngā Tikanga Kooti | Rules Committee consider amending Rule 4.24 of the High Court Rules and Rule 4.24 of the District Court Rules to provide they should not be used where a proceeding is more appropriately brought as a class action. This could include situations

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<sup>9</sup> See draft legislation, cl 5(2).

<sup>10</sup> High Court Rules 2016, r 10.12. We discuss these powers in the Issues Paper at [3.61]–[3.63].

where a plaintiff seeks to bring a representative action as a means of avoiding the concurrent class action rules.

## DEADLINE FOR FILING CONCURRENT CLASS ACTIONS

- 5.21 In the Supplementary Issues Paper, we discussed whether a deadline for filing any competing class action was desirable.<sup>11</sup> The Australian Law Reform Commission (ALRC) favoured an approach where any competing class action would need to be filed within a defined period, such as 90 days from when the first class action is commenced. It preferred this being in a Practice Note so the court would have some flexibility as to the timeframe.<sup>12</sup> In Ontario, any competing class action must be filed within 60 days of the initial class action being filed (or with the leave of the court).<sup>13</sup>
- 5.22 We said it would be desirable to have a time limit for filing any competing class actions, otherwise new class actions could be filed after the first proceeding had been certified.<sup>14</sup> We proposed that any competing class actions should be filed within 90 days of the first class action being commenced. After that date, we proposed that any competing class action could only be commenced with the leave of the court. We suggested that whether the parties are aware of any competing class actions could be a matter discussed at the initial case management conference. We anticipated this conference would occur prior to the certification hearing.
- 5.23 If there was a time limit for filing a class action, we said it was important that other lawyers and funders were aware that the first class action had been filed.<sup>15</sup> We suggested there could be a publicly available list of current class actions on Ngā Kōti o Aotearoa | Courts of New Zealand website, with an ability to sign up for email notifications of any new class actions. It might also be necessary to make the statement of claim publicly available.

## Results of consultation

- 5.24 We asked submitters whether a competing class action should be filed within 90 days of the first class action being filed (or with the leave of the court) and how information about new class actions could be made available to lawyers and funders. We received 17 submissions on this question.<sup>16</sup>

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<sup>11</sup> Supplementary Issues Paper at [2.24]–[2.28].

<sup>12</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [4.98]–[4.101].

<sup>13</sup> Class Proceedings Act SO 1992 c 6 (Ontario), ss 13.1(3) and (8).

<sup>14</sup> Supplementary Issues Paper at [2.26]–[2.28].

<sup>15</sup> Supplementary Issues Paper at [2.27].

<sup>16</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson and Nicole Smith.

### *Timeframe for filing competing class actions*

- 5.25 Fifteen submitters agreed that competing class actions should be filed within 90 days (or with leave of the court).<sup>17</sup> Reasons given by submitters included:
- (a) There would be ongoing uncertainty unless there was a time limit.
  - (b) A 90-day period would allow sufficient flexibility to ensure the process is fair for all parties.
  - (c) In most cases, it should allow sufficient time for actions to be investigated properly and also provide certainty for the participants and the court at an early stage of the proceedings.
  - (d) Having a timeframe is consistent with ensuring fairness to defendants and the efficient case management of proceedings.
  - (e) It will avoid subsequent class actions after a proceeding has been certified, resulting in multiple class actions proceeding by default.
  - (f) It aligns with the objective of increasing efficiency and reducing the burden on the court.
  - (g) If there are going to be competing class actions, it will be important to promptly deal with the challenges they present.
- 5.26 Maurice Blackburn/Claims Funding Australia preferred a more flexible approach than a 90-day time period, with the question left to the court to determine. It said that, if the court has a range of powers, which might include allowing two proceedings to run in parallel, there is no reason why a potentially competing claim must be filed within 90 days. If a statutory timeframe is necessary, it suggested six months would be appropriate. It said this would be long enough to avoid a de facto ‘first to file’ rule, but not so long that proceedings are unduly delayed.
- 5.27 Michael Duffy suggested the 90-day period may be too short and should perhaps be extended. The IBA Antitrust Committee said the timeframe needed to be long enough to give litigants the opportunity to commence proceedings without causing undue unfairness or allowing court processes to substantively run. It said 90 days seemed appropriate, as did 120 days.
- 5.28 Bell Gully and LPF Group suggested the 90-day period could begin once there is public notice of the first class action.<sup>18</sup> Michael Duffy suggested any time limit should not start until after the notice of commencement and right to opt-out has gone to class members.
- 5.29 Chapman Tripp said leave should only be granted to bring a competing class action outside of the 90-day period in limited circumstances. The IBA Antitrust Committee said leave should only be granted in extenuating circumstances to ensure certainty and suggested a rebuttable presumption that leave would not be granted.

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<sup>17</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, MinterEllisonRuddWatts (it said 90 *calendar* days), Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>18</sup> Bell Gully said the court registry should publish details of a class action on ngā Kōti o Aotearoa | Courts of New Zealand website as soon as practicable after it is filed. The 90-day period should start following publication. LPF Group said it could start once the statement of claim becomes publicly available.

### Publicising new class actions

- 5.30 Many submitters supported the use of a register of class actions on a platform such as the Courts of New Zealand website, with the ability to sign up for email notifications of new class actions.<sup>19</sup> Submitters noted that class actions typically attract substantial media attention, which will alert lawyers and funders. It was also suggested that information about new class actions could be published in legal publications such as *Kōrero Mō te Ture / Law Talk*. The IBA Antitrust Committee noted that while Aotearoa New Zealand does not currently have established plaintiff class action law firms, that will likely change with the introduction of a class actions regime and a notification system that relies on notice being given to firms could soon be workable.
- 5.31 Maurice Blackburn/Claims Funding Australia questioned whether statements of claim should be made publicly available, as this could encourage unwanted strategic behaviour by competing firms to “one-up” the first-filed proceeding. Conversely, Omni Bridgeway supported statements of claim being available online to enable lawyers and funders to establish whether their claim will compete with an existing proceeding. The IBA Antitrust Committee suggested directions could be made about the form of disclosure required, which would result in a “book” of disclosures being made available for browsing by interested parties.

### Recommendations

#### 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.

<sup>19</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia (if a time limit is implemented), MinterEllisonRuddWatts, Omni Bridgeway, Rhonson Salim, Simpson Grierson and Nicole Smith.

**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.

- 5.32 We consider the Class Actions Act should specify a time period for filing any concurrent class actions. This will provide some degree of certainty to litigants and allow the court to consider how to manage concurrent class actions at an early stage. A deadline is particularly important because we recommend a certification stage. We think it would be undesirable to have additional class actions filed once a class action has been certified.
- 5.33 The appropriate timeframe needs to be long enough to allow other lawyers and funders sufficient time to assess whether a concurrent class action would be viable and to commence proceedings. This would include analysing potential legal claims, identifying an appropriate representative plaintiff (including ensuring the person has received independent legal advice), preparing a statement of claim and application for certification and ensuring that suitable legal representation and funding has been arranged. However, given the first class action cannot be significantly progressed until it is known whether there are any concurrent class actions, the timeframe should not be longer than necessary.
- 5.34 We consider that 90 days is an appropriate period. We think this should be sufficient time for other lawyers and funders to consider whether to bring another class action, while not causing significant delay to the first class action. In some situations, other lawyers and funders will have been aware of the circumstances giving rise to the first class action (such as regulatory action) or that a law firm has been seeking registrations of interest for a potential class action. They may have already undertaken some initial consideration of whether to bring a class action before the first class action is published on the public register. Most of the submissions we received on this issue considered that 90 days was appropriate. This included some submissions from plaintiff lawyers and litigation funders with experience in assessing potential group actions.
- 5.35 While 90 days is not a lengthy period, our intention is to provide a fair opportunity for any concurrent class actions to be filed, rather than to encourage concurrent class actions. In Chapter 14, we acknowledge the benefits of competition in funded litigation, including its potential to lower funding commissions. However, this needs to be balanced against the efficiency objective of the class actions regime. We note that in Ontario, which is a larger jurisdiction with greater likelihood of concurrent class actions, subsequent class



actions on the same or a similar issue with some overlap in class membership must be filed within 60 days.<sup>20</sup>

- 5.36 Once the 90-day period has ended, we recommend a concurrent class action should only be able to be commenced with the leave of the court.<sup>21</sup> We think this provides an important safeguard to prevent any unfairness. We propose leaving the circumstances where leave would be granted to the court's discretion. However, we envisage that leave would only be granted in limited circumstances. An example might be where the concurrent class action is only peripherally related to the first class action and it was not clear that it should have been commenced within the 90-day period.
- 5.37 We acknowledge the policy concern that having a time limit essentially imposes a strict limitation period on those who might otherwise wish to bring a concurrent class action to resolve their claims. While our proposal is designed to allow multiple claims to be managed in an efficient way, it may impact on our other objective of improving access to justice. However, we consider our recommendation strikes the appropriate balance between these objectives. Our conception of access to justice is wider than simply access to the courts. Having multiple class actions about the same issue may be unfair to defendants, cause delay for other court users and be confusing for class members. The 90-day period would not be an absolute bar to bringing claims before the court, only to bringing them as a concurrent class action. Individual claims could still be brought, or a non-concurrent class action could be brought (such as against a different defendant). The court could also grant leave to allow claims to be commenced outside the 90-day period if it considers this appropriate.
- 5.38 We consider the 90-day period should begin from the time of public notification that a class action has been filed. We recommend Te Tāhū o te Ture | Ministry of Justice create a class actions webpage on the Courts of New Zealand website. We envisage this would contain a class actions register with a list of class actions that have been commenced and the date they were added to this register. There should be a function to subscribe to email updates of new cases added to the class actions register, similar to the ability to subscribe to judgments of public interest.
- 5.39 It will also be necessary to provide some information about the class action on the webpage so that lawyers and funders can see whether another class action would be considered concurrent. Our consultation has indicated some concerns about having the statement of claim made available by default, as it may contain confidential information. There may also be some unfairness in allowing competitors to have automatic access to legal documents that considerable work has gone into. Instead, we think specific information should be provided about the class action.
- 5.40 We recommend the Rules Committee 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 proceeding, which the Ministry of Justice would make available on the class actions webpage. The Rules Committee could consider developing a standard form for this, to be included in a schedule to the High Court Rules. We consider the Summary of Class Action should include:
- (a) The proposed defendant or defendants.

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<sup>20</sup> See Class Proceedings Act SO 1992 c 6 (Ontario), s 13.1(3) and 13.1(8).

<sup>21</sup> Draft legislation, cl 5(1).

- (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.
- 5.41 Some lawyers or funders may choose to make the statement of claim available on a website promoting the class action.<sup>22</sup> Other lawyers or funders could also apply to the court for access to documents on the court file, following the usual processes for this. However, we do not consider there should be a requirement to proactively publish a statement of claim as the information in our proposed Summary of Class Action should be sufficient to enable other litigants to understand whether a contemplated class action would be considered concurrent.

## TIMING OF HEARING ON CONCURRENT CLASS ACTIONS

- 5.42 The Supplementary Issues Paper discussed when the court should consider how to manage competing class actions.<sup>23</sup> We identified three options. The court could have a separate hearing on competing class actions, prior to certification. This would prevent multiple plaintiffs from having to incur the cost of a certification hearing. However, it might involve a court considering substantially similar issues at two different hearings. There would also be a risk of considerable delay, particularly if there was an appeal from the court's decision on competing class actions. It could also lead to a situation where one class action is selected to proceed, but then fails at certification.
- 5.43 Alternatively, competing class actions could be considered at certification. While this would require multiple plaintiffs to incur the expense of a certification hearing, it would prevent the relitigation of issues at certification. It would also avoid the delay caused by having separate hearings, judgments and appeals.
- 5.44 A third option was for the court to have discretion as to whether it considers competing class actions at certification or prior. This would give the court flexibility to consider what would be most efficient in a particular case but could also cause uncertainty and delay.
- 5.45 Our preferred approach was for the court to consider the issue of competing class actions at the same time as certification, as we thought it would be the most efficient option for the parties and the court.

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<sup>22</sup> For example, see the material published on the website of a representative action that has been filed against ANZ and ASB banks: Banking Class Action "Claim Documents" <[www.bankingclassaction.com](http://www.bankingclassaction.com)>.

<sup>23</sup> Supplementary Issues Paper at [2.30]–[2.32].

## Results of consultation

- 5.46 We asked submitters when the court should determine the issue of competing class actions. We received 17 submissions on this issue.<sup>24</sup>
- 5.47 Thirteen submitters thought the court should consider competing class actions at the same time as certification.<sup>25</sup> Reasons given by submitters included:
- (a) It is the most efficient option for the parties and the court, and will minimise expense and/or delay.
  - (b) If the issue of competing class actions is resolved prior to certification, there is a risk that the ‘chosen’ class action is not certified.
  - (c) While it will require multiple parties to incur the cost and expense of a certification hearing, plaintiffs commence a class action on the understanding that such a hearing will be required.
  - (d) There is likely to be an overlap in some of the factors considered in the tests for competing class actions and certification.
- 5.48 Nicole Smith suggested there should be a requirement for the lawyers acting for the competing class actions to go to mediation to see whether the classes can be combined.
- 5.49 Two submitters favoured the court determining the issue of competing class actions prior to certification. LPF Group said this would provide a plaintiff with certainty that a class action can proceed. Shine Lawyers said it would be onerous to expect a defendant to prepare for a certification hearing with respect to multiple proceedings. Requiring multiple plaintiffs to prepare for certification would increase uncertainty and risk, which could increase funding commissions or act as a significant impediment to class actions being commenced. It also said that determining competing class actions prior to certification would reduce the complexity of any appeal arising out of a certification decision.
- 5.50 Two submitters proposed other options. Zane Kennedy said there is little point in the court considering how to manage competing class actions until after each has been certified. Maurice Blackburn/Claims Funding Australia thought the court should have discretion to determine the issue of competing class actions at any stage, based on the circumstances of the case. It said that, if competing class actions and certification were considered at the same time, it could become an “omnibus procedural hearing”. It said it could be unnecessarily costly for a defendant to have to prepare detailed submissions on multiple class actions.

## Recommendation

**R26**

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

<sup>24</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson, Nicole Smith and Woodsford Litigation Funding.

<sup>25</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Omni Bridgeway, Rhonson Salim, Simpson Grierson and Nicole Smith.

- 5.51 We recommend the issue of how to manage concurrent class actions should be resolved at the same time as certification. To achieve this, we recommend the Class Actions Act should require the court to consider the applications for certification of concurrent class actions together.<sup>26</sup> We consider this is likely to be more efficient than having a concurrent class actions hearing prior to certification. There is some overlap between the certification test we recommend and the factors we propose a court should consider when deciding which of the concurrent class actions it will certify. For example, whether the representative plaintiff seeks to bring an opt-in or opt-out class action will be considered by the court as part of the certification test and will also be relevant when considering how concurrent class actions are formulated. Requiring a separate hearing on concurrent class actions prior to certification could cause considerable delay, particularly if there is an appeal.
- 5.52 While our approach will require multiple parties to prepare for a certification hearing, this will be a known cost of bringing a class action. This cost will not necessarily be wasted as the court may decide that multiple class actions can proceed. While some submitters raised concerns about the cost for defendants of responding to multiple certification applications, submissions that focused on defendant perspectives did not express concern about this issue. We discuss the issue of costs for certification in Chapter 12, including where there are concurrent class actions.

## THE COURT'S POWERS TO MANAGE CONCURRENT CLASS ACTIONS

- 5.53 The Supplementary Issues Paper discussed what powers the court should have to manage competing class actions.<sup>27</sup> One option was for the court to select one class action to progress and stay the other proceedings, which is the approach taken in Canada.
- 5.54 Alternatively, the court could be empowered to make a wider range of orders when managing competing class actions, as in Australia. This could include consolidating the proceedings, ordering them to be tried simultaneously or successively, selecting one class action as a test case with the other proceedings temporarily stayed, or requiring amendments to class definitions.
- 5.55 A middle ground approach could involve a presumption that only one class action will proceed, subject to the overriding discretion of the court to order otherwise.
- 5.56 We expressed the view that in most cases, it will be desirable for only one class action to proceed. However, this will not always be the case, particularly if the class actions are managed and heard together.

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<sup>26</sup> Draft legislation, cl 6(1).

<sup>27</sup> Supplementary Issues Paper at [2.34]–[2.36].

## Results of consultation

- 5.57 We asked submitters whether a court should be required to select one class action to proceed and stay the other proceedings, or whether the court should have a broader range of powers available to it. We received 17 submissions on this question.<sup>28</sup>
- 5.58 Three submitters thought only one class action should be allowed to proceed. Bell Gully said allowing two class actions to go ahead would not enhance access to justice and would cause unnecessary cost and confusion. It said the other proceedings should be dismissed, as leaving other class actions effectively “hanging” through a stay would create issues of *res judicata* and a potential “long tail of risk” for defendants. Te Kāhui Inihua o Aotearoa | Insurance Council commented that allowing competing class actions taking different approaches would be inefficient for courts and costly for defendants. Michael Duffy supported only allowing one class action to proceed but considered that other lawyers should be able to represent individual class members in relation to individual issues.
- 5.59 Thirteen submitters supported the court having a broader range of powers to manage competing class actions.<sup>29</sup> Several submitters said this would allow the court flexibility to deal with the circumstances of individual cases. Maurice Blackburn/Claims Funding Australia said only allowing one class action to proceed would make the competing class actions hearing the defining event of the proceedings and a “winner-takes-all” contest. It said this approach might lead to inappropriate strategic behaviour such as a race to the courthouse with claims being inadequately investigated and prepared, overbroad pleadings designed to exaggerate case value or appear to represent the biggest class, unsubstantiated public commentary by lawyers and funders about the value of claims, unrealistic litigation budgets and tactical delay.
- 5.60 Some submitters supported a presumption in favour of a single proceeding, with the court having discretion to allow multiple class actions in appropriate circumstances.<sup>30</sup> Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland) suggested multiple class actions could be allowed where it would be against the interests of justice to order otherwise and any efficiency concerns are outweighed by proportionality in light of the claim value. Chapman Tripp said that, in rare cases it might be appropriate to have multiple class actions that would be heard together, such as cases on similar issues with a slightly different focus or class definition.
- 5.61 Consultation workshop participants had a range of views on this question. Some supported a presumption that only one case will go ahead and noted the inefficiency of having multiple class actions on the same issue. Other participants noted that competing class actions could encourage more competitive legal costs and funding commissions, which could benefit class members. Competing class actions could be framed differently and class members should have the choice to join the class action that best suits their

<sup>28</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Andrew Harmos, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson, Nicole Smith and Woodsford Litigation Funding.

<sup>29</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Andrew Harmos, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson and Woodsford Litigation Funding.

<sup>30</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Johnson & Johnson and Rhonson Salim. In addition, LPF Group said certifying multiple class actions should be an exception rather than the rule.

position. There could also be an issue with class members not falling within the class that is allowed to proceed but being unable to join another class action. Some participants asked whether limitation periods would begin running again for class actions that have not been selected to proceed.

## Recommendation

**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.

5.62 While in general terms we think it is undesirable to have multiple class actions on the same issue, ultimately it will depend on the circumstances of the case. Therefore, we do not recommend a statutory presumption in favour of only allowing one case to proceed.

5.63 We consider the Class Actions Act should set out the procedure a court should apply when considering the certification applications of concurrent class actions. We recommend the court should assess whether each concurrent class action meets the certification test. If a proceeding does not meet the certification test, the court will necessarily be required to decline the application for certification. In a situation where only one case meets the certification test, the court will not need to consider the issue of concurrent class actions further.

5.64 Where more than one concurrent class action meets the certification test, we recommend the court should then consider whether to certify more than one class action.<sup>31</sup> If (for example) there are two concurrent class actions, the court could either decide to certify both or to only certify one of those. In a situation where three concurrent class actions have been filed and all meet the certification test, the court could decide to certify either one, two or three of these class actions. If the court decides a class action will be certified,

<sup>31</sup> Draft legislation, cl 6(2).

it should grant the application for certification for that class action and make a certification order.<sup>32</sup>

- 5.65 We recommend the Class Actions Act specify that if the court decides a concurrent class action will not be certified (even though it meets the certification test), the application for certification must be dismissed.<sup>33</sup> In Chapter 10, we recommend the unsuccessful applicant should only be able to appeal this decision with the leave of the court.<sup>34</sup> In Chapter 4 we recommend that limitation periods should begin to run again when an application for certification is dismissed.
- 5.66 In some situations, the court might determine that more than one concurrent class action should be certified. While we discuss the criteria the court should apply in the next section of this chapter, situations where it could be appropriate to certify more than one class action might include:
- (a) Cases where there is relatively little overlap between the legal issues and/or the class definition.
  - (b) Cases where the parties have proposed an efficient way of progressing both proceedings together.
  - (c) Cases where there is a particular reason for class members retaining the ability to choose between class actions. For example, where the subject matter of the case involves sensitive matters such as allegations of abuse and class members must feel comfortable disclosing information to their lawyer.
- 5.67 The court's decision to certify more than one class action could be conditional on one or more of the parties amending their certification application. For example, the proposed class definition could be amended to avoid overlap between the class actions and provide greater clarity for class members. The parties could also agree to bring the class action on an opt-in rather than opt-out basis. As we explain in Chapter 6, we do not think the court should be able to certify a proceeding on a different basis to how it was commenced without the applicant's consent. However, the court could allow applicants an opportunity to amend their applications. Where there are concurrent class actions, the court could grant an adjournment to allow the applicants to confer as to how the proposed proceedings could be amended to allow both to be certified.
- 5.68 If the court decides that more than one class action should be certified, it is important they can be managed in a way that is efficient for the court and the parties and does not unduly duplicate costs. We recommend the court should be able to make any orders it considers appropriate for the efficient management of the proceedings, including orders that:<sup>35</sup>
- (a) The class actions be case managed together.
  - (b) The class actions be consolidated.
  - (c) The class actions be heard together or successively.

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<sup>32</sup> We discuss certification orders in Chapter 6.

<sup>33</sup> Draft legislation, cl 6(5).

<sup>34</sup> This differs from the court's decision not to certify a class action on the basis that the certification test is not met, which we recommend can be appealed as of right.

<sup>35</sup> Draft legislation, cl 6(6).

- (d) One or more of the class actions be temporarily stayed (such as where one proceeding will be heard as a test case).<sup>36</sup>
- 5.69 In some cases, the applicants might confer and put forward a proposal to the court as to how both class actions could proceed in an efficient manner.

## CRITERIA TO APPLY WHEN ASSESSING CONCURRENT CLASS ACTIONS

- 5.70 In the Supplementary Issues Paper, we said class actions legislation should provide an overarching test for courts to apply when considering how competing class actions should be managed. A list of relevant factors could also be provided for courts to consider when applying this test.<sup>37</sup>
- 5.71 We proposed the court should consider which approach to competing class actions would best allow class member claims to be resolved in a just and efficient way. We suggested the following factors might be relevant when the court is applying this test:
- (a) How each case is formulated. This might include the nature and scope of the causes of action, what the common issues are, how manageable the individual issues will be to resolve once common issues are determined, the relief sought, the class definition and likely class size, and whether the plaintiff seeks to bring the claim as an opt-in or opt-out class action.
  - (b) The preferences of potential class members, to the extent these can be ascertained. We did not think that 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.
  - (c) The funding arrangements for each class action. This would involve consideration of whether litigation funding has been secured and on what basis, including the estimated return to the litigation funder.
  - (d) Whether there is appropriate legal representation.
- 5.72 We did not consider there should be a rule or presumption in favour of the first class action to be filed, as this might encourage hastily drafted claims. Nor did we think the court should consider the prospects of success of each class action, as there was a risk of this turning into a burdensome preliminary merits test.

## Results of consultation

### General test

- 5.73 We asked submitters whether the court should consider which approach to competing class actions would best allow class member claims to be resolved in a just and efficient way. We received 12 submissions on this question.<sup>38</sup>

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<sup>36</sup> We note that under our proposed approach to limitation, staying a proceeding would not cause limitation periods to begin running again. We discuss limitation in Chapter 4.

<sup>37</sup> Supplementary Issues Paper at [2.38]–[2.66].

<sup>38</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim and Simpson Grierson.



- 5.74 Eight submitters agreed with our proposed test.<sup>39</sup> Nikki Chamberlain commented that our test is preferable to a narrow approach that looks primarily at efficiency and cost-effectiveness and said the inclusion of “just” will allow the court to consider matters such as legal representation.
- 5.75 Three submitters supported a modified version of our proposed test. Bell Gully suggested the court undertake a two-step analysis where it considers (i) which approach will allow class member claims to be resolved in a just and efficient way and (ii) whether that approach unjustly compromises the interests of defendants over another possible approach. Chapman Tripp said the “just and efficient” analysis should not just include the perspective of class members but also the defendant’s interests and court resources. It proposed the court should consider what approach will best allow the claims to be resolved in a way that is just and efficient for the parties. Similarly, the IBA Antitrust Committee considered that “just and efficient way” should be interpreted as in the interests of both parties.
- 5.76 Maurice Blackburn/Claims Funding Australia supported any approach where the interests of class members would be paramount. Similarly, Woodsford Litigation Funding suggested the court should consider which class action would best represent the interests of the class.

### Relevant factors

- 5.77 We also asked submitters 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. In particular, we asked whether the court should consider how each case is formulated, the preferences of potential class members, litigation funding arrangements or legal representation. Eighteen submitters addressed this question.<sup>40</sup>

### How cases are formulated

- 5.78 Thirteen submitters agreed that the court should consider how each case is formulated.<sup>41</sup> Maurice Blackburn/Claims Funding Australia said the parties should have to explain certain key aspects of the pleading, such as the time period, which will discourage “extravagant pleadings” that exaggerate the value of the claim. It also said the parties should identify the work done to investigate and analyse the case, and that parties should be discouraged from filing a claim that simply copies and pastes from the first-filed claim. Michael Duffy commented that courts have an obligation to try to bring the real issues forward, but this does not necessarily mean picking the most strongly formulated claim. Omni Bridgeway thought case formulation should be given primacy to encourage proper investigation and careful preparation, rather than a rush to file.

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<sup>39</sup> Nikki Chamberlain, Michael Duffy, Gilbert Walker, Insurance Council, Johnson & Johnson, Omni Bridgeway, Rhonson Salim and Simpson Grierson.

<sup>40</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith and Woodsford Litigation Funding.

<sup>41</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers and Simpson Grierson.

- 5.79 Two submitters noted potential risks of this factor. Simpson Grierson cautioned that it should not extend to an overall assessment of the merits of the case, since our proposed certification test only requires a claim to disclose a reasonably arguable cause of action. Nicole Smith said this factor might lead to cases being put forward on a “shopping list” basis with every possible cause of action pleaded. She thought it would be preferable to focus on the likely efficiency of each proposed strategy.

### Preferences of potential class members

- 5.80 Ten submitters agreed the preferences of potential class members are relevant.<sup>42</sup> Maurice Blackburn/Claims Funding Australia considered this factor is particularly important and said class members are not agnostic. It said in cases involving property damage, investment losses or traumatic circumstances, the relationship between a class member and their lawyer could become highly personal and may be a key determinant of a person’s willingness to participate in a class action. In shareholder class actions, class members are often well placed to evaluate and discriminate between competing proposals, particularly institutional class members.
- 5.81 Bell Gully did not support this factor. It said a court should have regard to the best interests of class members but their expressed preferences may not be a reliable indicator of this and might reflect which case was commenced first or how cases were advertised. Shine Lawyers queried how the court could practically take this factor into account if it could not take into account book building by a particular firm or funder.<sup>43</sup>

### Litigation funding arrangements

- 5.82 Sixteen submitters thought litigation funding arrangements are relevant to which class action should proceed.<sup>44</sup> The Insurance Council said funding arrangements are of paramount importance, particularly whether a funder can provide security for costs and/or meet an adverse costs award and whether the funder’s commission is fair, just and reasonable. Michael Duffy noted the impact on courts of a case collapsing midstream due to lack of funding. Similarly, MinterEllisonRuddWatts referred to recent cases where the terms of funding arrangements allowed cases to be brought to trial that were then abandoned.
- 5.83 However, Simpson Grierson commented that the court should not become too involved in the specific litigation funding arrangements and said it was preferable to encourage competition between funders.

### Legal representation

- 5.84 Twelve submitters agreed that legal representation is a relevant factor.<sup>45</sup> Maurice Blackburn/Claims Funding Australia suggested the parties should address the experience

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<sup>42</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Gilbert Walker, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Shine Lawyers and Simpson Grierson. Omni Bridgeway thought the preferences of potential class members were only relevant in an opt-in class action.

<sup>43</sup> Book building is a process where a lawyer and/or litigation funder sign up a person to a class action.

<sup>44</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Omni Bridgeway, Shine Lawyers and Simpson Grierson.

<sup>45</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Shine Lawyers and Simpson Grierson.

of the law firms and lawyers in running class actions of the kind at issue as well as the resources available for pursuing the claims. Similarly, Michael Duffy saw experience, resources and fees as relevant. Johnson & Johnson observed that choice of counsel for plaintiffs may be limited in Aotearoa New Zealand because the lack of personal injury litigation means there are few large well-resourced firms that normally act for plaintiffs.

### **‘First to file’ presumption**

- 5.85 Seven submitters commented there should not be a ‘first to file’ presumption.<sup>46</sup> The Insurance Council said it is more important for plaintiffs to take the time to properly formulate their case to avoid unnecessary legal costs and delay later in the proceeding.
- 5.86 Bell Gully said any evidence that a class action has been more fulsomely developed or more efficiently pursued should be relevant to the court’s consideration. Michael Duffy commented that the first case filed might still be a relevant factor, even if not a presumption.

### **Prospects of success**

- 5.87 Three submitters agreed the court should not consider the relative prospects of success of the class actions.<sup>47</sup> Maurice Blackburn/Claims Funding Australia said there is a risk this would turn into a burdensome preliminary merits test at an early stage and noted that class actions are dynamic and complex proceedings in which issues evolve over time.
- 5.88 Chapman Tripp saw this as a relevant factor, consistent with its view that a merits review should be part of certification. The IBA Antitrust Committee also saw this as relevant, noting the overlap between considering how a case is formulated and its prospects of success.

### **Other factors**

- 5.89 Several submitters suggested the factors should be non-exhaustive so the court can take into account other factors it considers relevant.<sup>48</sup>
- 5.90 Chapman Tripp said the defendant’s preferences should be a relevant consideration, noting that all parties have an interest in the just and efficient resolution of the claims.
- 5.91 Woodsford Litigation Funding suggested the factors developed by Canadian courts may be relevant when determining which class action best represents the interests of the class.<sup>49</sup>

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<sup>46</sup> Bell Gully, Michael Duffy, Insurance Council, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Shine Lawyers and Simpson Grierson.

<sup>47</sup> Bell Gully, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>48</sup> Bell Gully, Nikki Chamberlain, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers and Simpson Grierson.

<sup>49</sup> It referred to: the nature and scope of the causes of action advanced; the theories advanced by the legal team as supporting the claims advanced; which group delivers the best value to the class; the state of each class action, including preparation; the number, size and extent of involvement of the proposed representative plaintiffs; the relative priority of commencing the class actions; the resources and experience of the legal teams; and the presence of any conflicts of interest.

## Recommendation

### 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.

## Overarching test

- 5.92 We recommend the Class Actions Act specify that when the 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.<sup>50</sup> This test reflects our proposed objectives for class actions and most submitters on this issue agreed with this approach.
- 5.93 Some submitters suggested the test should also refer to the interests of defendants and the court system. The test we recommend requires consideration of how the claims can be resolved in a just and efficient way, which we do not see as limited to the perspective of class members. As outlined in the Issues Paper and Supplementary Issues Paper, our conception of access to justice is broader than simply access to the courts and includes procedural access to justice for all participants and a substantively fair result.<sup>51</sup> Resolving claims in a just and efficient way is beneficial for all parties, other court users and the court system. We therefore think the proposed amendment is unnecessary.
- 5.94 While two submitters suggested the test should make the interests of class members paramount, we prefer an approach that allows the court broad discretion to consider considerations of justice and efficiency. The interests of class members will be an important part of this, but the interests of defendants and the need to ensure multiple claims are managed in an efficient way will also be relevant.

## Relevant factors

- 5.95 We recommend the Class Actions Act specify factors a court may consider when determining which approach will best allow claims to be determined in a just and efficient way.<sup>52</sup> In our view, the following factors are likely to be relevant:
- (a) How each case is formulated.
  - (b) The preferences of potential class members.

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<sup>50</sup> Draft legislation, cl 6(3).

<sup>51</sup> Issues Paper at [5.23] and Supplementary Issues Paper at [27].

<sup>52</sup> Draft legislation, cl 6(4).

- (c) Litigation funding arrangements.
  - (d) Legal representation.
- 5.96 We agree with the point made by some submitters that the factors should not be exhaustive, and the court should be able to consider any other factors it considers relevant in a particular case.

### Formulation of the case

- 5.97 A court's consideration of how each case is formulated might include:
- (a) Which causes of action are pleaded.
  - (b) To what extent the case has been developed.
  - (c) The class definition and likely class size.
  - (d) The common issues and individual issues to be determined.
  - (e) Whether the claim is brought as an opt-in or opt-out class action.
  - (f) The relief sought.
- 5.98 We do not think this factor should involve a preliminary merits assessment, in line with our recommendation that this should not be part of the certification test.
- 5.99 There is a degree of overlap between this factor and the certification test we recommend, particularly the requirements for the proposed opt-in or opt-out mechanism to be an appropriate means of determining class membership and for a class action to be an appropriate procedure for the efficient resolution of class member claims. This reinforces our conclusion that the certification applications for concurrent class actions should be considered at the same time.
- 5.100 We do not anticipate this factor will lead to overly broad or inflated pleadings, as a court will not necessarily prefer the broadest possible class action. In some cases, a class action that is narrower but more straight-forward to manage could be preferable. When comparing how cases are formulated, it is also possible a court will find there is little overlap, and it would be just and efficient to allow both cases to be certified.

### Preferences of potential class members

- 5.101 We see the preferences of potential class members as a relevant consideration, although we acknowledge in some cases it will be different to ascertain this. The court's assessment of this factor might indicate that one class action is preferable, or it might indicate that potential class members should be given a choice of class action.
- 5.102 While we do not think the court should be prevented from considering how many class members have signed up to each class action (through 'book building'), we think this should be given limited weight as it may simply indicate which class action was commenced first or how the case was advertised. In appropriate cases, affidavit evidence could be filed by potential class members to explain why they prefer a particular class action. While this may not always be possible, there are likely to be some cases where potential class members have a clear preference or a reason for wanting a choice of class actions and are willing to give affidavit evidence.

### Litigation funding arrangements

- 5.103 When assessing this factor, the court could consider how the representative plaintiff intends to fund the litigation. For example, whether litigation funding has been secured

and on what basis. Having appropriate funding arrangements in place will help to ensure the case can proceed to resolution and mitigate the risk that the class action may be abandoned mid-proceeding due to lack of funding. Where a litigation funding agreement has been entered into, the respective funding commission will also be relevant, although we do not think the class action with the lowest funding commission should automatically be preferred.

- 5.104 In Chapter 17, we recommend the court must approve litigation funding agreements in class actions in order for them to be enforceable by the funder. We suggest that the court must be satisfied the funding agreement, including the funding commission, is fair and reasonable and that the representative plaintiff has received independent legal advice on the agreement. We note that the court will be assessing the concurrent class actions prior to approving any litigation funding agreement. We therefore anticipate the court's consideration of this factor will be conducted at a relatively high-level that focuses on the availability of funding and comparing key factors like the proposed funding commissions, rather than the detailed matters it will need to consider as part of court approval of a litigation funding agreement.
- 5.105 In Chapter 18, we recommend a class action fund should be established. This could be an alternative means of funding a concurrent class action.

### Legal representation

- 5.106 We agree with the sentiment expressed at one of our consultation workshops that judges should not conduct a broad assessment of who is the more competent counsel. We think this factor could involve a relatively high-level consideration of whether there is appropriate legal representation for each class action. This could include whether legal representation has been secured, whether the lawyer or law firm has the experience and resources to bring a class action and the basis upon which fees will be charged. Relevant expertise could include experience in running complex litigation or experience in the substantive area of law at issue. We would not want this factor to be interpreted as requiring prior expertise in class actions or representative actions.<sup>53</sup>

### Other factors

- 5.107 We remain of the view that it is not appropriate to have a presumption in favour of the first class action filed, as this might encourage hastily prepared statements of claim. Submitters did not indicate support for such a presumption.
- 5.108 We also confirm our view that the prospects of success of the respective class actions should not be a factor, given our view that a preliminary merits test should not be part of the certification test.

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<sup>53</sup> The Ontario legislation refers to “the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue”: Class Proceedings Act SO 1992 c 6, s 13.1(4)(c). This followed a recommendation by the Law Commission of Ontario, which did not think “experience of counsel” should be interpreted exclusively as meaning experience in class action litigation as this might bar new entrants to the plaintiff class action “marketplace”: Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 26.

## DEFENDANT PARTICIPATION IN CONCURRENT CLASS ACTION HEARINGS

- 5.109 In the Supplementary Issues Paper we noted that a hearing on competing class actions might include discussion of case strategy or funding arrangements that plaintiffs do not want disclosed to defendants. For this reason, the ALRC recommended a defendant should not be involved in any hearing to decide which competing class action should proceed, except on the issue of security for costs.<sup>54</sup>
- 5.110 We expressed the view that defendants should not be prevented from attending a hearing on competing class actions, as this would offend the open court principle and a defendant would likely want to make submissions on how competing class actions should be managed. We thought courts had the necessary powers to manage any confidentiality issues that might arise.

### Results of consultation

- 5.111 We asked submitters whether they had any concerns about defendants gaining a tactical advantage from a competing class action hearing and how any concerns should be managed. We received 11 submissions on this question.<sup>55</sup>
- 5.112 Nine submitters considered a defendant should be entitled to attend a hearing to determine how competing class actions should be managed.<sup>56</sup> Reasons given included:
- (a) It would be contrary to the principles of access to justice and open justice for a defendant to be excluded.
  - (b) The outcome of the hearing will impact on the defendant.
  - (c) The defendant's involvement may assist the court on issues such as commonality, the relief sought and evidence required.
  - (d) It would not give the defendant a tactical advantage, or any advantage would only be fleeting.
  - (e) Courts have the necessary powers to manage any confidentiality issues that arise.
- 5.113 Maurice Blackburn/Claims Funding Australia said a defendant should not attend a competing class actions hearing as it would be inconsistent with the interests of justice to allow defendants to choose their plaintiffs. It said redacting documents would likely be inadequate and would be cumbersome and costly.
- 5.114 Two submitters considered the defendant should have to provide information to balance the information it obtained from a competing class actions hearing. Shine Lawyers said that, if a defendant played a role in any competing class action hearing, it should have to disclose any external funding arrangement and its estimate of legal fees. Nicole Smith suggested the defendant be required to respond to a notice to admit facts early in the proceeding.

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<sup>54</sup> Supplementary Issues Paper at [2.67].

<sup>55</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>56</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Omni Bridgeway, Simpson Grierson and Nicole Smith.

## Defendants should not be excluded from concurrent class action hearing

- 5.115 We consider it would be unfair to exclude a defendant from aspects of a certification hearing which consider whether more than one concurrent class action should be certified. A defendant should have the ability to make submissions on how concurrent class actions should be managed, including on whether it is just and efficient to allow more than one class action to be certified. While we agree that a defendant should not be able to ‘choose its plaintiff’, it is the court rather than the defendant that will ultimately decide which class action(s) can proceed.
- 5.116 It may also be practically difficult to exclude a defendant from aspects of the certification hearing that consider concurrent class actions, given the degree of overlap between the certification criteria and the factors relevant to concurrent class actions. Nor are we convinced that a defendant will gain any significant tactical advantage from hearing discussions on how to manage the concurrent class actions. One factor that may raise confidentiality issues is litigation funding arrangements. In Chapter 14 we recommend that funded plaintiffs should 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. If confidentiality issues arise with respect to other information provided by a proposed representative plaintiff, we think the court can manage this on a case-by-case basis, including allowing appropriate redactions in information given to the defendant.

## DRAFT CONCURRENT CLASS ACTION PROVISIONS

- 5.117 Below we set out draft legislative provisions that could give effect to our recommendations on concurrent class actions.

### 5 Commencement of concurrent class actions

- (1) A concurrent class action proceeding must be commenced—
- (a) 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
  - (b) at a later time with the leave of a court.

- (2) In this Act,—

**Class Actions Register** means a register of class action proceedings published on an Internet site maintained by or on behalf of the Ministry of Justice

**concurrent class action proceeding** means a class action proceeding that has the following 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 1 defendant.



## 6 Procedure for certification of concurrent class actions

- (1) The applications for certification of concurrent class action proceedings must be considered by a court together.
  - (2) If the court considers that more than 1 of the proceedings meets the test for certification under **section 4**, it must decide whether all, and if not all which, of those proceedings will be certified.
  - (3) When deciding which of the proceedings will be certified, the court must consider what approach will best allow the claims of class members to be resolved in a just and efficient way.
  - (4) When assessing which approach is best under **subsection (3)**, the court may consider—
    - (a) how each proceeding is formulated:
    - (b) the preferences of potential class members:
    - (c) any litigation funding arrangements for each proceeding:
    - (d) the legal representation for each proceeding:
    - (e) any other factors the court considers relevant.
  - (5) If the court decides under **subsection (2)** that a proceeding will not be certified, the application for certification must be dismissed.
  - (6) If the court decides that more than 1 of the proceedings will be certified, it may make further orders for the management of those proceedings, including orders that—
    - (a) the proceedings be case managed together:
    - (b) the proceedings be consolidated:
    - (c) the proceedings be heard together or successively:
    - (d) 1 or more of the proceedings be temporarily stayed.
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## CHAPTER 6

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# Certification

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## INTRODUCTION

- 6.1 In this chapter, we discuss:
- (a) Requiring certification of class actions.
  - (b) The test for certification of a class action.
  - (c) Procedural matters relating to certification.
- 6.2 At the end of this chapter, we set out a draft legislative provision that could give effect to our recommendations on the certification test.

## REQUIRING CERTIFICATION OF CLASS ACTIONS

- 6.3 Most overseas jurisdictions with class actions regimes require the court to approve a case proceeding in class action form, which is generally known as certification.<sup>1</sup> A notable exception to this is Australia, where none of the class actions regimes have a certification requirement.<sup>2</sup>
- 6.4 In the Issues Paper we discussed the advantages and disadvantages of certification and asked submitters whether a class actions regime in Aotearoa New Zealand should require proceedings to be certified.<sup>3</sup> In the Supplementary Issues Paper, we summarised the feedback we received on this question and explained our conclusion that a class actions regime should have a certification stage.<sup>4</sup>

## Results of consultation

- 6.5 In response to the Issues Paper, we received 29 submissions on whether a class actions regime should have a certification stage. We also received 22 submissions on the Supplementary Issues Paper that addressed the topic of certification. Although this second consultation paper was focused on the design of a certification test and did not expressly ask submitters whether certification was desirable, some submitters provided

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<sup>1</sup> Issues Paper at [10.4] and [10.8]–[10.15].

<sup>2</sup> Issues Paper at [10.16]–[10.18].

<sup>3</sup> Issues Paper at [10.20]–[10.28].

<sup>4</sup> Supplementary Issues Paper at [1.27]–[1.33].

feedback on this point. In total, we received submissions on certification from 36 different submitters.<sup>5</sup>

6.6 Nineteen submitters expressly supported having a certification stage as part of a class actions regime.<sup>6</sup> Three submitters appeared to support certification (by indicating agreement with our proposed provision).<sup>7</sup>

6.7 Benefits of certification identified by submitters included the following:

- (a) Preventing meritless, frivolous or vexatious claims and filtering claims that are unsuitable to proceed as a class action.
- (b) Allowing the court to consider the interests of the plaintiff, defendant and class members.
- (c) 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.
- (d) Requiring the plaintiff to be thoughtful about how the litigation will be run.
- (e) Enabling the early identification and management of issues. This includes ensuring claims are properly pleaded, proactively managing conflicts of interest, and ensuring the representative plaintiff is appropriate.
- (f) Providing an opportunity to manage concurrent class actions.
- (g) Ensuring a level of court oversight at an early stage.
- (h) Avoiding the need for multiple interlocutory applications. Certification could lower the overall cost for litigants and provide a degree of certainty at an early stage.

6.8 Nine submitters disagreed with having certification.<sup>8</sup> Key themes in submissions opposed to certification were as follows:

- (a) Certification could be cumbersome and costly and may restrict access to justice.
- (b) The Australian approach of having powers to discontinue a class action is preferable and has not led to a proliferation of unsuitable class actions.
- (c) There are other mechanisms that can protect class member interests, including the right to opt out, notification rights and the ability to apply to substitute the representative plaintiff.
- (d) The risk of adverse costs deters vexatious or meritless claims. Defendants have other tools to challenge such claims, such as a strike-out or summary judgment application.

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<sup>5</sup> Fourteen submitters commented on certification in their submissions on both the Issues Paper and the Supplementary Issues Paper.

<sup>6</sup> Andrew Barker QC, Bell Gully, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Gilbert Walker (Supplementary Issues Paper submission), Andrew Harnos (Supplementary Issues Paper submission), Institute of Directors, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, IBA Antitrust Committee, Johnson & Johnson (Supplementary Issues Paper submission), LPF Group, Te Kāhui Ture o Aotearoa | New Zealand Law Society, NZX, Simpson Grierson and Tom Weston QC. We note Andrew Harnos and LPF Group said they supported a process where the plaintiff filed a document from an independent lawyer certifying that certification requirements were met and the court then granted certification.

<sup>7</sup> Zane Kennedy, Rhonson Salim and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>8</sup> Association of Litigation Funders of Australia, Joint Action Funding, Maurice Blackburn/Claims Funding Australia, Meredith Connell, Vince Morabito (Supplementary Issues Paper submission), Omni Bridgeway, Shine Lawyers (Supplementary Issues Paper submission), Nicole Smith and Woodsford Litigation Funding.

- 6.9 Other submitters commented on aspects of certification without expressing a clear preference as to whether certification is desirable.<sup>9</sup>

## Recommendation

### R29

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

- 6.10 We recommend the Class Actions Act should require a proceeding to be certified to proceed as a class action and prescribe a certification test. Although 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 as they are usually expensive and lengthy. Class actions also risk insufficient protection of class member interests. We therefore think it is appropriate for the court to consider whether a case is suitable to bring as a class action. Requiring certification may deter meritless or vexatious class actions, although we think the risk of such class actions is relatively low because of the cost of class actions and the risk of being ordered to pay costs.
- 6.11 Certification will provide an early opportunity for the court to consider issues such as whether class membership should be determined on an opt-in or opt-out basis and whether there is a suitable representative plaintiff. It will also allow the court to consider how to respond to concurrent class actions at an early stage.<sup>10</sup> The certification process may help to refine a plaintiff's case, such as by identifying any causes of action that are not arguable and ensuring there is a suitable class definition.
- 6.12 We acknowledge the concerns that certification could cause additional cost and delay for parties, require considerable judicial resource and make it more difficult for plaintiffs to commence class actions. However, we think these concerns are outweighed by the benefits of certification we have identified. If the proposed elements of our certification test are not considered at certification, they may need to be decided in multiple interlocutory applications instead. One consultation workshop participant said that, in Australia plaintiffs could be "tortured in a drip feed fashion", with the issues being dragged out over a long period rather than being resolved at one certification hearing. If this occurred in Aotearoa New Zealand, this would be burdensome for both the parties and the court. Certification will allow a number of preliminary issues to be dealt with at the same time.
- 6.13 While the certification process creates an upfront test for the representative plaintiff to meet, we do not think the requirements of our proposed certification test are overly onerous. As we discuss below, we have rejected aspects of a certification test that could make it particularly difficult for a plaintiff, such as a preliminary merits test and a requirement to establish that common issues predominate. We note preliminary court approval is required before cases can proceed as a representative action under rule 4.24 of the High Court Rules 2016 (HCR) (unless there is consent from all persons with the same

<sup>9</sup> Barry Allan, Samuel Becher, Colin Carruthers QC, Michael Duffy (Supplementary Issues Paper submission), Michael Legg and Vicki Waye (although she indicated certification was probably not necessary).

<sup>10</sup> In Chapter 5 we recommend the court should consider the applications for certification of concurrent class action proceedings together.

interest) and submitters did not point to this requirement as a significant barrier for litigants.

## THE TEST FOR CERTIFICATION OF A CLASS ACTION

- 6.14 In Chapter 10 of the Issues Paper, we discussed possible elements of a certification test for Aotearoa New Zealand, based on the tests that apply in other jurisdictions. These included: a minimum number of class members (numerosity), sufficient commonality among claims, requiring a class action to be the preferable or superior procedure for resolving class member claims, a preliminary merits assessment, a cost-benefit assessment, a litigation plan and assessment of funding arrangements.<sup>11</sup> We asked submitters whether these different elements were appropriate for a certification test in Aotearoa New Zealand.
- 6.15 In Chapter 11 of the Issues Paper, we asked submitters whether the court should consider the representative plaintiff's suitability for the role as part of certification and, if so, what the test should be. Possible criteria included being able to adequately represent the class, having no conflicts of interest, understanding the role, having sufficient financial resources and having a claim that is typical of the class.<sup>12</sup> We also discussed whether tikanga Māori should inform who could be the representative plaintiff in Māori collective action.<sup>13</sup> In Chapter 12 of the Issues Paper, we asked whether membership of a class action should be determined on an opt-in or opt-out basis, or whether multiple approaches should be available.
- 6.16 We set out the feedback we received on these questions in the Supplementary Issues Paper, explained our conclusions on each aspect of the certification test and provided a draft legislative provision.<sup>14</sup> Key features of our proposed certification test were:
- (a) The statement of claim must disclose a reasonably arguable cause of action.
  - (b) Each class member's claim should raise a common issue of fact or law that is of significance to the resolution of the claim.
  - (c) There must be a suitable representative plaintiff who would fairly and adequately represent class members.
  - (d) The opt-in or opt-out mechanism proposed for the proceeding must be an appropriate means of determining class membership in the circumstances of the case.
  - (e) A class action must be an appropriate procedure for the efficient resolution of class member claims.

## Results of consultation

- 6.17 In the Supplementary Issues Paper, we asked submitters whether they agreed with our draft provision on certification and, if not, how it should be amended. There were 20

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<sup>11</sup> Issues Paper at [10.29]–[10.71].

<sup>12</sup> Issues Paper at [11.2]–[11.23].

<sup>13</sup> Issues Paper at [11.42]–[11.47].

<sup>14</sup> Supplementary Issues Paper at [1.34]–[1.102].

submissions on this question.<sup>15</sup> Of these, 11 submitters agreed or broadly agreed with our draft provision.<sup>16</sup>

- 6.18 Five submitters commented on aspects of our test without indicating overall agreement or disapproval of our proposed certification provision.<sup>17</sup> Three submitters commented on aspects of our certification test but remained opposed to requiring certification.<sup>18</sup>
- 6.19 In the sections below, we discuss the feedback we received on specific aspects of our proposed certification test and our recommendations on each.

## REASONABLY ARGUABLE CAUSE OF ACTION

- 6.20 The Supplementary Issues Paper explained we did not favour a preliminary merits assessment as part of certification. Our preferred approach was to require the statement of claim to disclose a reasonably arguable cause of action, with the same test applying as for a strike-out application.<sup>19</sup>

## Results of consultation

- 6.21 Six submitters commented on this issue.<sup>20</sup> Three of these submitters agreed with requiring the statement of claim to disclose a reasonably arguable cause of action.<sup>21</sup> Dr Michael Duffy (Monash University) commented that the requirement to disclose a cause of action applies in normal litigation and Australian lawyers must certify this in federal class actions.<sup>22</sup> Gilbert Walker agreed that certification should not involve any further detailed consideration of the merits, to avoid cost and delay. Simpson Grierson said it should be clear that where the plaintiff pursues multiple causes of action only those causes of action that are reasonably arguable should be allowed to proceed.
- 6.22 Omni Bridgeway said our proposed test shifted the burden of showing a reasonably arguable cause of action from a defendant filing a strike-out application onto the plaintiff in every class action, which would add additional cost and delay in every case.

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<sup>15</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, International Bar Association (IBA) Antitrust Committee, Institute of Directors, Insurance Council, Johnson & Johnson, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Tom Weston QC.

<sup>16</sup> Michael Duffy, Gilbert Walker, Zane Kennedy and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) indicated they agreed with our draft certification provision. Submitters who generally agreed with our certification provision but suggested some amendments were: Bell Gully, Nikki Chamberlain, Chapman Tripp, Johnson & Johnson, LPF Group, Rhonson Salim and Simpson Grierson. Shine Lawyers disagreed with certification but said if Aotearoa New Zealand was to adopt a certification process, it generally agreed with our draft provision.

<sup>17</sup> Institute of Directors, IBA Antitrust Committee, Nicole Smith, Insurance Council and Tom Weston QC.

<sup>18</sup> Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Shine Lawyers.

<sup>19</sup> Supplementary Issues Paper at [1.74]–[1.76].

<sup>20</sup> Chapman Tripp, Michael Duffy, Gilbert Walker, Omni Bridgeway, Rhonson Salim and Simpson Grierson.

<sup>21</sup> Michael Duffy, Gilbert Walker and Simpson Grierson. In addition, Zane Kennedy and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) indicated general agreement with our certification provision.

<sup>22</sup> Federal Court Rules 2011 (Cth), r 16.01(c).

- 6.23 Two submitters supported a stricter test. Chapman Tripp preferred a merits review, which it said could discourage meritless or speculative class actions.<sup>23</sup> Rhonson Salim (Aston University) suggested the threshold of a preliminary merits test could be higher in opt-out cases.
- 6.24 Some consultation workshop participants did not support requiring a reasonably arguable cause of action, commenting that it was a higher hurdle than ordinary proceedings and could inhibit access to justice. It was suggested that requiring a defendant to bring a strike-out application was preferable. A concern was also expressed that a defendant could have ‘two bites at the cherry’ by arguing there was no reasonably arguable cause of action and then subsequently filing a strike-out application. Other consultation workshop participants agreed with the requirement to have a reasonably arguable cause of action and saw this as preferable to a preliminary review of the merits which could turn into a mini-trial. A small number of participants supported having a preliminary merits test.

## Recommendation

### R30

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

- 6.25 We consider the certification test should include a requirement for a class action to disclose one or more reasonably arguable causes of action.<sup>24</sup> Given the time and expense involved with a class action, we do not think it would be in the interests of the parties, class members or the court for a class action without any reasonably arguable causes of action to be allowed to proceed. While we recognise this is a requirement that does not apply to ordinary litigation, the same can be said of the entire certification test. We think it is justified to require a representative plaintiff to establish there is a reasonably arguable cause of action as a prerequisite of bringing a class action on behalf of others.<sup>25</sup>
- 6.26 It would also be undesirable if the court made its decision on certification and then had to consider whether there was a reasonably arguable cause of action as part of a separate strike-out application. In our view, it would be preferable to consider this issue as part of certification.
- 6.27 We do not think the requirement to establish one or more reasonably arguable causes of action will be onerous. 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 aspect of the certification test is not met where all the causes of action are “so clearly untenable that they cannot possibly succeed”.<sup>26</sup> We also envisage the court’s assessment would proceed on the basis that the pleaded facts are true, except if the

<sup>23</sup> In its submission on the Issues Paper, it suggested a “real prospect of success” test.

<sup>24</sup> Draft legislation, cl 4(1)(a).

<sup>25</sup> As Te Kōti Pira | 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 propounding the claim to invite others to join the group represented”: *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [16].

<sup>26</sup> *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.

pleaded allegations are entirely speculative and without foundation.<sup>27</sup> We discuss the evidential standard for the certification test later in this chapter.

- 6.28 A similar approach applies in the Ontario certification test, which requires the pleadings to disclose a cause of action.<sup>28</sup> This aspect of the test does not appear to have posed an insurmountable barrier for litigants. Analysis by the Law Commission of Ontario (LCO) has found that certification occurred by consent in 37 per cent of Ontario cases. Where certification was contested, the plaintiff's application for certification was successful in around 73 per cent of cases. The LCO's limited review of unsuccessful certification applications found that it was rare for certification to fail on one factor alone. The aspects of the test most commonly responsible for a plaintiff failing at certification were the requirements for a common issue and for the class action to be the preferable procedure.<sup>29</sup>
- 6.29 We prefer the approach of requiring one or more reasonably arguable causes of action 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. This approach could also lead to a certification hearing turning into a 'mini-trial', with a plaintiff having to bring evidence to show the class action has sufficient prospects of success, causing considerable delay and expense.
- 6.30 We think it is unnecessary for all the pleaded causes of action to be reasonably arguable. Where the court determines that only some pleaded causes of action are arguable, it should certify the case on the basis of the arguable causes of action only. The plaintiff would need to meet the other aspects of the certification test (such as a common issue) with respect to this more limited case.<sup>30</sup> As outlined later in this chapter, we consider the court should make a certification order when it certifies a case, which would include the confirmed causes of action and the common issue(s).
- 6.31 If the court finds there is a reasonably arguable cause of action at certification, we think it would be undesirable for the defendant to be able to relitigate the point in a subsequent strike-out application. While interlocutory decisions do not generally give rise to issue estoppel, "it is generally undesirable for an issue decided by an interlocutory ruling to be relitigated in the same proceeding".<sup>31</sup> This principle is reflected in HCR 7.52, which provides that a party that fails on an interlocutory application must not apply again for the same or similar order without leave, which is only to be granted in special circumstances. While this rule is unlikely to apply directly (because it envisages a scenario where a party has made two consecutive applications) the principle behind it is relevant. There may, however, be limited situations where it would be appropriate to have a

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<sup>27</sup> *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267; *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566 and *Collier v Panckhurst* CA136/97, 6 September 1999 at [19].

<sup>28</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 5(1)(a).

<sup>29</sup> Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 39–40. The LCO was able to review 30 cases where certification was denied between 2011 and 2018. There were 14 cases where the court found there was no cause of action, although in six of those cases the court found some of the plaintiffs had a cause of action on some issues but not on others.

<sup>30</sup> We agree with the point made in submissions that a plaintiff should not be able to satisfy elements of the certification test on the basis of a cause of action that is not reasonably arguable.

<sup>31</sup> *Stephenson v Jones* [2014] NZHC 1604 at [7].



subsequent strike-out application, such as a significant development in case law that means the plaintiff may no longer have a reasonably arguable cause of action. There are also grounds for striking out a claim other than “no reasonably arguable cause of action”, including where the case is likely to cause prejudice or delay or is otherwise an abuse of the court’s process.<sup>32</sup>

- 6.32 That being said, we think a defendant is unlikely to make a strike-out application (absent any material change) after a case is certified, since the court will have already reached a view on whether there is a reasonably arguable cause of action and whether the case is appropriate to bring as a class action. It is more likely a defendant would seek to appeal the certification decision. We therefore think it is unnecessary to have a specific rule to prohibit strike-out applications.
- 6.33 In some cases, it is possible a strike-out application would be heard prior to an application for certification, such as where the proceeding is alleged to be frivolous or vexatious or an abuse of the court’s process.

## COMMON ISSUE OF FACT OR LAW

- 6.34 The Supplementary Issues Paper explained that our preferred approach to commonality was that each class member’s claim should raise a common issue of fact or law that is of significance to the resolution of each claim. We preferred a significance requirement over a test that required the common issues to predominate over individual issues, as we considered the latter might frustrate the objective of improving access to justice by making it too hard for plaintiffs to bring class actions.<sup>33</sup>

## Results of consultation

- 6.35 Eight submitters commented on the common issue requirement.<sup>34</sup> Two of these submitters agreed with our proposed test.<sup>35</sup>
- 6.36 Three submitters agreed with our conclusion that the commonality test should not require the common issues to predominate over individual issues.<sup>36</sup> Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland) and Omni Bridgeway recommended the certification provision clarify that common issues are not required to predominate over individual issues. Bell Gully preferred a predominance test but accepted we had reached a different conclusion.
- 6.37 The International Bar Association (IBA) Antitrust Committee suggested there should be a definition of common issues, such as “the same, similar or related issues of fact or law”, which is the definition used in the United Kingdom (UK) Competition Appeal Tribunal

<sup>32</sup> High Court Rules 2016, r 15.1(1).

<sup>33</sup> Supplementary Issues Paper at [1.39]–[1.41].

<sup>34</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, IBA Antitrust Committee, Omni Bridgeway, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>35</sup> Michael Duffy and Simpson Grierson. In addition, Gilbert Walker, Zane Kennedy and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) indicated general agreement with our certification provision.

<sup>36</sup> Nikki Chamberlain, Omni Bridgeway and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission). The Supplementary Issues Paper discusses the submissions we received on predominance in response to the Issues Paper at [1.37]–[1.38].

Rules.<sup>37</sup> It also said it was unclear what was meant by “significance” and the absence of guidance may lead to disputes over this factor. This point was also made by some participants at our consultation workshops. The IBA Antitrust Committee suggested there may be some duplication between the significance requirement in the commonality test and the analysis required under our proposed factor of whether a class action is an appropriate procedure for the efficient resolution of class member claims.

- 6.38 Several submitters commented on whether the common issue should apply to each claim. Nikki Chamberlain proposed the common issue of fact or law should be of significance to “at least one of” a class member’s claims, instead of “each of the claims”. This would reflect the fact that all class members may not have the same common issue of fact or law in relation to each of their claims. Bell Gully suggested referring to “the claims of each member of the proposed class”. Chapman Tripp said there may be groups of claimants whose claims are sufficiently closely related on factual or legal issues for them to proceed as one class action, even if strictly there may not be a common issue across all the sub-classes.
- 6.39 Bell Gully submitted the reasonably arguable cause of action must raise a common issue of fact or law of significance to the resolution of the claims of each member of the proposed class. It said a plaintiff should not be able to satisfy the criteria by bringing one cause of action that has merit and another cause of action that has no merit but raises common issues.

## Recommendation

### 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.

- 6.40 We recommend the certification test should require a common issue of fact or law that applies to the claim of each member of the proposed class.<sup>38</sup> While the common issue should apply to each class member’s claim, we do not think it necessarily has to apply to each cause of action within a class member’s claim.<sup>39</sup>
- 6.41 The benefits of a class action can only be realised if the case will resolve a common issue for a group. Resolving a common issue for each class member in a single proceeding can improve access to justice for a wide group, as well as being an efficient way of managing multiple claims. Our comparator jurisdictions all require a common issue of fact or law, although they have taken different approaches to the extent of commonality required.<sup>40</sup>
- 6.42 We remain of the view that the common issue(s) should not have to predominate over individual issues. We consider this standard is too strict and could frustrate the objective of improving access to justice. It could also frustrate the objective of managing multiple

<sup>37</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 73(2). The IBA Antitrust Committee suggested this definition apply in the commencement provision. However, we have considered this as part of certification as the definition in the commencement provision is simply meant to reflect the certification test.

<sup>38</sup> Draft legislation, cl 4(1)(b).

<sup>39</sup> As we note in Chapter 4, each class member’s claim may include multiple causes of action.

<sup>40</sup> Issues Paper at [10.36]–[10.46].

claims in an efficient way, by requiring claims with common issues that do not predominate to be brought as individual proceedings or as representative actions.

- 6.43 In the Supplementary Issues Paper, we proposed the common issue(s) must be significant to the resolution of each class member's claim. Having reflected on the feedback we received, we no longer consider it is necessary for the provision to contain a significance requirement. One of the factors relevant to the appropriate procedure test (which we discuss below) is the extent of the other issues that would need to be determined once the common issue is resolved. If the common issue is not significant to the resolution of class member claims, it is unlikely this factor will be met. In Australia, there was a considerable amount of litigation over the meaning of a "substantial" common issue, which ultimately led to the term being "watered down".<sup>41</sup> We are concerned that a reference to a significant common issue could similarly lead to uncertainty and litigation over the meaning of the term. While the common issue(s) must be sufficiently central to the claims to justify bringing the case as a class action, we think it is preferable for the court to consider this issue as part of the inquiry into whether a class action is an appropriate procedure.<sup>42</sup> A similar approach is taken by most Canadian jurisdictions.<sup>43</sup> We also note the UK Competition Appeal Tribunal Rules simply require a common issue.<sup>44</sup>
- 6.44 We have considered the suggestion that a definition of common issues should be provided. In the UK Competition Appeal Tribunal Rules, common issues are defined as "the same, similar or related issues of fact or law".<sup>45</sup> The Ontario legislation defines common issues as:<sup>46</sup>
- (a) common but not necessarily identical issues of fact, or
  - (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.
- 6.45 We think including "related issues" may be too broad a definition of common issues and prefer an approach that includes "the same or similar issues" or "common but not necessarily identical issues". However, we think it is unnecessary to provide a statutory definition of common issues. This can be left to the courts to determine as it will ultimately depend on the facts of the matter.

<sup>41</sup> Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 115. In *Wong v Silkfield Pty Ltd* [1999] HCA 48, (1999) 199 CLR 255 at [27]–[28], the Court said a substantial common issue was one which was not "ephemeral or nominal", was "real or of substance", but did not have to be one of "special significance".

<sup>42</sup> A similar conclusion was reached by the Ontario Law Reform Commission, which thought the issue of whether the common issues predominated was more relevant to the issue of whether a class action would be a superior procedure, rather than the common issues test: see Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 346.

<sup>43</sup> For example, in British Columbia, class member claims must raise common issues, whether or not they predominate over individual issues. When the court is determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, it must consider whether common questions predominate over individual questions: Class Proceedings Act RSBC 1996 c 50, s 4(1)(c) and 4(2)(a). Note, however, that in Ontario the common issues must predominate over individual questions: Class Proceedings Act SO 1992 c 6 (Ontario), s 5(1.1)(b). This requirement was added to the certification test in 2020.

<sup>44</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 79(1)(b).

<sup>45</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 73(2).

<sup>46</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 1(1).

## REPRESENTATIVE PLAINTIFF

6.46 In the Supplementary Issues Paper, we outlined our conclusion that the court should consider, as part of the certification test, whether there is a suitable representative plaintiff who is able to fairly and adequately represent the class.<sup>47</sup> We said relevant factors might include:

- (a) Whether there are any conflicts of interest that could prevent the person from properly fulfilling their role as representative plaintiff.
- (b) 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.
- (c) In a case where the person seeks to represent members of their hapū or iwi, tikanga on representation.

### Results of consultation

6.47 Six submitters commented on our proposed requirement for a suitable representative plaintiff who will fairly and adequately represent class members.<sup>48</sup> Four broadly agreed with our approach, with some suggesting amendments.<sup>49</sup> Bell Gully agreed that adequacy of representation is fundamental to the operation of a modern class actions regime and said a person should not lightly be able to bring claims on behalf of potentially thousands of others. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said the suitability of the representative plaintiff is so important that our proposed factors should be mandatory rather than permissive.

6.48 Other matters that submitters proposed a representative plaintiff should need to establish were:

- (a) They have the means to meet an adverse costs award.<sup>50</sup>
- (b) They understand class action proceedings and their rights and obligations under any funding arrangements.<sup>51</sup>
- (c) A method of notifying class members of progress in the class action.<sup>52</sup>
- (d) Governance and consultation procedures for the class.<sup>53</sup>

6.49 Nicole Smith queried how the court would practically assess the three factors we proposed. For example, who will raise the issue of a conflict of interest and how can a court assess whether a person has a reasonable understanding of the nature of the claims and the responsibilities of representative plaintiff?

6.50 Te Tari Ture o te Karauna | Crown Law Office submitted that difficulties could arise if a litigant in person could bring a class action on behalf of others. Te Kāhui Ture o Aotearoa

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<sup>47</sup> Supplementary Issues Paper at [1.84]–[1.96].

<sup>48</sup> Bell Gully, Michael Duffy, Insurance Council, NZLS, Rhonson Salim and Nicole Smith.

<sup>49</sup> Bell Gully, Michael Duffy, Rhonson Salim and Insurance Council. In addition, Gilbert Walker, Zane Kennedy and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) indicated general agreement with our certification provision.

<sup>50</sup> Bell Gully and Insurance Council.

<sup>51</sup> Bell Gully.

<sup>52</sup> Rhonson Salim.

<sup>53</sup> Rhonson Salim.

| New Zealand Law Society and some consultation workshop participants suggested we should reconsider the role of the representative plaintiff. We considered these issues in Chapter 3.

## Recommendations

### 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.

6.51 We think the court should consider the proposed 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, who are not parties to the proceeding, and we think the court should be satisfied the person is able to fulfil that role.

6.52 We recommend 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.<sup>54</sup> It is important that a representative plaintiff can fairly and adequately represent the class because they will be making decisions on their behalf. Whether the proposed representative plaintiff can fairly and adequately represent the class is part of the certification tests in Canada, the United States and the UK Competition Appeal Tribunal.<sup>55</sup> We have included "suitability" as well as fairly and adequately because it allows

<sup>54</sup> Draft legislation, cl 4(1)(c).

<sup>55</sup> See Issues Paper at [11.6]. In Australia, there are provisions that allow the court to discontinue proceedings or replace a representative plaintiff if they cannot adequately represent class members: see Issues Paper at [11.6]–[11.7].

for considerations that are slightly broader than their representation of the class, such as whether they have received independent legal advice and whether they understand their own potential costs liability.

### **Relevant factors**

- 6.53 We consider several factors are relevant to the court’s analysis of whether a proposed representative plaintiff is suitable and will fairly and adequately represent the class. We recommend the certification test should provide that 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 as representative plaintiff.<sup>56</sup>
  - (b) It should consider whether they have a reasonable understanding of the nature of the claims and the duty and responsibilities of a representative plaintiff, including their potential liability for costs.<sup>57</sup>
  - (c) It should be satisfied the person has received independent legal advice on the duty and responsibilities of the role.<sup>58</sup>
  - (d) If they 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.<sup>59</sup>
- 6.54 We discuss each of these factors below. We also recommend the court should be able to take into account any other factors it considers relevant, to allow flexibility to consider the circumstances of a particular case.<sup>60</sup> For example, a proposed representative plaintiff not having legal representation could be a relevant factor.
- 6.55 In the Supplementary Issues Paper, we proposed the court “may” take into account the factors we identified. On reflection, we consider some of these factors should be mandatory considerations.

### **Conflicts of interest**

- 6.56 Having a conflict of interest may prevent a representative plaintiff from adequately fulfilling their role. This could include a conflict or likely conflict relating to the common issues in the case, a relationship with the defendant or the law firm acting, or involvement in another associated legal proceeding.<sup>61</sup> We therefore think the court should consider whether there is, or is likely to be, a conflict of interest that could prevent the proposed representative plaintiff from properly fulfilling the role of representative plaintiff.
- 6.57 We acknowledge it will not always be apparent at certification whether there is (or is likely to be) a conflict of interest, given the uncertainty about who will ultimately be a class member. The court’s consideration will necessarily be limited to any information available at the certification stage about actual or potential conflicts of interest. We envisage that,

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<sup>56</sup> Draft legislation, cl 4(2)(a).

<sup>57</sup> Draft legislation, cl 4(2)(b).

<sup>58</sup> Draft legislation, cl 4(2)(c).

<sup>59</sup> Draft legislation, cl 4(2)(d).

<sup>60</sup> Draft legislation, cl 4(4)(e).

<sup>61</sup> See Issues Paper at [11.10].

in an affidavit in support of the certification application, the proposed representative plaintiff would detail any conflict of interest or potential conflict of interest they are aware of. Alternatively, they could state they are unaware of any conflicts of interest. The affidavit could also outline whether the proposed representative plaintiff has had any dealings with the lawyer, litigation funder or defendant other than in connection with the case or the matters giving rise to the case.

- 6.58 If a potential or actual conflict of interest came to light later in the proceeding, it could give rise to an application to replace the representative plaintiff. Alternatively, a conflict of interest could be managed through sub-classes. We discuss sub-classes in Chapter 8.

### Understanding of the case and duty and responsibilities of role

- 6.59 In order to properly represent class members, the representative plaintiff needs to have a reasonable understanding of the claims being pursued in the class action. It will be difficult for a plaintiff to provide instructions and make decisions about matters such as settlement without this knowledge. However, we do not think a representative plaintiff must have a detailed knowledge of the facts and the law as this could pose too high a bar.<sup>62</sup> The proposed representative plaintiff's affidavit could provide information on how they have developed an awareness of the case. This might include being briefed on the case by the lawyer acting in the class action and reading the statement of claim.
- 6.60 The representative plaintiff also needs to understand the duty and responsibilities of their role, which we discussed in Chapter 3. This will include their potential liability for adverse costs. The applicant's affidavit should state whether they have received independent legal advice on these matters. Requiring a court to consider whether the representative plaintiff has a reasonable understanding of the duty and responsibilities of the role can help to ensure the representative plaintiff is entering into the role with an informed understanding of what is expected of them.
- 6.61 We think this factor should be a mandatory consideration. We do not think a person should be appointed as representative plaintiff unless they have a reasonable understanding of the case and the duty and responsibilities of the role.

### Independent legal advice

- 6.62 In Chapter 3 we recommend a representative plaintiff must receive independent legal advice on the duty and responsibilities of the role. To ensure that this occurs, we consider the certification test should require the court to be satisfied a person has received this independent advice.

### Tikanga on representation

- 6.63 Where a person seeks to bring a class action on behalf of members of their hapū or iwi, we think the tikanga of the hapū or iwi on representation may be relevant to a court's consideration of whether the person is a suitable representative plaintiff who can fairly and adequately represent the claims of those members. 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

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<sup>62</sup> See Rachael Mulheron *The Class Action in Common Law Legal Systems – A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 293 (commenting that requiring a representative plaintiff to have a detailed knowledge of the relevant law and facts “would hold the representative to such a high standard that the effect of class actions legislation would be essentially nullified”).

hurdle that makes it more difficult for Māori litigants to bring a class action. We have not made this a mandatory consideration as there may be cases where it is unnecessary, such as where the person is clearly recognised as having a mandate.

- 6.64 In a case where this factor appears relevant, the court could receive evidence of the tikanga of the iwi or hapū on representation and any tikanga process that has been undertaken with respect to the proposed representative plaintiff.
- 6.65 One submitter queried whether a certification application would need to be provided to the hapū or iwi in case the issue of representation was disputed. We do not think this is necessary as a matter of course. However, in cases where a certification application does not provide sufficient evidence about the person's mandate to bring the case or there appears to be some dispute over representation, the court could consider whether to make directions on who should be given notice of the certification application.

### *Replacing the representative plaintiff*

- 6.66 A proceeding will be certified on the basis of a particular representative plaintiff, who the court has determined is able to fairly and adequately represent the class. For this reason, we recommend the Class Actions Act should specify that the representative plaintiff may only withdraw from the role with the leave of the court.
- 6.67 One situation where it may be necessary to replace the representative plaintiff is where a person no longer wishes to continue in the role. A class action can only proceed if it has a suitable representative plaintiff and so we think a person should only be able to withdraw from the role with the leave of the court.<sup>63</sup> Otherwise there may be a risk of a defendant seeking to settle an individual representative plaintiff's claim to try and prevent the class action from continuing.<sup>64</sup>
- 6.68 A situation could also arise where the representative plaintiff is no longer able to fairly and adequately represent the class.<sup>65</sup> In this situation, we anticipate that another class member would file an application to be substituted as representative plaintiff. If there is no one else able to fulfil the role, it may lead to the proceeding being decertified.<sup>66</sup>
- 6.69 We recommend the Class Actions Act should empower the court to substitute the representative plaintiff in these two situations. Later in this chapter we recommend that a certification order should include the name of the representative plaintiff. This will need to be amended if the representative plaintiff is replaced.

## **CLASS ACTION MUST BE AN APPROPRIATE PROCEDURE**

- 6.70 In the Supplementary Issues Paper, we proposed that a court should consider whether a class action is an appropriate procedure for the efficient resolution of class member claims. This would enable the court to assess whether another procedure would be a

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<sup>63</sup> We note in the United Kingdom Competition Appeal Tribunal, a representative plaintiff may only withdraw from their role with the leave of the court: The Competition Appeal Tribunal Rules 2015 (UK), r 87.

<sup>64</sup> We discuss individual settlements in Chapter 11.

<sup>65</sup> In Australia, the court may substitute another class member as representative plaintiff if it appears to the court that the representative plaintiff is not able to adequately represent the interests of class members: see Federal Court of Australia Act 1976 (Cth), s 33T. The other Australian regimes have similar provisions.

<sup>66</sup> We discuss decertification later in this chapter.



more appropriate means of resolving claims without requiring the class action to be the preferable or superior procedure.<sup>67</sup> We suggested the court should be able to consider the following factors when determining whether a class action would be an appropriate procedure:

- (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.

## Results of consultation

- 6.71 Seven submitters commented on our proposed “appropriate procedure” requirement.<sup>68</sup> Simpson Grierson indicated its agreement with this aspect of the certification test.<sup>69</sup> The IBA Antitrust Committee noted that our provision referred to the “efficient resolution of the *claims* of class members,” while the Ontario certification provision requires a class action to be the preferable procedure for the resolution of the *common issues*.<sup>70</sup> It agreed with the focus on claims because it would encourage a holistic assessment of the class action, allowing the court to consider whether a class action makes sense for the parties and the court, particularly in light of residual issues.
- 6.72 The Insurance Council said the factors should be mandatory rather than permissive, because it is important to carry out a full assessment of whether a class action is an appropriate procedure in every case.
- 6.73 Bell Gully suggested “the extent of the other issues that will need to be determined once the common issue is resolved” should be amended to “the *nature* and extent of...” It also suggested the court should consider whether there is a real prospect that class members may be adversely affected by the order and the need for, and number of, sub-classes.
- 6.74 The IBA Antitrust Committee suggested the appropriate procedure aspect of the certification test could involve duplication with the proposed requirement for a common issue of fact or law of significance to the resolution of each claim. It suggested that the appropriate procedure analysis may be the better place to consider whether the common issue lends itself to a class action. Omni Bridgeway said it should be made clear that consideration of the extent of the other issues that will need to be resolved once the common issues are resolved is not akin to a predominance test. This point was also made by consultation workshop participants.

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<sup>67</sup> Supplementary Issues Paper at [1.44].

<sup>68</sup> Gilbert Walker, Insurance Council, IBA Antitrust Committee, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Tom Weston QC.

<sup>69</sup> In addition, Gilbert Walker, Zane Kennedy and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) indicated general agreement with our certification provision.

<sup>70</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 5(1)(d).

- 6.75 Two submitters commented on the proposed factor of whether the likely time and cost of the proceeding is proportionate to the remedies sought. Shine Lawyers said the court should exercise caution with this factor at early stages of the proceeding. It said a significant benefit of class actions is making small individual claims against large defendants viable, so any cost-benefit analysis should not deny access to justice for individuals and should not solely focus on economic considerations. It said the court could exercise other powers to ensure a proportionate response, such as making a *cy-près* award of damages (which we have termed alternative distribution).<sup>71</sup> Tom Weston QC suggested clarifying whether this factor could mean that a proceeding might not be certified where it involves a large number of class members with each having a very small claim, so the only real financial benefit is to a litigation funder.
- 6.76 A consultation workshop participant questioned whether an appropriate procedure test was robust enough and thought a superiority test would be better.
- 6.77 Gilbert Walker suggested the appropriateness test could consider whether regulatory action (either concluded or in progress) might count against certification.

## Recommendation

### 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.

- 6.78 We consider the certification test should require a class action proceeding to be an appropriate procedure for the efficient resolution of the claims of class members.<sup>72</sup> This requirement will allow the court to make a holistic assessment of whether the claims are suitable to bring as a class action, without requiring a plaintiff to establish that a class action would be superior to other procedures for resolving the claims. We think it would be unduly burdensome if the plaintiff had to demonstrate that a class action was superior to every alternative means of bringing a claim and this might frustrate the objective of

<sup>71</sup> We discuss alternative distribution in Chapter 10.

<sup>72</sup> Draft legislation, cl 4(1)(d).

improving access to justice. 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.

- 6.79 This aspect of our recommended test focuses on whether a class action would be an efficient way of resolving class member claims, rather than simply resolving the common issues. Even if a class action could be an efficient way of resolving the common issues, the proceeding might not be suitable to bring as a class action if there will be real difficulty in determining individual issues for a large group of class members and there is another procedure that could more easily resolve those claims.<sup>73</sup>
- 6.80 We recommend the certification test should specify the court must consider the following factors when determining whether a class action is an appropriate procedure:<sup>74</sup>
- (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.
- 6.81 In the Supplementary Issues Paper, we suggested these factors should be discretionary. On reflection, we now consider they should be mandatory. The existence of these factors has been key to the design of other aspects of the certification test we recommend. For example, we have decided against a strict numerosity threshold because the number of class members will be considered as part of the court's consideration of whether a class action is an appropriate procedure. Similarly, we have removed "significance" from the common issue requirement because the court will consider the nature and extent of the other issues that will need to be determined once the common issue is resolved. Our conclusion that class actions should not be restricted to claims for damages is based on the assumption that a court will consider whether there is another procedure available to class members that would be a more appropriate means of dealing with their claims. Our policy intent may be undermined if the court is not required to consider each of the factors relevant to the appropriate procedure requirement. We think these factors should be considered in every case.
- 6.82 We discuss each factor below. Some of these factors are likely to overlap, for example, the nature of the claims and whether there are other procedures available for resolving them.

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<sup>73</sup> We do, however, make recommendations to enable individual issues to be determined in an efficient manner in a class action. In Chapter 8, we recommend the court should have a power to give directions with respect to determination of individual issues. In Chapter 10, we recommend the court should have a power to make an aggregate assessment of monetary relief.

<sup>74</sup> Draft legislation, cl 4(3).

### Proposed class definition

- 6.83 We have added a requirement for the court to consider the proposed class definition, as this will affect the size, scope and manageability of a class action. Having a clear class definition is important because it allows potential class members to determine whether they are covered by a class action, affects the notice arrangements that will be needed, and provides a defendant with some clarity as to the nature and scope of their exposure. The class definition is particularly important in opt-out class actions, because potential class members who fall within the definition and do not opt out will be bound by the outcome.
- 6.84 The way a class has been defined might mean the proceeding is not appropriate to bring as a class action. One issue that has arisen in other jurisdictions is ‘over-inclusive’ class definitions, where the class definition may encompass some class members without a cause of action against the defendant.<sup>75</sup> One response to over-inclusive class definitions is allowing subjective class definitions, which limit the class to those who have suffered injury or who will ultimately have a successful cause of action.<sup>76</sup> Although subjective class definitions can prevent the inclusion of class members without a cause of action against the defendant, they can be problematic. They can be circular and may require subjective issues to be decided, involve a preliminary consideration of the merits, unduly narrow the class and impede finality for the defendant.<sup>77</sup> They may also make it difficult for potential class members to determine whether they fall within the class.
- 6.85 Consideration of the class definition is also part of the certification test in other jurisdictions. In Ontario, the certification test includes a requirement for an “identifiable class” of two or more people.<sup>78</sup> Case law has held that class membership must be defined by objective criteria that are rationally related to the common issues and not dependent on the outcome or merits of the litigation.<sup>79</sup>
- 6.86 The certification criteria applied by the UK Competition Appeal Tribunal includes a requirement that claims are “brought on behalf of an identifiable class of persons”.<sup>80</sup> The Tribunal’s *Guide to Proceedings* recommends that subjective or merits-based class definitions should be avoided, and the class should be defined as narrowly as possible without arbitrarily excluding people. It must be possible to say for any particular person, using an objective definition of the class, whether or not the person falls within the class.<sup>81</sup>

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<sup>75</sup> Rachael Mulheron *The Class Action in Common Law Legal Systems – a Comparative Perspective* (Hart Publishing, 2004) at 324. The example is given of a claim brought against an educational institution for alleged misrepresentations that students relied on to their detriment. Defining the class as all persons who attended the institution between certain dates was considered over-inclusive because not all of those students had experienced detriment.

<sup>76</sup> Rachael Mulheron *The Class Action in Common Law Legal Systems – a Comparative Perspective* (Hart Publishing, Oxford, 2004) at 327.

<sup>77</sup> Rachael Mulheron *The Class Action in Common Law Legal Systems – a Comparative Perspective* (Hart Publishing, Oxford, 2004) at 330.

<sup>78</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 5(1)(b). The other Canadian regimes have similar provisions.

<sup>79</sup> Garry D Watson *Holmested and Watson: Ontario Civil Procedure* (online ed, Carswell) at §27:12. However, it notes several cases where courts have taken a more relaxed view of the prohibition against merits-based class definitions.

<sup>80</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 79(1)(a).

<sup>81</sup> Competition Appeal Tribunal *Guide to Proceedings* (2015) at 6.37.

- 6.87 Some United States courts have considered ‘ascertainability’ or ‘definiteness’ of the class to be an implicit certification requirement in class actions seeking damages.<sup>82</sup> Courts will consider whether the class can be ascertained by objective criteria. A class definition that depends on subjective criteria such as a class member’s state of mind will be rejected for lack of definiteness.<sup>83</sup> In addition, some courts have considered whether a class definition is “administratively feasible”, so the process of identifying class members will be manageable and require little, if any, individual factual inquiry.<sup>84</sup>
- 6.88 In Australia, where there is no certification requirement, an application commencing a class action must describe or otherwise identify the class members to whom the proceeding relates.<sup>85</sup>
- 6.89 A class action is a procedural device that is intended to provide an efficient way of bringing multiple individual claims. It should not be used to confer a right of action on individuals who would not otherwise have one.<sup>86</sup> Defining the class in a way that does not use inappropriate subjective criteria but is not over-inclusive involves a delicate balancing act and will ultimately depend on the case at issue. We do not propose any rules for class definition and think this is a matter for the courts to determine.
- 6.90 There may be cases where the court is only prepared to certify the class action if the proposed class definition is amended. In such a case, the court could consider adjourning the certification hearing to give the representative plaintiff an opportunity to amend their application.

### *Potential number of class members*

- 6.91 As discussed in the Supplementary Issues Paper, we consider a nuanced approach to numerosity is preferable to a threshold such as “seven or more persons”. Our draft commencement provision only requires a representative plaintiff and two other persons.<sup>87</sup> We think the size of the class is better considered as part of the court’s assessment of whether a class action is an appropriate procedure. Where the estimated class size is large, this may be a factor in favour of a class action.
- 6.92 We envisage the affidavit filed by the proposed representative plaintiff would contain information on the potential size of the class. In some cases, it will be straightforward to obtain this information, such as the number of shareholders on a share register. In other cases it will be more difficult to accurately estimate the potential class size prior to discovery, such as in consumer class actions. In such a case, the affidavit could provide

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<sup>82</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §3:2.

<sup>83</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §3:3.

<sup>84</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §3:3.

<sup>85</sup> See Federal Court of Australia Act 1976 (Cth), s 33H(1)(a). The other Australian regimes have similar provisions. In *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61 at [19], the court said that a useful test was: “...whether the description is such as to enable a person, with the assistance of a legal adviser if necessary, to ascertain whether he or she is a group member. If the description incorporates a reference to conduct alleged in the pleadings, a person or his or her adviser ought to be able, by reading the description and the relevant portion of the pleadings, to determine whether he or she is a member of the represented group”.

<sup>86</sup> A representative action will not be allowed if it might confer a right of action on a group member who would not otherwise be able to assert that in individual proceedings: *Cridge v Studorp* [2017] NZCA 376 at [11(i)].

<sup>87</sup> Draft legislation, cl 1(5).

an estimated range of class size and information as to how this estimate has been obtained.

### ***Nature of the claims***

- 6.93 We see the nature of the claims as being relevant, including which area of law is involved and the nature of the relief sought. In Chapter 4, we explained we did not consider class actions should be prevented with respect to particular areas of the law or types of relief. However, we said this could be considered as part of certification. For example, a judicial review claim seeking only a declaration is likely to be less appropriate to bring as a class action than a private law claim seeking damages.

### ***Nature and extent of the other issues to be determined***

- 6.94 This factor requires the court to consider which issues will need to be resolved once the common issues are determined, and whether a class action will still be appropriate in light of this. As one commentator has noted:<sup>88</sup>

No matter how significant the common issues may be, if resolution of the leftover individual issues is going to degenerate into an “unmanageable monster”, those common issues will not be “big enough” to sustain a class action.

- 6.95 We see this exercise as not simply a numerical comparison of the number of common and individual issues, but as an assessment of how manageable it will be to determine the individual issues. We have therefore amended this factor to refer to the “nature and extent” of the other issues. This will allow the court to consider, for example, whether the remaining issues would require individual determination or could be determined by using sub-groups. We do not see this factor as requiring common issues to predominate.

### ***Proportionality***

- 6.96 We consider the court should assess whether the time and expense of a class action is proportionate to the remedies sought. It reflects our objectives for class actions of improving access to justice and managing multiple claims in an efficient way. We do not think a class action will be consistent with those objectives if it is lengthy and expensive to run and results in very small individual payments to class members. While such a class action might still involve the defendant paying a significant award and result in a change to its behaviour, we have not recommended ‘strengthening incentives for compliance with the law’ as an objective for class actions.
- 6.97 As discussed in Chapter 4, we do not think class actions should be limited to proceedings seeking damages, so this assessment should not be limited to an economic calculation. The cost and expense of a class action could be justified by non-monetary relief that will be significant for individual class members.
- 6.98 To allow the court to assess this factor, we envisage the affidavit filed in support of the certification application will need to include some information about:
- (a) The potential duration of the class action, such as the likely number of witnesses and estimated hearing duration.

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<sup>88</sup> Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 209.

- (b) The likely expenses of the proceeding, such as anticipated legal fees, project management fees and disbursements.
  - (c) The estimated range of individual claims.
- 6.99 Some of this information may be confidential and we anticipate a court might approve some redactions of material that is provided to the defendant. We acknowledge that it may be difficult to provide an accurate estimate of these matters at an early stage of proceedings, so we envisage the court's consideration would be at a fairly high-level. Nonetheless, we expect that lawyers and litigation funders will have undertaken considerable due diligence before bringing a class action and will have developed estimates of the potential costs of the proceeding and individual claim sizes.

### *Other procedures for resolving individual claims*

- 6.100 This factor requires the court to consider whether there are other avenues available to class members that would be more appropriate for resolving their claims, without requiring the plaintiff to establish that a class action is superior to all alternative procedures. For example, in a case seeking a non-monetary remedy, the court could consider whether the case would be more appropriately brought as a judicial review or representative action proceeding or through an application under the Declaratory Judgments Act 1908.
- 6.101 This factor refers to other procedures available to class members because we do not think the possibility of regulatory action on the same issue should prevent a class action. In Chapter 2, we suggest that where there is a class action and a regulatory action over the same matter, courts could manage this using their general case management powers.

## **CLASS MEMBERSHIP**

- 6.102 The Supplementary Issues Paper explained our conclusion that both opt-in and opt-out class actions should be available, with no default approach.<sup>89</sup> We proposed the court should consider whether the opt-in or opt-out mechanism proposed for the proceeding was an appropriate means of determining class membership in the circumstances of the case. We suggested considerations that may be relevant to this assessment, but did not include them as factors in our proposed certification test.
- 6.103 We also expressed the view it was unnecessary to provide for universal or compulsory class actions.<sup>90</sup> This is where a class action is brought on behalf of all members of a defined class without first obtaining their consent or providing any opportunity for them to remove themselves from the proceedings.<sup>91</sup> We said the situations in which a universal class action might be appropriate would be relatively rare and the individual autonomy of litigants supported giving class members an opportunity to either opt in or opt out of a class action.

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<sup>89</sup> Supplementary Issues Paper at [1.52]–[1.59].

<sup>90</sup> Supplementary Issues Paper at [1.68].

<sup>91</sup> *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [82].

## Results of consultation

6.104 We received 10 submissions on this aspect of our proposed certification test.<sup>92</sup>

### *Whether to have opt-in and opt-out class actions with no default*

6.105 Several submitters commented on our conclusion that both opt-in and opt-out proceedings should be available, with no default approach. Three submitters agreed that both opt-in and opt-out proceedings should be available.<sup>93</sup> The Insurance Council expressed concern about opt-out class actions being allowed, while Professor Vince Morabito (Monash University) disagreed with having a discretionary opt-in/opt-out model.<sup>94</sup>

6.106 Simpson Grierson agreed with having a case-by-case assessment of the appropriate class mechanism, rather than a default approach. Gilbert Walker said that, if both opt-in and opt-out class actions were permitted, a case-by-case approach was preferable to having a default mechanism. Two submitters preferred having a default mechanism. Bell Gully said the default should be opt-in and an applicant should have the burden of establishing that an opt-out class action is more appropriate. Johnson & Johnson suggested a rebuttable presumption that class membership should be opt-out.

6.107 Rhonson Salim suggested that overseas class members should only be able to join a class action by opting in. Bell Gully said the court should not certify a class action on an opt-out basis if the class would include foreign residents.<sup>95</sup>

6.108 The joint submission by Philip Skelton QC, Kelly Quinn and Carter Pearce questioned our conclusion that universal class actions are not required and pointed to significant public law cases where it would have been infeasible to provide an ability to opt out.

### *Whether test should specify factors*

6.109 Several submitters thought greater guidance would be desirable on when an opt-in or opt-out procedure would be an appropriate means of determining class membership. Nikki Chamberlain suggested adding factors that a court may consider when determining whether a class action should be opt-in or opt-out. Bell Gully proposed that the court apply the ‘appropriate procedure’ factors when assessing whether an opt-out mechanism is more appropriate than opt-in.<sup>96</sup> Rhonson Salim agreed the court should have broad discretion to consider the circumstances of a particular case but suggested a guiding principle such as “the sound administration of justice”. He also considered the strength of the claim should be a relevant factor when an opt-out class action is proposed.

6.110 Simpson Grierson thought the considerations we identified as relevant to whether a class action should be allowed on an opt-in or opt-out basis were appropriate. Gilbert Walker

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<sup>92</sup> Bell Gully, Nikki Chamberlain, Michael Duffy, Gilbert Walker, Insurance Council, Johnson & Johnson, Vince Morabito, Rhonson Salim, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>93</sup> Michael Duffy, Omni Bridgeway and Simpson Grierson.

<sup>94</sup> The latter referred us to: Vince Morabito “Opt in or Opt Out A Class Dilemma for New Zealand” (2011) 24 NZULR 421.

<sup>95</sup> We discuss this issue in Chapter 7.

<sup>96</sup> As noted above, Bell Gully submitted that opt-in should be the default mechanism.



commented that conducting class actions on an opt-out basis is particularly challenging where there are many individual issues, and where defendants want to join other parties.

## Recommendation

### 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.

- 6.111 We confirm our preliminary conclusion that opt-in and opt-out class actions should both be available, with no default mechanism.
- 6.112 There are advantages and disadvantages to both forms of class action, as we discussed in detail in the Issues Paper.<sup>97</sup> An opt-in class action ensures that class members have actively consented to the proceedings. This removes the risk of a person being bound by a proceeding they are unaware of and enables class members to actively sign up to a legal retainer and litigation funding arrangements. It also means the size and identity of the class is clear, which can help the defendant to calculate its potential liability and allow them to identify any contributory claims. A key disadvantage of opt-in class actions is they typically involve a smaller class size, which may limit the extent to which they improve access to justice, make it more difficult to attract litigation funding, increase the risk of multiple individual proceedings being brought and provide less finality for defendants.
- 6.113 Opt-out class actions are likely to have a greater impact on improving access to justice because class members do not need to take any active steps to become part of the class action. In addition, as opt-out class actions generally involve a larger class size than opt-in class actions, they may make more cases economic to bring as a class action. They may also help to provide greater finality for a defendant since the outcome will be binding on a larger number of people. A disadvantage of opt-out class actions is that individuals are automatically part of a class action without their consent. If class members are unaware of the opportunity to opt out of the class action, they will be bound to the outcome of the proceedings without having any knowledge of it.

<sup>97</sup> Issues Paper at [12.15]–[12.50].

- 6.114 The implications of these potential advantages and disadvantages will differ depending on the type of case. For example, the implications of binding a class member to the outcome of a proceeding they are unaware of may differ depending on the value of individual claims and the subject matter. The access to justice benefits of an opt-out class action could be particularly important in a case where individual claims are modest and it is difficult to identify potential class members, such as a consumer claim involving a defective product. By contrast, the benefits of an opt-out class action may be less pronounced in a shareholder class action where potential class members can be easily identified through the share register. We think the best approach is to allow both opt-in and opt-out class actions, to allow for a case-by-case assessment of which is appropriate.
- 6.115 Because we think the advantages and disadvantages of both forms of class action will differ depending on the case, rather than one being generally preferable, we do not recommend a default approach. In our view the starting point should be the mechanism for determining class membership proposed by the representative plaintiff, given that the case will have been formulated on a particular basis. We recommend the certification test require the mechanism proposed for the proceeding to be appropriate means of determining class membership in the circumstances of the proceeding.<sup>98</sup> We think “appropriate” is the right threshold rather than the court having to decide which is the best way of determining class membership. It may be that either opt-in or opt-out would be appropriate in some cases.
- 6.116 Unless the representative plaintiff agrees, we do not think a class action should be certified on a different basis to that sought by the representative plaintiff, as it may not be feasible for them to continue with the litigation on that basis.<sup>99</sup> If the representative plaintiff is prepared to proceed with the litigation on the basis of another class mechanism, the application for certification could be brought in the alternative. Alternatively, the court could provide the representative plaintiff with the opportunity to amend their certification application if the court is likely to decline certification on the basis of the proposed approach to class membership.<sup>100</sup>

### **Relevant factors**

- 6.117 As suggested by some submitters, we recommend the certification test provide guidance on the factors a court can consider when determining whether a class mechanism is appropriate. This will provide greater certainty and avoid the risk of litigation over whether the factors courts have developed with respect to representative actions should apply to class actions.
- 6.118 We recommend the certification test specify the court may consider the following factors when making its assessment:<sup>101</sup>
- (a) The potential size of the class and how potential class members will be identified.

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<sup>98</sup> Draft legislation, cl 4(1)(e).

<sup>99</sup> For example, a litigation funder may only be prepared to fund the proceeding on an opt-out basis since this is likely to result in a larger class size.

<sup>100</sup> We note the Ontario class actions legislation provides that the court may adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence: Class Proceedings Act SO 1992 c 6, s 5(4).

<sup>101</sup> Draft legislation, cl 4(4).

- (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 factor it considers relevant.
- 6.119 This approach will provide some guidance to parties and the court, while still allowing flexibility to consider the circumstances of an individual case. We considered the suggestion made by one submitter that the same factors should apply to the court's assessment of the proposed mechanism for determining class membership and its assessment of whether a class action is an appropriate procedure, and we acknowledge the overlap between these factors. However, given there are some factors unique to each inquiry, we prefer to keep these as separate lists of factors.

### Potential size of the class and how potential class members will be identified

- 6.120 Te Kōti Mana Nui | Supreme Court has said an opt-in approach may be preferable where the class size is small and there is a natural community of interest or pre-existing connection.<sup>102</sup> In such a case, it is likely to be easier to contact class members. However, it said class size will not necessarily be determinative.<sup>103</sup> We also think it is relevant to consider how easy or difficult it will be to identify class members, regardless of class size. Even where the class is large, opt-in could still be appropriate if it is easy to identify and contact potential class members.

### Characteristics of the class

- 6.121 The characteristics of the class may also be relevant, including whether the class is predominantly made up of individuals under 18 years old or individuals who may be considered to lack decision-making capacity with respect to a step in a class action. As we discuss in Chapter 7, there are arguments in favour of both opt-in and opt-out in such cases, and we think a case-specific approach is appropriate.
- 6.122 We also discuss the issues of class members who live outside Aotearoa New Zealand and the Crown as a class member in Chapter 7. We recommend in both cases, the class member should have to opt into a class action to become a class member, even if the class action is opt-out. If the class predominantly comprises foreign residents or government entities, this could be a factor favouring an opt-in approach.<sup>104</sup>

### Nature of the claims

- 6.123 It may be relevant for a court to consider the nature of the claims, including the subject matter and the size of individual claims. Claims involving personal or sensitive subject matter or allegations of lack of consent may be less appropriate to bring as opt-out class

<sup>102</sup> *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [98]. The size and nature of the class may be considered by the UK Competition Appeal Tribunal when determining whether a class action should be opt-in or opt-out: The Competition Appeal Tribunal Rules 2015 (UK), r 79(3).

<sup>103</sup> *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [98].

<sup>104</sup> It may also be that Aotearoa New Zealand is not the appropriate forum for the class action where the majority of class members are outside the jurisdiction. This is an issue the court could consider as part of its assessment of whether a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members.

actions. It may be appropriate for a case involving individual claims of significant size to be brought as an opt-in class action, given that it may be economic for potential class members to bring their own individual proceedings. An opt-out class action might be preferable where a case involves claims of modest value.

### Whether class members could be adversely affected by the proceedings

- 6.124 If there is a real risk that class members could be adversely affected by participating in a class action, it may be more appropriate for the class action to be brought on an opt-in basis. An example might be where the defendant has brought a counterclaim, or there is a real prospect of this occurring.<sup>105</sup> The opt-in notice could contain information on the counterclaim (or other possible adverse effect) so that individuals are fully informed before they decide whether to become a class member.

### Whether class mechanism would unfairly prejudice the defendant in running its defence

- 6.125 It may be relevant to consider whether the defendant will be unfairly prejudiced in its ability to respond to a class action if the class action is brought on a particular basis. For example, whether the defendant would be unable to identify applicable defences, or to make any contributory claims within a limitation period, due to uncertainty about the scope of the class or the particulars of the claims. In the Supplementary Issues Paper, we noted that bringing contributory claims within the applicable limitation period is not normally an issue because the Limitation Act 2010 allows a defendant to bring a contribution claim up to two years after their liability was quantified. However, case law has diverged on whether the requirement to bring claims under the Building Act 2004 within 10 years applies to contribution claims.<sup>106</sup>
- 6.126 We do not intend this factor to encompass a defendant's general preference for opt-in over opt-out proceedings or a difficulty in assessing the extent of liability because the exact class size is unknown. In Chapter 8, we make recommendations to enable the defendant to obtain information on class member claims, which we think will assist to provide some clarity as to the case against it.

### Universal class actions

- 6.127 We think the individual autonomy of litigants supports giving class members an opportunity to either opt into or opt out of a class action. In our view, it is unnecessary for a class actions regime to provide for universal or compulsory class actions, where there is no opportunity to opt in or opt out.
- 6.128 The Canadian, Australian and UK Competition Appeal Tribunal class actions regimes do not provide for universal class actions. The Ontario Law Reform Commission had recommended the court should have a discretion in each case to determine whether class members should be permitted to exclude themselves from a class action, with criteria to

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<sup>105</sup> Te Kōti Mana Nui | Supreme Court has said that an opt-in approach should be favoured in representative actions where there is a real prospect that some class members may end up worse off or adversely affected by proceedings, including where there is potential for a counterclaim: *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [93].

<sup>106</sup> Supplementary Issues Paper at [1.124]–[1.125].

guide the decision.<sup>107</sup> However, the legislature rejected this approach, and the Ontario legislation includes a right to opt-out in all cases.<sup>108</sup>

- 6.129 We think the strongest argument for allowing universal class actions relates to class actions seeking a declaration or injunction that would apply to all, given the difficulty in practically opting out of such a remedy. In the United States, there is no requirement to provide a right to opt out of such cases.<sup>109</sup>
- 6.130 However, we think it would be unnecessary to bring a case seeking a declaration or injunction that will have general effect as a class action. We see class actions as a form of aggregate litigation that enables many individual claims to be brought together. Whether it is necessary to bring claims as a class action will depend on whether individuals need to be class members to benefit from the court's decision. Where the remedy sought is a declaration or injunction that will have general effect, we think it is unlikely to be necessary to bring the case as a class action. The case can be brought as an ordinary proceeding and individuals will benefit from the court's decision without needing to be class members.
- 6.131 Alternatively, such a proceeding could be brought as a representative action under HCR 4.24. We note the declaratory or injunctive relief class action in the United States has been described as “the closest incarnation” to the English representative action rule.<sup>110</sup> Many of the class action provisions we recommend are designed to deal with the complexities of a case involving an opt-in or opt-out procedure where monetary relief is sought. It seems unnecessary to rely on these provisions for a case without any opt-in or opt-out procedure that is simply seeking a declaration or injunction of general effect.
- 6.132 A class action may be more appropriate where it is seeking an order or injunction that will only apply to those who are part of the class action. We discuss this issue in Chapter 4.

## OTHER ASPECTS OF THE CERTIFICATION TEST

- 6.133 In this section we discuss:
- (a) Whether to require a litigation plan at certification.
  - (b) The interaction between review of litigation funding arrangements and the certification test.
  - (c) The effect of the certification requirements being met.
  - (d) Whether the Class Actions Act should specify matters that will not prevent a case from being certified.
  - (e) The evidential standard for certification.

<sup>107</sup> Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 487–491.

<sup>108</sup> See Class Proceedings Act SO 1992 c 6 (Ontario), s 8(1)(f) and 9. Subsequent to the Ontario Law Reform Commission's report, there was consultation with interest groups on class actions reform and agreement was reached to undertake class actions reform according to certain parameters. The terms of reference for the Attorney-General's Advisory Committee on Class Action Reform included having an opt-out entitlement: see *Report of the Attorney General's Advisory Committee on Class Action Reform* (Ministry of the Attorney General, February 1990) at 22 and 33–34.

<sup>109</sup> United States Federal Rules of Civil Procedure, r 23(b)(2). See also Supplementary Issues Paper at [1.64]–[1.67].

<sup>110</sup> Rachael Mulheron “Opting in, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers” (2011) 50 Can Bus LJ 376 at 388.

## Litigation plan

- 6.134 The Supplementary Issues Paper explained that we did not think a litigation plan should be required as part of certification.<sup>111</sup> Two submitters commented on this. Chapman Tripp said the plaintiff should have to outline a litigation plan and how individual issues would be managed at certification. It noted that substantial class actions can take a long time and saw benefit in setting appropriate expectations about the process and likely timeframes. Johnson & Johnson said the representative plaintiff should ensure a workable plan for the proceeding is produced but did not specify this should be part of the certification test.
- 6.135 Some consultation workshop participants thought a litigation plan could ensure the plaintiff has a clear idea of how they will bring and prove their case and could be particularly useful where claims require detailed scientific evidence. Others cautioned that discussing how a plaintiff will prove their case might get close to discussing the merits of the case at certification. It was also suggested the information provided to support the proportionality assessment might be sufficient and that litigation plans might fit better as part of case management.
- 6.136 A plaintiff will need to provide some information about how the case will be run as part of their certification application, particularly to allow the court to assess whether the time and expense of a class action will be proportionate to the remedies sought. However, we do not consider there should be a separate requirement to provide a litigation plan. We think this could require too many detailed issues to be discussed at an early stage of proceedings. A litigation plan would be better considered as part of case management, if the case is certified. In Chapter 8 we recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee consider developing a list of matters to be discussed at class actions case management conferences in the High Court Rules.

## Litigation funding

- 6.137 In the Supplementary Issues Paper, we indicated we had not yet formed a view on whether the court should consider litigation funding arrangements when a class action is commenced, but if it should, this would likely need to be in a separate provision rather than in the certification test.<sup>112</sup>
- 6.138 Nikki Chamberlain suggested an additional clause in the certification provision that the court must approve the terms of any litigation funding arrangement. Three submitters supported the court carrying out an assessment of litigation funding arrangements at the same time as certification, without specifying whether this should be part of the certification test.<sup>113</sup> Zane Kennedy agreed with our view that the process of considering funding arrangements should be separate from the certification test, and said there would be little point in the court considering funding arrangements if it then declined to certify the class action. Some consultation workshop participants said it would be efficient to consider litigation funding arrangements at the same time as certification.

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<sup>111</sup> Supplementary Issues Paper at [1.99]–[1.101].

<sup>112</sup> Supplementary Issues Paper at [1.102].

<sup>113</sup> Andrew Harmos, LPF Group and NZLS.

- 6.139 In Chapter 17, we recommend that litigation funding arrangements in class actions should only be enforceable by funders if they are approved by the court and set out factors the court should consider when deciding whether to approve a funding agreement in a class action. We suggest that the funded representative plaintiff should generally seek approval of the funding agreement shortly after certification.<sup>114</sup> There are several reasons why we consider this should be in a separate provision rather than in the certification test:
- (a) While many class actions will be litigation funded, this is not a requirement of bringing a class action.
  - (b) It would not make sense for the court to review a litigation funding arrangement unless it has decided to certify the class action.
  - (c) If the court has certified the class action on a slightly different basis to that initially sought (for example, by narrowing the class definition or only allowing it to proceed on an opt-in basis), the representative plaintiff and funder may need to review the litigation funding arrangements.
  - (d) In some cases, litigation funding could be obtained part-way through proceedings, or the litigation funding arrangements could change during the proceedings.

### Effect of certification requirements being met

- 6.140 Our draft certification provision stated that a court “may” certify a proceeding if the test was met. The IBA Antitrust Committee queried whether a residual discretion was intended, contrasting the Ontario provision which states the court “shall” certify a class action if satisfied that the criteria are met. Bell Gully suggested the certification provision state the court may certify a proceeding “only if” satisfied the certification criteria are met, so it is clear that the provision is a code for certification.

### Recommendation

#### 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.

- 6.141 We do not consider a court should have a residual discretion to decline to certify a proceeding as a class action if the criteria are met. This would create a high degree of uncertainty for litigants and undermine the specific criteria in the certification test. We therefore recommend 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.<sup>115</sup> This should be subject to an exception where there is more than one concurrent class action proceeding that meets the certification test and the court decides that not all of them will be certified. For any concurrent class action that the court decides will not be certified, we recommend

<sup>114</sup> However, if settlement occurs prior to certification, the funded representative plaintiff should apply for court approval of the funding agreement at the same time as the application for settlement approval. If the funding agreement is entered into after certification, funding approval should be sought as soon as practicable after the agreement is entered into. If the terms of an approved funding agreement are amended during the proceedings, funding approval should be sought as soon as practicable after that amendment.

<sup>115</sup> Draft legislation, cl 4(1).



the Class Actions Act specify the application for certification must be dismissed. We discuss this issue in Chapter 5.

### Whether to specify matters that do not prevent certification

- 6.142 The Ontario legislation provides that a court shall not refuse to certify a proceeding as a class action solely on any of the following grounds:<sup>116</sup>
- (a) The relief sought includes a damages claim that would require individual assessment after the common issues have been determined.
  - (b) The relief sought relates to separate contracts involving different class members.
  - (c) Different remedies are sought for different class members.
  - (d) The number of class members or the identity of each class member is not known.
  - (e) The class includes a subclass with claims or defences that raise common issues not shared by all class members.
- 6.143 The IBA Antitrust Committee noted the Ontario provision and suggested a similar provision may be helpful in Aotearoa New Zealand.
- 6.144 This provision was included in the Ontario legislation to remove what had been impediments to bringing a representative action.<sup>117</sup> As discussed in the Issues Paper, English case law took a restrictive approach to what could proceed as a representative action and this approach influenced other jurisdictions, including Canada, and provided impetus for the development of class actions regimes.<sup>118</sup> While Ontario courts had been moving away from the position that a representative action should be barred where individual assessments of damages may be required or the relief arose out of separate contracts, the OLRC recommended a statutory provision “to put these matters beyond doubt”.<sup>119</sup>
- 6.145 It is 30 years since the Ontario legislation was enacted and the law on representative actions has evolved considerably in that time. Courts in Aotearoa New Zealand have rejected the earlier restrictive approach to representative actions in favour of a liberal and flexible approach.<sup>120</sup> For example, it is now well established that a representative action is not precluded where damages will need to be determined on an individual basis.<sup>121</sup> We therefore think it is unnecessary to have a provision similar to Ontario that provides a list of matters that do not preclude certification.

### Evidential standard for certification

- 6.146 We have considered what evidential standard should apply when the court assesses whether the certification test is met. This was an issue we noted briefly in the Issues

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<sup>116</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 6. The other common law Canadian regimes have similar provisions.

<sup>117</sup> See *Bywater v Toronto Transit Commission* (1998) 27 CPC (4th) 172 at [23].

<sup>118</sup> See Issues Paper at [2.27] and [2.36]–[2.37].

<sup>119</sup> Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 347 and 531.

<sup>120</sup> See Issues Paper at [3.33]–[3.36].

<sup>121</sup> See Issues Paper at [3.38]–[3.42].



Paper.<sup>122</sup> It was also raised in one submission we received on the Supplementary Issues Paper.

- 6.147 One option is for the ordinary civil standard of proof to apply, which would require the proposed representative plaintiff to prove the certification test is met on the balance of probabilities.<sup>123</sup> The joint submission from Philip Skelton QC, Kelly Quinn and Carter Pearce cautioned against requiring the court to determine the certification test to an evidentiary standard, with the burden of proof resting on the plaintiff. They said this would require the plaintiff to bring evidence affirmatively showing that every aspect of the certification criteria is met, could lead to defendants contesting the minutiae of the test and may require discovery, briefs of evidence and cross-examination.
- 6.148 Another option is for a lesser evidentiary standard to apply. In Ontario, the plaintiff needs to show “some basis in fact” for each of the certification requirements (except for the requirement that the pleadings disclose a cause of action, which has its own standard of proof).<sup>124</sup> This standard does not require the court to resolve conflicting facts and evidence at the certification stage.<sup>125</sup> It does not involve determining the merits of the proceeding, “nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny”.<sup>126</sup>
- 6.149 In its 2019 report, the Law Commission of Ontario (LCO) considered whether a more stringent evidential standard should be required. It identified several concerns with moving from a “some basis in fact” standard to a “balance of probabilities” standard, including needing more evidence at certification and a more merit-focused discussion of the certification criteria. It concluded that the evidentiary standard for certification should not be amended.<sup>127</sup> The LCO noted similar evidentiary standards are applied in other Canadian jurisdictions. In Alberta and British Columbia, courts favour an “air of reality” standard, while in Saskatchewan a “plausible standard” applies at certification that requires the plaintiff to show an “authentic” cause of action.<sup>128</sup> In the United States, while courts have applied divergent approaches, there has been a trend towards requiring a plaintiff to prove the certification requirements by a preponderance of the evidence.<sup>129</sup>
- 6.150 A third option is to apply the standard that applies to a strike-out application, with the court proceeding on the basis that the pleaded facts are true (unless the pleaded allegations are entirely speculative and without foundation).<sup>130</sup> The strike-out standard was supported by Philip Skelton QC, Kelly Quinn and Carter Pearce. Their joint submission said matters alleged in the statement of claim should be taken to be true (for the purposes of certification) unless they are entirely speculative and without foundation or are shown

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<sup>122</sup> Issues Paper at [10.72].

<sup>123</sup> See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97].

<sup>124</sup> *Hollick v Toronto (City)* 2001 SCC 68 at [25]; *Pro-Sys Consultants Ltd v Microsoft Corp* 2013 SCC 57 at [99]–[105].

<sup>125</sup> *Pro-Sys Consultants Ltd v Microsoft Corp* 2013 SCC 57 at [102].

<sup>126</sup> *Pro-Sys Consultants Ltd v Microsoft Corp* 2013 SCC 57 at [103].

<sup>127</sup> Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 45–48.

<sup>128</sup> Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 46.

<sup>129</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §7:21.

<sup>130</sup> See *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267, *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566, *Collier v Panckhurst* CA136/97, 6 September 1999 at [19].

to be untrue by affidavit evidence that is indisputable. Some consultation workshop participants thought most of the certification requirements could be met on the pleadings with little evidence required.

- 6.151 We consider there must be some basis in fact for each of the certification requirements, except for the requirement for a reasonably arguable cause of action. As we explain in our discussion of this element of the certification test, we think the strike-out standard should apply to this requirement so the court would proceed on the basis that the pleaded facts are true, except if the pleaded allegations are entirely speculative and without foundation.
- 6.152 The plaintiff should be required to provide affidavit evidence to support other aspects of the certification test, rather than the court simply relying on what is in the pleadings. For example, if the pleadings assert there is a potential class of 100,000 people, this should be supported by an affidavit explaining the basis for this figure. If the certification application states that a proposed representative plaintiff has a reasonable understanding of the claim and the duty and responsibilities of the role, the affidavit could outline the steps taken to develop this understanding. We think it would be too low a standard for a court to determine certification on the pleadings without any evidence provided by the representative plaintiff. However, we consider requiring a plaintiff to meet a balance of probabilities standard would be too high and could mean that briefs of evidence and cross-examination are required for certification, which would cause unnecessary cost and delay.

## PROCEDURAL MATTERS RELATING TO CERTIFICATION

- 6.153 In this section we consider the following procedural aspects of certification:
- (a) The certification application.
  - (b) The certification hearing.
  - (c) The certification order.
  - (d) The court's powers when certification criteria are no longer met.
- 6.154 As we did not address the certification hearing or the court's powers when the certification criteria are no longer met in the Supplementary Issues Paper, submitters did not comment on these matters.

### Certification application

- 6.155 In the Supplementary Issues Paper, we proposed that when a class action is commenced it must be accompanied by an application for an order certifying the proceeding as a class action and an order appointing one or more representative plaintiffs for the proceeding.<sup>131</sup>

### Results of consultation

- 6.156 Several submitters raised questions about what must be filed in support of a certification application and when:

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<sup>131</sup> Draft legislation, cl 3.

- (a) The IBA Antitrust Committee said it was unclear when the representative plaintiff must file evidence in support of certification and what the manner, scope and timing of any evidential requirements are. It noted that in Ontario, a proceeding would be initiated by filing a statement of claim and an application would subsequently be filed for orders certifying the proceeding and appointing a representative plaintiff.
- (b) Shine Lawyers said that, given the certification criteria will likely require considerable evidence from the plaintiff, it would be premature to require the plaintiff to seek a certification order at commencement. It said this is particularly so given the proposed 90-day time frame for filing a competing class action.
- (c) Omni Bridgeway said certification should be able to be determined on the pleadings, except for the requirement for the representative plaintiff to demonstrate they have a reasonable understanding of the nature of the claims and their obligations. This could be dealt with by way of a brief affidavit.
- (d) Two submitters queried how a plaintiff could prove aspects of the certification test, such as how they would fairly and adequately represent the class or that a class action is an appropriate procedure.<sup>132</sup> The joint submission by Philip Skelton QC, Kelly Quinn and Carter Pearce noted that opinion evidence from the plaintiff or their counsel would be inadmissible.

### Recommendation

#### 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.

- 6.157 We recommend the Class Actions Act should require an intending representative plaintiff to file an interlocutory application for an order certifying the proceeding as a class action and appointing a representative plaintiff. This should be filed when the proceeding is commenced.<sup>133</sup> We also recommend the application should be supported by an affidavit from the proposed representative plaintiff. As discussed in the preceding section, such an affidavit will allow the court to determine whether there is some basis in fact for the certification requirements.
- 6.158 While we acknowledge the difficulty of filing an interlocutory application and affidavit within the 90-day timeframe applying to concurrent class actions, we do not think a class action proceeding should be commenced unless full consideration has been given to the certification requirements. We note the High Court Rules require an affidavit in support of an interlocutory application to be filed at the same time as the application and we do not favour a different approach for class actions.<sup>134</sup> Our recommendations on concurrent class

<sup>132</sup> Philip Skelton QC/Kelly Pearce/Carter Quinn (joint submission) and Nicole Smith.

<sup>133</sup> Draft legislation, cl 3.

<sup>134</sup> High Court Rules 2016, r 7.20. We note the court retains a discretion to extend the time for filing a supporting affidavit: see *New Zealand Trade Centre v Jianhua Trading Group Ltd* [2015] NZHC 3014 at [5].

actions are designed to provide an opportunity for any concurrent class action to be filed but are not intended to encourage multiple class actions. We have also recommended the court retain a discretion to grant leave to file a class action proceeding outside the 90-day timeframe.<sup>135</sup>

- 6.159 A notice of opposition to an interlocutory application must normally be filed and served within 10 working days of being served with the application, along with any affidavit in support.<sup>136</sup> This may be insufficient time to respond to a certification application, which is likely to be more complex than a standard interlocutory application, and an extension to this timeframe may be needed.<sup>137</sup>

### The certification hearing

- 6.160 We envisage it will usually be necessary to hold a hearing to determine whether a case should be certified as a class action. In Chapter 5, we recommend that a class actions webpage be developed on ngā Kōti o Aotearoa | Courts of New Zealand website and that details of new class actions be listed on it. We suggest Te Tāhū o te Ture | Ministry of Justice make details of upcoming certification hearings available on the webpage. This would allow interested persons, including potential class members, to attend the hearing or to seek leave to intervene in the proceedings. We do not think it is necessary to specify any rights of intervention in certification hearings, as Te Kōti Matua | High Court has the necessary powers to permit this where appropriate.<sup>138</sup>
- 6.161 In some cases, it could be possible to determine the certification application on the papers, particularly where the defendant consents. Regardless of whether a hearing is held, the court will still need to consider whether each aspect of the certification test is met.
- 6.162 The Ontario legislation allows the court to adjourn an application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.<sup>139</sup> This is based on a recommendation of the Attorney-General's Advisory Committee on Class Action Reform that determining certification should not be a "forced choice between certification or no certification".<sup>140</sup>
- 6.163 We can envisage scenarios where the court might consider it can only certify a class action on a slightly different basis to how it has been brought. These include:
- (a) Where the court considers the class definition should be amended from that pleaded in the statement of claim.
  - (b) Where one or more of the causes of action is not reasonably arguable.

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<sup>135</sup> We discuss concurrent class actions in Chapter 5.

<sup>136</sup> High Court Rules 2016, rr 7.24–7.25.

<sup>137</sup> An extension of this timeframe could be granted under the High Court Rules 2016, r 1.19.

<sup>138</sup> Te Kōti Matua | High Court has jurisdiction to make orders or directions as to how a hearing should be conducted under the High Court Rules 2016, r 7.43A(1)(d)–(e) and inherent jurisdiction to grant leave to a non-party to intervene in a proceeding: *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2833 at [11]; *Seales v Attorney-General* [2015] NZHC 828 at [41].

<sup>139</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 5(4).

<sup>140</sup> Ministry of the Attorney General *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990) at 31.

- (c) Where the plaintiff has sought to bring a class action on an opt-out basis and the court considers it can only be certified on an opt-in basis.
- 6.164 In these situations, it might be appropriate for the court to provide an applicant with the opportunity to amend their pleadings rather than declining certification. The court already has the power to adjourn the hearing of an interlocutory application and we think a certification-specific power is unnecessary.<sup>141</sup>

### Certification order

- 6.165 In the Supplementary Issues Paper, we said if the court decides to certify a proceeding as a class action it should make a formal certification order.<sup>142</sup> We suggested the matters specified in the 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.

### Results of consultation

- 6.166 We received 10 submissions that commented on certification orders.<sup>143</sup> There was general agreement that the list of matters we proposed should be included in a certification order.
- 6.167 Bell Gully suggested the certification order should also list the date by which class members must opt into or opt out of the class action and state whether and when the representative plaintiff must provide security for costs. Carter Pearce said the certification order should identify the plaintiff's solicitors as lawyer for the class. Several submitters said the court should have a power to amend the certification order to allow for issues evolving as the case progresses.<sup>144</sup>
- 6.168 At our consultation workshops, there was general agreement that clarity around the class definition and common issues is important. However, concern was raised about common issues being fixed by a certification order as it was considered necessary to have flexibility to amend claims during the class action.

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<sup>141</sup> See High Court Rules 2016, r 7.42.

<sup>142</sup> Supplementary Issues Paper at [1.109].

<sup>143</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>144</sup> Chapman Tripp, Omni Bridgeway and Shine Lawyers.

## Recommendations

**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.

6.169 We recommend the Class Actions Act should specify that when a proceeding is certified as a class action, the court must make a certification order. The benefits of having a certification order include helping to establish the common issues that will be determined in the class action, providing clear information to class members about the nature and scope of the class action, and assisting the appellate court in the event the certification decision is appealed.<sup>145</sup>

6.170 We recommend the terms of a certification order should include:

- (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.

6.171 We do not see this list as exhaustive and think the court should have flexibility to include any other matter it considers appropriate in the certification order.

6.172 We have made some small amendments to our earlier list. We now refer to the class definition, rather than the class description, which aligns with our certification test. We also refer to a description of the causes of action rather than the claims.

6.173 We see the purpose of a certification order as clarifying the scope of the claim and the basis on which the proceeding has been certified. For this reason, we do not think it needs

<sup>145</sup> These functions of a certification order were identified in Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 432.

to contain matters such as the opt-in or opt-out date, security for costs or the lawyer for the class.

- 6.174 We recommend the Class Actions Act specify that the court may amend a certification order, in order to provide flexibility as a case develops. Situations where this might be necessary include where an amended statement of claim is filed or where the representative plaintiff is substituted. Without the power to amend a certification order, a representative plaintiff could be constrained by the way the case was framed in the initial statement of claim, including with respect to the common issues. Identifying additional common issues to be determined could be in the interests of both access to justice and managing multiple claims in an efficient way.
- 6.175 We recommend the Ministry of Justice should publish certification orders on the class actions webpage of the Courts of New Zealand website. This would enable potential class members to access information about the scope of the class action and assist other litigants to determine whether another proceeding would be considered a concurrent class action.

### Court's powers when certification criteria are no longer met

- 6.176 It is possible that a change in circumstances during a class action will mean the certification criteria are no longer met. For example, a representative plaintiff may no longer be able to fairly and adequately represent the class, or there may no longer be a common issue applying to the class. In other jurisdictions with a certification stage, courts have powers they can exercise if the certification criteria are no longer met:
- (a) In Ontario, if it appears to the court that the certification requirements are no longer satisfied, it may amend the certification order, decertify the proceeding or make any other order it considers appropriate.<sup>146</sup> If the court decertifies a proceeding, it may permit the proceeding to continue as one or more proceedings between different parties.<sup>147</sup>
  - (b) The UK Competition Appeal Tribunal can make an order varying or revoking the certification order or staying the class action. In doing so, it must consider whether the certification criteria continue to be met, whether the representative plaintiff still meets the criteria, and whether the Tribunal has given them permission to withdraw as representative plaintiff.<sup>148</sup>
  - (c) In the United States, a court may alter or amend its class certification decision at any time before final judgment.<sup>149</sup> This can include decertifying or modifying a class action that was initially approved if, during the litigation, the class action fails to meet the certification requirements.<sup>150</sup>
- 6.177 Australian courts also have powers to order that a proceeding not continue as a class action, although these powers serve as an alternative to requiring certification.<sup>151</sup>

<sup>146</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 10(1).

<sup>147</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 10(2).

<sup>148</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 85(1)-(2).

<sup>149</sup> United States Federal Rules of Civil Procedure, r 23(c)(1)(C).

<sup>150</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §7:34 and §7:38.

<sup>151</sup> Federal Court of Australia Act 1976 (Cth), ss 33L-33P.

## Recommendation

**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.

- 6.178 We recommend the Class Actions Act specify that if the court is satisfied the certification criteria are no longer met, it may make an order decertifying the proceeding or any other order it considers appropriate. An example of another order that may be appropriate is an order appointing an alternative representative plaintiff.<sup>152</sup>
- 6.179 We consider that either a party or a class member should be able to apply for an order to have a proceeding decertified (or other order), although this should require the leave of the court to prevent misuse of this power. We also think the court should be able to make decertification or other orders on its own motion.

## DRAFT CERTIFICATION PROVISION

- 6.180 Below we set out a draft legislative provision that could give effect to our recommendations on the certification test.

### 4 Certification of class action

- (1) Subject to **section 6** (which relates to the certification of concurrent class actions), a court must certify a proceeding as a class action proceeding if it is satisfied that—
- (a) the proceeding discloses 1 or more reasonably arguable causes of action; and
  - (b) there is a common issue of fact or law in the claim of each member of the proposed class; and
  - (c) there is at least 1 representative plaintiff that is suitable and will fairly and adequately represent the class; and
  - (d) a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members; and
  - (e) 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.
- (2) When assessing the suitability of a proposed representative plaintiff and whether they will fairly and adequately represent the proposed class under **subsection (1)(c)**, the court—

<sup>152</sup> Earlier in this chapter, we recommend there should be a power to substitute the representative plaintiff.



- (a) must consider whether there is or is likely to be a conflict of interest that could prevent them from properly fulfilling the role as representative plaintiff:
  - (b) must consider whether they have a reasonable understanding of the nature of the claims and the duty and responsibilities of a representative plaintiff, including potential liability for costs:
  - (c) must be satisfied that they have received independent legal advice on the duty and responsibilities of a representative plaintiff:
  - (d) if they will be representing members of their hapū or iwi, may consider the tikanga of the hapū or iwi as relevant to representation in the proceeding:
  - (e) may consider any other factors it considers relevant.
- (3) When assessing under subsection (1)(d) whether a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members, the court must consider—
- (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.
- (4) When assessing under subsection (1)(e) whether the mechanism proposed for the proceeding is an appropriate means of determining class membership, the court may consider—
- (a) the potential size of the proposed class and how potential class members will be identified:
  - (b) the characteristics of the proposed 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 the mechanism would unfairly prejudice the defendant in running their defence:
  - (f) any other factors it considers relevant.
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## CHAPTER 7

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# The class

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## INTRODUCTION

- 7.1 In this chapter, we discuss:
- (a) Whether special rules are needed for certain categories of class member.
  - (b) The relationship between the lawyer and class members.
  - (c) Communications between the defendant's lawyer and class members.

## SPECIAL CATEGORIES OF CLASS MEMBER

- 7.2 In this section we discuss whether special rules are needed for the following categories of class member:
- (a) Class members who reside outside Aotearoa New Zealand.
  - (b) Ministers and government departments.
  - (c) Minors and people who are considered to lack sufficient decision-making capacity with respect to a particular step.

### Class members who reside outside Aotearoa New Zealand

- 7.3 Two submitters raised the issue of class members who reside outside the jurisdiction. Bell Gully proposed the court should not certify a class action on an opt-out basis if the proposed class would include foreign residents. Rhonson Salim (Aston University) said non-resident class members should only be able to join a class action by opting in.
- 7.4 We agree this issue needs addressing. Difficulties could arise if class members who reside outside Aotearoa New Zealand are included in an opt-out class action, including ensuring class members receive notice of the class action and uncertainty as to whether a class action judgment would be recognised in a foreign jurisdiction.

### Overseas approaches

- 7.5 Jurisdictions have developed a variety of approaches for dealing with the issue of non-resident class members.<sup>1</sup>

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<sup>1</sup> We have drawn on the approaches outlined in Rachael Mulheron "Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom" (2019) J Priv Int L 445 at 452.

- 7.6 Foreign-resident class members must opt into all class actions in the United Kingdom (UK) Competition Appeal Tribunal, including opt-out class actions.<sup>2</sup> Two Canadian provincial regimes also require non-resident class members to opt into class actions.<sup>3</sup>
- 7.7 In Ontario, courts will consider at certification whether it has jurisdiction to certify a class action that includes foreign class members. A key consideration is whether there is a “real and substantial connection” between the court and the subject matter.<sup>4</sup>
- 7.8 In the United States, whether overseas courts would recognise the binding effect of the judgment may be a factor considered by the court at certification.<sup>5</sup> Parties often bring expert evidence on the likelihood that a foreign court would grant binding effect to a judgment as part of certification and courts conduct a country-by-country analysis.<sup>6</sup> Commentary notes it is rare for a court to deny certification on this basis, as the court can exclude individual class members whose home country would not recognise the binding effect of the judgment or manage the issue through sub-classes.<sup>7</sup>
- 7.9 In Australia, generally speaking, if the relevant court has jurisdiction, there is no legal requirement to limit class membership to persons within the jurisdiction.<sup>8</sup> Given that class members are not parties, the issue to consider is whether the court has personal jurisdiction over the defendant and subject-matter jurisdiction over the claims, rather than whether the court has personal jurisdiction over class members.<sup>9</sup> However, the Victorian regime does allow the court to order that a person ceases to be, or does not become, a class member if they do not have sufficient connection with Australia to justify their inclusion as a class member.<sup>10</sup>
- 7.10 Other possible approaches to non-resident class members include:
- (a) Class actions legislation could expressly allow opt-out classes consisting of both resident and non-resident class members.<sup>11</sup>

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<sup>2</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 82(1)(b)(ii).

<sup>3</sup> Class Proceedings Act RSNB 2011 c 125 (New Brunswick), s 18(3); Class Actions Act SNL 2001 c C-18.1 (Newfoundland and Labrador), s 17(2). The class must be divided into resident and non-resident sub-classes: Class Proceedings Act RSNB 2011 c 125, s 8(2); Class Actions Act SNL 2001 c C-18.1, s 7(2). Note this approach was originally followed in Alberta, British Columbia and Saskatchewan, but the provisions were subsequently amended.

<sup>4</sup> For example, see *Airia Brands Inc v Air Canada* 2017 ONCA 792, leave refused in *Air Canada v Airia Brands Inc* [2017] SCC 476.

<sup>5</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §4:71. This analysis typically takes place in the “superiority” limb of the certification test.

<sup>6</sup> Tania Monestier “Transnational Class Actions and the Illusory Search for Res Judicata” (2011) 86 Tul L Rev 1 at 21.

<sup>7</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §4:71.

<sup>8</sup> Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (3rd ed, Thomson Reuters, Sydney, 2022) at [7.180]. However, the authors note that it may still be desirable to limit the class description to those within the jurisdiction to ensure the judgment can be enforced and because of the cost and difficulty of giving notice to overseas class members.

<sup>9</sup> *Impiombato v BHP Group (No 2)* [2020] FCA 1720 at [105].

<sup>10</sup> Supreme Court Act 1986 (Vic), s 33KA(2)(a). Commentary notes that “from a jurisdictional perspective it is hard to see that s 33KA serves a meaningful purpose in respect of foreign group members. It is the defendant’s amenability to the jurisdiction that is critical”: Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (3rd ed, Thomson Reuters, Sydney, 2022) at 129.

<sup>11</sup> Rachael Mulheron “Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom” (2019) J Priv Int L 445 at 453. This approach is followed in several Canadian jurisdictions: Class Proceedings

- (b) Class actions legislation could give the court discretion to require non-resident class members to opt into the class action.<sup>12</sup>

### Recommendation

#### 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.

- 7.11 We recommend the Class Actions Act specify that, in both opt-in and opt-out class actions, a person who resides outside Aotearoa New Zealand should only be able to join a class action if they opt in. This follows the approach used by the UK Competition Appeal Tribunal, which also allows both opt-in and opt-out class actions. For the following reasons, we think this approach best responds to the challenges with notice requirements and the uncertainty as to whether a class action judgment would be recognised in a foreign jurisdiction.
- 7.12 An essential protection of opt-out class actions is adequate notice to potential class members, which informs them they will be bound by the judgment if they do not opt out by the required date. It is likely to be more difficult and costly to provide notice to overseas class members, particularly where they reside in multiple countries. There is a risk that overseas class members will not receive the notice advising of their right to opt out. Even where overseas class members receive the notice, they may not understand it because of language difficulties or because the concept of class actions is unknown to them.<sup>13</sup> If overseas class members are required to opt in, they can provide contact details which should make any further notice more straightforward.
- 7.13 We think this approach will provide greater certainty and clarity about the class membership status of individual foreign residents. It may also facilitate recognition and enforcement of the court's judgment in other jurisdictions. Although the principles on when a foreign judgment will be recognised will differ among jurisdictions, there is a strong argument for a court recognising the binding effect of a class action judgment upon a foreign resident class member who has opted into the class action. This is because they have affirmatively indicated their desire to be bound by the class action judgment. The common law principle of submission recognises that the court has jurisdiction over parties who submit to its jurisdiction.<sup>14</sup> While class members are not parties, we think this principle may be relevant by analogy. In other jurisdictions, the case for requiring foreign

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Act RSBC 1996 c 50 (British Columbia), s 4.1 (2)(a); The Class Proceedings Act SM 2002 c C-130 (Manitoba), s 6(3); The Class Actions Act SS 2001 c C-12.01 (Saskatchewan), s 6.1(2)(a).

<sup>12</sup> Rachael Mulheron "Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom" (2019) J Priv Int L 445 at 454. The example of the Pennsylvania Code is given.

<sup>13</sup> See Debra Lyn Bassett "Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation" [2004] Mich State Int Law Rev 619 at 628.

<sup>14</sup> Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [2.225].

resident class members to opt in has been premised on the basis that this would result in a judgment having a binding effect on those class members in their home country.<sup>15</sup>

- 7.14 In Chapter 6 we recommend that the characteristics of the class should be included in the list of relevant factors a court may consider when deciding whether the mechanism for determining class membership is appropriate. In a case where many class members will be foreign residents, it may be appropriate for the case to be opt-in for all class members.<sup>16</sup> Where a lesser proportion of class members will be foreign residents, we do not think it would be problematic to have an opt-out class action where foreign resident class members must opt in.

### Ministers and government departments

- 7.15 In the Issues Paper and Supplementary Issues Paper, we discussed the issue of when a state entity should be able to fulfil the role of representative plaintiff. We have identified an additional issue of whether the Crown should be required to opt in to become a class member.
- 7.16 The Australian class actions regimes require certain categories of potential class members (which can be broadly termed government) to give written consent before becoming a class member.<sup>17</sup> This was recommended by the Australia Law Reform Commission (ALRC) on the basis that the activities of government agencies and officials are subject to legislative and other restraints that mean it may not be appropriate to commence proceedings on their behalf without consent.<sup>18</sup>

### Results of consultation

- 7.17 We sought feedback from Te Tari Ture o te Karauna | Crown Law Office on this issue. It submitted the Crown should only be able to become a class member by opting in, for the following reasons:
- (a) The Crown must be deliberate about the litigation it brings. It needs to be cognisant of the power imbalance between the Crown and private litigants, and the use of public money.
  - (b) Any class action where the Crown is a class member would be caught by the Cabinet Directions for the Conduct of Crown Legal Business 2016 and the Attorney-General's Values for Crown Civil Litigation. However, the plaintiff class would have their own

<sup>15</sup> See Tania Monestier "Transnational Class Actions and the Illusory Search for Res Judicata" (2011) 86 Tul L Rev 1 at 67 (suggesting that most foreign jurisdictions would regard a foreign claimant's consent to join a class action in the United States as precluding any subsequent action) and Rachael Mulheron "Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom" (2019) J Priv Int L 445 at 455–456 (noting that a key reason why foreign class members are required to opt into class actions in the UK Competition Appeal Tribunal is to avoid the risk that the judgment would not be recognised in other jurisdictions and would not have preclusive effect).

<sup>16</sup> It may also be that Aotearoa New Zealand is not the appropriate forum for the class action where the majority of class members are outside the jurisdiction.

<sup>17</sup> Each of the Australian regimes provides that the following must give consent to being a class member: the Commonwealth, a State or Territory, a Minister of a Commonwealth, State or Territory, a body corporate established for a public purpose by a law of the Commonwealth, State or Territory (other than an incorporated company or association); and an officer of the Commonwealth, State or Territory in their capacity as an officer. For example, see Federal Court of Australia Act 1976 (Cth), s 33E(2). In Victoria, written consent is also required before a judge, magistrate or other judicial officer can become a class member: Supreme Court Act 1986 (Vic), s 33E(2)(d).

<sup>18</sup> Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [128].

lawyers and potentially a litigation funder and plaintiff committee, which could remove control of the litigation from the Crown. The plaintiff class might also be pursuing a different litigation strategy to the Crown.

- (c) The Crown's interests are likely to be different from those of private plaintiffs.
- (d) There may be important policy reasons against filing a claim in a particular case.
- (e) The scale of the Crown's claim will often be much larger than other class members, which could result in a power imbalance within the class.

### Recommendation

#### 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.

- 7.18 We recommend 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. A key rationale for opt-out class actions is to provide access to justice, including by overcoming psychological and social barriers to litigation. This access to justice rationale is unlikely to apply to the Crown because it has sufficient resources for litigation.
- 7.19 Core Crown legal matters must be conducted consistently with the Attorney-General's Values for Crown Civil Litigation.<sup>19</sup> These include dealing with litigation promptly and efficiently and without causing unnecessary delay or expense, not contesting matters it accepts as correct and not taking unmeritorious points for tactical reasons.<sup>20</sup> A Crown class member may have little control over how a class action is run, so it may be difficult to ensure these values are upheld.<sup>21</sup> A class action might also take a legal position contrary to that espoused by the Crown in other litigation, making it difficult to maintain a "single and consistent" Crown view.<sup>22</sup>
- 7.20 Although the Crown could opt out of a class action, this would require it to maintain an awareness of new class actions, consider whether it might fall within the class definition of each and take steps to opt out by the required date. There is a risk of the Crown becoming a class member because it was unaware of a class action or failed to realise it

<sup>19</sup> Cabinet Office Circular "Cabinet Directions for the Conduct of Crown Legal Business" (30 March 2016) CO 16/2 at [13].

<sup>20</sup> Te Tari Ture o te Karauna | Crown Law Office Crown "Attorney-General's Values for Crown Civil Litigation" (31 July 2013) at [5].

<sup>21</sup> The "Attorney-General's Values for Crown Civil Litigation" (31 July 2013) apply to civil litigation "conducted on behalf of Crown departments, officers, and Ministers" (see [3]), which could extend to a class action. Note that the Cabinet Directions for the Conduct of Crown Legal Business 2016 refer to legal representation in litigation where the Crown is a party: Cabinet Office Circular "Cabinet Directions for the Conduct of Crown Legal Business" (30 March 2016) CO 16/2 at [9.2.1]. The Crown would not be a party in a class action unless it was the representative plaintiff or defendant.

<sup>22</sup> See "Attorney-General's Values for Crown Civil Litigation" (31 July 2013) at [4]: "There is only one Crown in New Zealand. Accordingly, the Crown needs to be able to have a single and consistent view, and speak with one voice, on questions of law".

fell within the class definition.<sup>23</sup> We therefore think it is preferable to provide that the Crown only becomes a class member if it opts in.

- 7.21 A key reason for our recommendation is to avoid conflict with current obligations about how Crown legal business is conducted. Therefore, we propose the opt-in requirement should apply to Ministers of the Crown and all government departments, as they are subject to the Cabinet Directions for the Conduct of Crown Legal Business. These directions define government departments as:<sup>24</sup>

departments of the public service as specified in the First Schedule to the State Sector Act 1988, the New Zealand Police, the New Zealand Defence Force, and the New Zealand Security Intelligence Service; and includes

bodies, decision-makers, office holders or employees within those departments

- 7.22 Bodies such as Crown entities, state-owned enterprises and local authorities are not subject to the Cabinet Directions for the Conduct of Crown Legal Business.<sup>25</sup> Following this same approach, we do not propose these bodies should fall within the opt-in requirement for class actions.

### Minors and people who are considered to lack sufficient decision-making capacity with respect to a particular step

- 7.23 We have also identified the additional issue of whether rules are needed with respect to class members who are minors or who are considered to lack sufficient decision-making capacity with respect to a particular step.

### High Court Rules

- 7.24 The High Court Rules 2016 (HCR) provide that a person under 18 years old (“a minor”) must have a litigation guardian as their representative in any proceeding, unless the court orders otherwise or an Act requires or permits them to conduct a proceeding without one.<sup>26</sup>
- 7.25 An “incapacitated person” must have a litigation guardian as their representative in any proceeding, unless the court orders otherwise.<sup>27</sup> The High Court Rules define “incapacitated person” as:<sup>28</sup>

a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—

- (a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or

<sup>23</sup> Although we note our recommendation for all class actions to be listed on the class actions webpage of ngā Kōti o Aotearoa | Courts of New Zealand website will assist with identifying class actions.

<sup>24</sup> Cabinet Office Circular “Cabinet Directions for the Conduct of Crown Legal Business” (30 March 2016) CO 16/2 at [7.1].

<sup>25</sup> The Directions do not apply to the following public entities: the Parliamentary Counsel Office, the Office of the Clerk of the House of Representatives, the Parliamentary Service, Crown entities, State-owned enterprises, offices of Parliament, bodies listed in Schedules 4, 4A and 5 of the Public Finance Act 1989, local authorities, and other bodies corporate that exist to perform public functions or that are owned by the Crown or a public entity: Cabinet Office Circular “Cabinet Directions for the Conduct of Crown Legal Business” (30 March 2016) CO 16/2 at [8].

<sup>26</sup> High Court Rules 2016, r 4.31.

<sup>27</sup> High Court Rules 2016, r 4.30.

<sup>28</sup> High Court Rules 2016, r 4.29.

(b) unable to give sufficient instructions to issue, defend, or compromise proceedings.

- 7.26 The provisions on minors and “incapacitated persons” are primarily directed at a situation where the person would be a party to the litigation.<sup>29</sup> The definition of an “incapacitated person” refers to being a “litigant conducting proceedings” and to giving instructions to issue, defend or compromise proceedings. The role of a litigation guardian is to conduct a proceeding in the name of, or on behalf of, a minor or “incapacitated person”.<sup>30</sup>
- 7.27 Class members do not have the status of parties. Although these rules seem clearly directed at situations where a minor or “incapacitated person” is a party to a proceeding, the language of the rules requires a litigation guardian as the person’s representative “in any proceeding”.<sup>31</sup> For the avoidance of doubt, we think it is desirable for a class actions regime to clarify whether these rules apply to a situation where a minor or a person falling within the definition of an “incapacitated person” is a class member.

### Overseas approaches

- 7.28 Some overseas class actions regimes have specific provisions relating to class members who are minors or who are considered to lack capacity.
- 7.29 In Australia, it is not necessary for a “person under disability” (which is defined to include a minor) to have a litigation guardian to be a class member. However, a class member who is “under disability” may only take a step in the proceeding through their litigation guardian.<sup>32</sup> This follows the recommendation of the ALRC, which said persons under a disability may be disadvantaged if a litigation guardian must be appointed before proceedings are commenced. It could also prevent the defendant from obtaining the benefit of a common binding decision for all class members. The ALRC thought a litigation guardian should be appointed if a class member under disability wants to take a step in the proceedings, such as opting out, assuming conduct of individual issues or expressing a view on a settlement offer.<sup>33</sup>
- 7.30 In Ontario, an opt-out notice and a notice of proposed settlement must be served on the Public Guardian and Trustee if there is a reasonable possibility that it may be authorised to act for one or more class members.<sup>34</sup> If the class might include minors, the court may

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<sup>29</sup> The provisions fall under Part 4 of the High Court Rules 2016, which is headed “Parties”.

<sup>30</sup> High Court Rules 2016, r 4.29.

<sup>31</sup> High Court Rules 2016, rr 4.30 and 4.31.

<sup>32</sup> See: Federal Court of Australia Act 1976 (Cth), s 33F; Civil Procedure Act 2005 (NSW), s 160; Civil Proceedings Act 2011 (Qld), s 103E; Supreme Court Act 1986 (Vic), s 33F; Supreme Court Civil Procedure Act 1932 (Tas), s 69. Some of these jurisdictions use the term “next friend” or “committee” instead of litigation guardian.

<sup>33</sup> Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [130]. Note that it referred to a litigation guardian as a “tutor”.

<sup>34</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 17(8) and 27.1(9). The Office of the Public Guardian and Trustee provides services to protect the financial, legal and personal care of “mentally incapable Ontarians”: Ministry of the Attorney General “Office of the Public Guardian and Trustee” Government of Ontario <[www.ontario.ca](http://www.ontario.ca)>.



direct the notice of proposed settlement to be served on the Children's Lawyer.<sup>35</sup> These provisions followed recommendations of the Law Commission of Ontario.<sup>36</sup>

- 7.31 The Alberta class actions legislation deals with this issue through its provision on the binding effect of a judgment. A judgment is not binding on a person who has opted out of the class action. If a person did not opt out within the specified time “by reason of mental disability”, the court may allow that person to be treated as if they opted out.<sup>37</sup>
- 7.32 When the UK Competition Appeal Tribunal grants certification, it may make directions regarding any class member who is a child or a person who lacks capacity.<sup>38</sup>

## Recommendations

### 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.

<sup>35</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(1)(a). The Office of the Children's Lawyer is an independent law office in the Ministry of the Attorney General that represents the interests of a child under age 18 in court cases and matters in Ontario: Ministry of the Attorney General “Office of the Children's Lawyer” Government of Ontario <[www.ontario.ca](http://www.ontario.ca)>.

<sup>36</sup> Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 57.

<sup>37</sup> Class Proceedings Act SA 2003 c C-16.5 (Alberta), s 27(3).

<sup>38</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 77(2)(b).

### Litigation guardian not required as a matter of course

- 7.33 We do not consider a class member, or potential class member, should be required to have a litigation guardian solely because they are under the age of 18 years or are considered to lack sufficient decision-making capacity with respect to a step in a class action proceeding. This means a person should not automatically require a litigation guardian before they can become a class member or take any steps in a class action. Rather, we think it is better to focus on the step at issue to see whether the court needs to make any orders to protect the interests of a class member.
- 7.34 While a litigation guardian may be necessary where a person is a party to litigation, a class member's role in litigation is very different.<sup>39</sup> A party to litigation must make decisions about the conduct of the litigation, meet evidential obligations, instruct lawyers and meet any adverse costs award. In a class action, these responsibilities are generally fulfilled by the representative plaintiff and class members can take a largely passive role in the litigation. A class member does not need to understand all of the issues involved in the litigation or be able to give instructions to a lawyer about conduct of the class action.
- 7.35 In addition, the class actions regime we recommend has safeguards that are designed to protect the interests of all class members. These include a representative plaintiff who must act in what they believe to be the best interests of the class, a certification test that requires consideration of whether a class action is an appropriate procedure for resolving class member claims and court approval of settlement.
- 7.36 We also consider practical difficulties may arise if a litigation guardian is required before certain categories of person can become a class member, given that it may not be apparent at the outset of a class action whether any potential class members would fall within these categories.
- 7.37 We recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule specifying that, unless the court orders otherwise, a class member (or potential class member) who is under the age of 18 or who is considered to lack sufficient decision-making capacity with respect to a step in a class action proceeding is not required to have a litigation guardian. This will avoid any doubt as to whether Part 4, Subpart 7 of the High Court Rules requires a litigation guardian to be appointed for class members. While we do not think a litigation guardian should be required as a matter of course, that does not mean it would never be appropriate to appoint one. The approach we recommend will allow the court to take a case-specific approach.

### Support with steps in a class action

- 7.38 There are several stages in a class action where a class member can take an active role:
- (a) They can exercise an initial right to either opt into or opt out of the class action.
  - (b) They can bring an application to substitute the representative plaintiff.
  - (c) They can file an objection to a proposed settlement.
  - (d) Their participation may be needed when issues are determined on an individual basis (such as giving evidence).

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<sup>39</sup> We note that when a court is considering whether to appoint a litigation guardian for a person under the High Court Rules, the inquiry into capacity focuses on the party's role in the specific litigation at issue: *Corbett v Patterson* [2014] NZCA 274, [2014] 3 NZLR 318 at [43(b)].

- (e) They may need to take an active step to participate in a settlement.
- 7.39 In some cases, class members who are under the age of 18 years or who are considered to lack sufficient decision-making capacity with respect to one of those steps may require additional support with the step. We do not favour a rule that a litigation guardian *must* be appointed in these situations, as we think it will depend on the class member involved and the consequences of taking, or not taking, a particular step. We think it would be preferable for the court to have a broad discretion to make any orders it considers appropriate. This might include appointing a litigation guardian in appropriate cases, although we envisage this would be tied to certain steps in the proceeding. It could also include orders with respect to notice, such as ensuring it is provided in accessible formats and/or to a third party.
- 7.40 We recommend 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.
- 7.41 We envisage the court could make an order either upon application or its own motion, where it considers this is appropriate. In some cases it may be apparent at the outset that there are class members who are under the age of 18 or who may be considered to lack decision making capacity with respect to a step in the proceeding, such as where a class action is brought on behalf of children or persons receiving dementia care. In other cases, it may not be apparent until later in the proceeding. Whether the parties are aware that orders may be needed with respect to persons under 18 years or class members who are considered to lack sufficient decision-making capacity with respect to a step could be a matter discussed at case management conferences.

### **Determining whether a person has sufficient decision-making capacity with respect to a step**

- 7.42 We recommend the Rules Committee consider developing a High Court Rule on the matters a court should consider when determining whether a class member (or potential class member) has sufficient decision-making capacity with respect to a step in the proceeding. The rule could require the court to 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.
- 7.43 We prefer this approach, rather than mirroring the language of HCR 4.29, which refers to a person who is not capable of understanding issues or giving instructions due to a physical, intellectual or mental impairment.<sup>40</sup>

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<sup>40</sup> Our recommendation reflects the approach to decision-making competence used in the End of Life Choice Act 2019, s 6 (which sets out when a person is competent to make an informed decision about assisted dying) and to decision-

### Interaction with certification requirements

- 7.44 In Chapter 6, we suggested the characteristics of the proposed class may be a relevant consideration when the court is considering whether a proposed opt-in or opt-out mechanism is an appropriate means of determining class membership. It may be relevant for the court to consider whether the class includes persons under 18 years old and/or persons who are considered to lack sufficient decision-making capacity with respect to a step in the proceeding, to the extent this is known. We do not think there should be a presumption in favour of either opt-in or opt-out in such cases. An opt-out class action can ensure that class members are not excluded from obtaining access to justice because they did not understand how to opt in. On the other hand, an opt-in class action can avoid the risk of a person being inadvertently bound by a court judgment. Ultimately, we think it comes down to a case-by-case assessment.
- 7.45 If the entire class consists of persons under 18 years old or who are considered to lack sufficient decision-making capacity with respect to steps in the proceeding, the issue of who can fulfil the role of representative plaintiff will arise. In this situation, the person will have the role of a party and the High Court Rules relating to minors and “incapacitated persons” will apply. We envisage it would generally be appropriate to appoint a litigation guardian for a class member who is fulfilling the role of representative plaintiff, given the duty and responsibilities of a representative plaintiff.<sup>41</sup> This is an issue the court can consider at certification, when determining whether there is a suitable representative plaintiff who can fairly and adequately represent the class.

### LAWYER-CLASS MEMBER RELATIONSHIP

- 7.46 In the Supplementary Issues Paper, we explained that as the law stands in Aotearoa New Zealand, the representative plaintiff in a class action would be in a lawyer-client relationship with their lawyer. The lawyer would also have a lawyer-client relationship with any class member who had entered into a retainer with them. We said the nature of the relationship between the lawyer and any other class members was unclear, although case law suggested it was not a lawyer-client relationship.<sup>42</sup>
- 7.47 We discussed the approaches taken in our comparator jurisdictions to the lawyer-class member relationship and proposed three options for reform:<sup>43</sup>
- (a) The status quo could be maintained. The lawyer would only have a lawyer-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) The lawyer could be regarded as having a lawyer-client relationship with each individual class member.

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making capacity in the Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 9 (capacity to make informed decisions about treatment for a severe substance addiction). These statutes reflect a ‘functional’ approach to decision-making capacity to a greater extent than the current language in the High Court Rules 2016, consistent with recent approaches to decision-making capacity in comparable jurisdictions. Te Aka Matua o te Ture | Law Commission is currently undertaking a review of the law relating to adult decision-making capacity: *He Arotake i te Ture mō ngā Huarahi Whakatau a ngā Pakeke* | Review of Adult Decision-making Capacity Law.

<sup>41</sup> We discuss the role of the representative plaintiff in Chapter 3.

<sup>42</sup> Supplementary Issues Paper at [3.22].

<sup>43</sup> Supplementary Issues Paper at [3.27]–[3.47].

- (c) The lawyer could have a lawyer-client relationship with the class as a whole (lawyer for the class), with specific duties created.
- 7.48 We indicated our preference for option (c) and said this recognised and reflected the unique nature of the relationship between the lawyer and the class. We noted the difficulty of having individual lawyer-client relationships with hundreds or thousands of class members, including in opt-out cases where the identity of some class members may be unknown.
- 7.49 We asked submitters whether they agreed the representative plaintiff's lawyer should be regarded as the lawyer for the class after certification and, if so, what duties the lawyer should owe the class.

### Results of consultation

- 7.50 We received 17 submissions on this issue.<sup>44</sup>

### *Submissions in favour of lawyer for the class*

- 7.51 Eleven submitters agreed the representative plaintiff's lawyer should be considered the lawyer for the class.<sup>45</sup> Reasons given by submitters included:
- (a) It would be unworkable to apply the obligations of a traditional lawyer-client relationship to a class where some class members have yet to be identified.
  - (b) It is illogical to suggest there is a retainer with an unknown class member who has not consented to the lawyer's services or their fees.
  - (c) The lawyer acts for the representative plaintiff in proving common issues for the class (but not necessarily individual issues unless specifically instructed).
  - (d) The lawyer is carrying out the instructions of the representative plaintiff, who conducts the litigation on behalf of the class and is obliged to act in the interests of the class as a whole.
  - (e) Class members are bound by outcomes achieved by the representative plaintiff's lawyer, so they ought to enjoy the incidents of a lawyer-client relationship.
  - (f) There should not be a distinction in the relationship between the lawyer and class members who have opted into the class versus those who have not.
- 7.52 Most of these submitters thought the lawyer-class relationship should arise after certification.<sup>46</sup> Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland) thought the relationship should arise once the opt-in or opt-out process was complete, but that the lawyer should owe a general duty to act in the best interests of the class before this point.

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<sup>44</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Crown Law Office, Michael Duffy, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Johnson & Johnson, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Maurice Blackburn/Claims Funding Australia, Carter Pearce, Rhonson Salim, Shine Lawyers, Simpson Grierson, Philip Skelton QC, Nicole Smith, Woodsford Litigation Funding and Tom Weston QC. Not all submitters indicated which option they preferred. While Philip Skelton QC, Kelly Quinn and Carter Pearce made a joint submission, there were some issues on which these submitters expressed separate views.

<sup>45</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Insurance Council, Johnson & Johnson, Carter Pearce, Rhonson Salim, Shine Lawyers, Simpson Grierson and Woodsford Litigation Funding.

<sup>46</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Carter Pearce, Shine Lawyers and Simpson Grierson.

- 7.53 Submitters suggested that the lawyer for the class could owe the following duties:
- (a) A duty to act in the best interests of the class.<sup>47</sup>
  - (b) A duty to avoid or manage conflicts that affect representation of the class as a whole.<sup>48</sup> If a conflict of interest does arise, counsel could seek direction from the court.<sup>49</sup>
  - (c) A duty to promptly disclose all information that the lawyer has, or acquires, that is relevant to the matter.<sup>50</sup>
  - (d) A duty to provide information at key stages of the class action, including an explanation of the legal consequences of key steps in the class action and any necessary steps to be taken by class members.<sup>51</sup>
  - (e) A duty to keep class members informed about the progress of the class action.<sup>52</sup>
  - (f) A duty to ensure the representative plaintiff understands their obligations and has sufficient information and advice to provide informed instructions on the case.<sup>53</sup>
  - (g) A duty to act on the instructions of the representative plaintiff, provided the instructions are consistent with the lawyer's other duties. Where there is a conflict, the lawyer should seek the direction of the court.<sup>54</sup>
- 7.54 Most of the submitters who favoured this option thought the nature of the lawyer-class relationship could or should be clarified in legislation or in the *Rules of conduct and client care for lawyers*.<sup>55</sup> Carter Pearce did not support the lawyer's obligations being codified in statute and said the general principles were clear in the case law.
- 7.55 At our consultation workshops, there was a high degree of support for our proposal that the lawyer should be regarded as the lawyer for the class after certification. Participants indicated a desire for clarity about who owes duties to whom and said it would be unworkable to owe obligations to individual class members in an opt-out case. It was suggested that class members should not be prevented from obtaining independent advice, and that a lawyer should be protected if they act in accordance with the representative plaintiff's instructions.

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<sup>47</sup> Chapman Tripp, Nikki Chamberlain, Carter Pearce, Shine Lawyers and Simpson Grierson.

<sup>48</sup> Nikki Chamberlain, Chapman Tripp, Shine Lawyers and Simpson Grierson.

<sup>49</sup> Chapman Tripp. Philip Skelton QC made this same point but did not think the lawyer should be regarded as the lawyer for the class.

<sup>50</sup> Chapman Tripp.

<sup>51</sup> Rhonson Salim.

<sup>52</sup> Chapman Tripp.

<sup>53</sup> Chapman Tripp.

<sup>54</sup> Chapman Tripp.

<sup>55</sup> Bell Gully, Chapman Tripp, Crown Law Office (for opt-out class actions), Insurance Council and Simpson Grierson. Philip Skelton QC preferred the status quo but thought the statute should recognise that the plaintiff's lawyer has to act in the best interests of the class. He also thought the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 should be amended to require retainer agreements with individual class members to record that the lawyer owes duties to the class as a whole and to have provisions for managing any conflict that may arise.

### *Submissions favouring other approaches*

- 7.56 Maurice Blackburn/Claims Funding Australia preferred maintaining the status quo. It said in Australia it is accepted that the representative plaintiff's lawyer owes some obligations to the class, and there is no evidence to suggest that class members are treated unfairly by this approach or that lawyers cannot act in the best interests of class members while acting for the representative plaintiff. It said prescriptive rules are unnecessary and that the court's inherent jurisdiction, its powers under the High Court Rules and lawyers' existing professional obligations are adequate to respond to issues. It said imposing class-wide obligations on the representative plaintiff's lawyer could deter lawyers from conducting class actions or oppressively burden those who do.
- 7.57 Nicole Smith considered a lawyer's duties as an officer of the court and ethical obligations should provide sufficient protection. She noted that lawyers have anti-money laundering obligations, so it would be inappropriate for a lawyer to be in a lawyer-client relationship with anyone who has not signed a retainer.
- 7.58 Philip Skelton QC preferred the status quo and said it is undesirable for a statute to impose a lawyer-client relationship with the class as a whole. He supported statutory recognition that the plaintiff's lawyer has to act in the best interests of the class but thought this is better viewed as part of the lawyer's duty to act consistently with the plaintiff's fiduciary duty to act in the best interests of the class as a whole. If a conflict arose, he considered the plaintiff's lawyer would have a duty to raise the matter with the court and seek directions under the court's supervisory jurisdiction over class actions.
- 7.59 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) suggested class actions legislation could create the concept of a person or persons responsible for conducting a class action (which in some cases might be a litigation committee). It said this approach would help define and confine lawyers' professional responsibilities, including the source of a lawyer's instructions and who a lawyer owed professional duties to.<sup>56</sup> It noted several professional responsibility issues that would need to be considered:
- (a) The possibility of multiple conflicting duties, where the lawyer owes conflicting duties to different categories of class member. It said that, if a lawyer has professional responsibilities to persons they do not have a retainer with, the extent of those duties should be defined and prescribed in rules.
  - (b) Who lawyers must provide information about the principal aspects of client service and disclose and communicate information to.
  - (c) Who a lawyer owes duties of confidentiality to, and which communications are privileged.
  - (d) Whether the defendant's lawyer can communicate with individual class members.

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<sup>56</sup> We discuss this proposal in Chapter 3.

## Recommendations

**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.

### Lawyer for the class

- 7.60 We consider the representative plaintiff's lawyer should be regarded as the lawyer for the class and be considered to have a relationship with the class. The lawyer is carrying out legal work on behalf of the entire class, so they should not be regarded solely as the representative plaintiff's lawyer. Class members will be bound by the outcome of the litigation, and they should be able to rely on the lawyer to conduct the litigation in a way that advances their interests and complies with ethical and professional obligations. We therefore think it is appropriate that a lawyer has obligations to the class, including a duty to act in the best interests of the class. We prefer to simply refer to "relationship" because there is a particular set of obligations that currently attaches to the lawyer-client relationship. We think it is preferable for the *Rules of conduct and client care for lawyers* to specify the obligations that will attach to the lawyer-class relationship, as we discuss later in this chapter.
- 7.61 Given that a lawyer will not necessarily know the identity of all class members or be able to enter into a retainer with them, we think it is preferable to conceive of the lawyer as owing duties to the class as a whole rather than to individual class members. Where a sub-class is created because there is a conflict of interest between groups of class members, it will usually be appropriate for the sub-class to have separate legal representation. We discuss this issue in Chapter 8.
- 7.62 We prefer this approach to the lawyer having a lawyer-client relationship with each individual class member whether or not they have signed a retainer. This option was not supported by submitters. Many of the traditional obligations of the lawyer-client relationship are inappropriate for a class action involving hundreds or thousands of class members, particularly in an opt-out class action where the identity of many class members is unknown. A significant feature of a class action is that class members generally have a passive role, with the representative plaintiff making decisions about the litigation on their behalf. Obligations such as obtaining informed instructions and disclosure and communication of information to clients may not be workable in a class action if they apply to each individual class member. Under our proposed approach, the duties and obligations of the lawyer for the class can be tailored to ensure they are appropriate and workable in the context of a class action.



- 7.63 Several submitters preferred the status quo, which would allow the nature of the lawyer-class relationship and a lawyer's duties to the class to develop through the case law. We consider this approach will lead to a high degree of uncertainty about the role of a lawyer in a class action and think it is preferable for lawyers to understand their obligations to the class before they agree to act in a class action. In Australia, which has not prescribed the role of the lawyer in a class action, a lawyer's duties toward the class appear to be somewhat uncertain.<sup>57</sup>

### *Relationship should arise upon certification*

- 7.64 We have considered when the representative plaintiff's lawyer should become the lawyer for the class. In our view, this relationship should arise upon certification rather than the point a class member opts in or the close of the opt-out date. The class comes into existence upon certification, even if the individual members are not finalised until the opt-in or opt-out process is complete. Because we have proposed that the lawyer has obligations to the class, we do not think it is necessary to wait until each individual class member has decided whether to opt in or opt out for these obligations to take effect. However, this does not preclude potential class members from seeking independent legal advice during the opt-in or opt-in period, such as on whether to join the class action or to accept an individual settlement offer.

### *Relationship should be prescribed by statute*

- 7.65 We think the lawyer-class relationship that arises upon certification should be prescribed by statute. This is a unique relationship that is not contemplated by the Lawyers and Conveyancers Act 2006 or the *Rules of conduct and client care for lawyers*. An illustration of this point is seen in *Ross v Southern Response Earthquake Services Ltd*, where Te Kōti Matua | High Court rejected the plaintiffs' argument that once leave to bring a representative action was granted, their lawyer also represented the class, which meant the 'no-contact rule' would apply.<sup>58</sup> The Court commented that the *Rules of conduct and client care for lawyers* were developed in a jurisdiction that had no tradition of opt-out representative actions and that the no-contact rule did not naturally speak into that situation.<sup>59</sup> It was not persuaded there was such a similarity between overseas certification regimes and the leave requirement under HCR 4.24 to make it appropriate for the courts to impose a solicitor-client relationship between the plaintiffs' lawyers and class members for the purposes of the ethical rules.<sup>60</sup>
- 7.66 The lawyer-class relationship could be prescribed in the Class Actions Act. However, we think it would be preferable for the relationship to be mandated by the Lawyers and Conveyancers Act 2006, so that regulatory requirements for lawyers are not split between two statutes. It would also enable the "lawyer for the class" approach to be extended to other legal procedures involving a representative plaintiff if that is

<sup>57</sup> See Supplementary Issues Paper at [3.28]–[3.29]. See also Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (3rd ed, Thomson Reuters, Sydney, 2022) at [6.210], noting that a number of cases have supported the proposition that the lawyer owes a fiduciary duty to class members but "the precise content of any fiduciary duty owed to those unrepresented class members has not been fully explored in Australia".

<sup>58</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 at [49], [121] and [149].

<sup>59</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 at [155].

<sup>60</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 at [159].

considered appropriate (although that is outside the scope of our review). We recommend 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.

### *Duties and obligations of the lawyer for the class*

- 7.67 We recommend NZLS consider what amendments may be needed to the *Rules of conduct and client care for lawyers* to clarify the duties and obligations of lawyers acting in class actions. We recognise NZLS is better placed to undertake the necessary policy work in this area, so we simply provide some general comments as to how these rules may need to be amended for class actions.<sup>61</sup> We think it is desirable for any amendments to come into effect at the same time as the provision mandating the lawyer-class relationship, so there is clarity about the obligations that flow from the relationship.
- 7.68 We think the key duties of the lawyer for the class would be to act in the best interests of the class and to avoid conflicts of interest that affect representation of the class as a whole. However, if our recommendation that the lawyer should be regarded as acting for the class is adopted, we think it will be necessary to consider whether each of the duties and obligations in the *Rules of conduct and client care for lawyers* should apply to the lawyer-class relationship.
- 7.69 While we have not considered the implications of each rule, we consider that the various duties and obligations in the rules can be grouped into four categories with respect to their application to class actions.
- 7.70 The first category covers a lawyer's broader ethical and professional obligations and does not specifically refer to clients. Examples are the obligation to use legal processes only for proper purposes, and the obligation to report misconduct.<sup>62</sup> These can be applied to lawyers acting in class actions without requiring any amendment.
- 7.71 The second category relates to the process of retaining and instructing a lawyer. This includes the requirement to provide information on the principal aspects of client service, the duty to complete a retainer, the right to terminate a retainer and the duty to provide a client with an estimate of fees and inform the client if this will be exceeded.<sup>63</sup> If these rules are applied to class actions, it may be desirable to clarify that references to the "client" in these rules mean the representative plaintiff (and other class members who have entered into a retainer) rather than the class as a whole.
- 7.72 The third category could be applied to the lawyer-class relationship if the phrase "client" is understood for this purpose as including the class. However, amendments would be needed to reflect that there is no retainer between the lawyer and the (client) class. Examples of rules in this category are:

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<sup>61</sup> However, later in this chapter we make a specific recommendation about communications between the defendant's lawyer and class members. This is an issue we specifically sought feedback on in the Supplementary Issues Paper.

<sup>62</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 2.3 and 2.8.

<sup>63</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3.4, 4.2, 4.3 and 9.4.

- (a) In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.<sup>64</sup>
  - (b) The duty to protect and hold in strict confidence all information concerning a client, the retainer and the client's business and affairs acquired in the course of the professional relationship.<sup>65</sup>
  - (c) The obligation not to communicate with another lawyer's client.<sup>66</sup>
- 7.73 The final category of rules would be inappropriate to apply to the lawyer-class relationship without amendment. One example is the rules on conflicts. It would be unworkable for a lawyer to consider whether there is a conflict with respect to each class member. We think a lawyer's obligation should be to avoid conflicts of interest that affect representation of the class as a whole. It would also be desirable to clarify how a lawyer should manage a situation where a conflict arises between the representative plaintiff and class members.
- 7.74 Another example is the rule on disclosure and communication of information to clients.<sup>67</sup> We think it is unrealistic to require a lawyer to promptly disclose all relevant information to individual class members. It is also unnecessary, given that the representative plaintiff will be making decisions about the litigation. We think it is preferable for our recommended notice regime to govern disclosures to class members.
- 7.75 A third example is a lawyer's duties to act in the best interests of their client and to obtain and follow a client's informed instructions on significant decisions in respect of the conduct of litigation (subject to the lawyer's overriding duty to the court).<sup>68</sup> We consider the first reference to "client" should be understood as including the class as well as the representative plaintiff, so the lawyer has a duty to act in the best interests of the class as a whole. However, the second reference to "client" should only refer to the representative plaintiff. The lawyer should obtain and follow the representative plaintiff's informed instructions on significant decisions in respect of the conduct of litigation. There should be an exception where the representative plaintiff gives instructions that conflict with the lawyer's duty to act in the best interests of the class.<sup>69</sup> We think this situation would be rare because the representative plaintiff also has a duty to act in what they believe to be the best interests of the class, as we discussed in Chapter 3. A lawyer could not act on instructions that are contrary to the duty to act in the best interests of the class. If the representative plaintiff was unwilling to reconsider the instructions, we suggest the lawyer would need to advise they could not continue acting in the class action.

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<sup>64</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

<sup>65</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.

<sup>66</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.4. We discuss the application of this rule below.

<sup>67</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 7.

<sup>68</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 13–13.1 and 13.3.

<sup>69</sup> An example would be where the representative plaintiff instructs the lawyer to settle the class action on terms that favour the defendant and representative plaintiff but would be detrimental to the class.

### **Duties prior to certification**

- 7.76 We have proposed that the lawyer-class relationship should arise upon certification. Prior to certification, we think the lawyer should still act in the interests of the potential class as a whole. For example, we think this would include ensuring public statements about the class action are accurate as this could affect decisions made by potential class members (such as whether to accept an individual settlement offer).<sup>70</sup> A lawyer may also choose to enter into individual retainers with class members prior to certification, particularly in an opt-in class action.

### **Lawyer acting for individual class member**

- 7.77 The lawyer for the class will act for the entire class, which will include (unless other arrangements are made) acting in relation to resolution of individual issues. However, there may be circumstances where an individual class member wishes to retain their own lawyer. One situation is where an issue arises that only relates to one class member (such as whether a particular class member's claim is time-barred) and it is not practicable for the lawyer for the class to appear for the class member. A class member is also likely to retain their own legal representation where they want to object to a settlement or apply to replace the representative plaintiff. We envisage the class member's lawyer would notify the lawyer for the class they are acting for the individual class member and advise that communications about the class action should be directed to them.<sup>71</sup>

## **COMMUNICATIONS BETWEEN THE DEFENDANT'S LAWYER AND CLASS MEMBERS**

- 7.78 As discussed above, we recommend NZLS consider how each of the duties and obligations in the *Rules of conduct and client care for lawyers* should apply to the lawyer-class relationship. In this section we make a specific recommendation with respect to one of these rules, on which we sought feedback in the Supplementary Issues Paper. This is the rule that a lawyer acting in a matter must not communicate directly with a person who the lawyer knows is represented by another lawyer in that matter, except as authorised by the rule.<sup>72</sup> This is sometimes known as the "no-contact rule".
- 7.79 In the Supplementary Issues Paper, we said that if the representative plaintiff's lawyer becomes the lawyer for the class upon certification, the defendant's lawyer should then be unable to contact class members directly (unless allowed by the rule). However, we did not think the defendant's lawyer should be prohibited from communicating with a potential class member prior to certification (unless that person has signed a retainer with a lawyer).<sup>73</sup>

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<sup>70</sup> Lawyers already have an obligation not to engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice: see *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 10.9.

<sup>71</sup> We note there are some scenarios where a lawyer may communicate directly with a person represented by another lawyer: see *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 10.4.5 and 10.4.6.

<sup>72</sup> *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 10.4.

<sup>73</sup> Supplementary Issues Paper at [3.63].

- 7.80 We asked submitters whether they agreed that communications between the defendant's lawyer and class members should be directed to the representative plaintiff's lawyer after certification.

### Results of consultation

- 7.81 We received 10 submissions on this question.<sup>74</sup> Six submitters agreed that after certification, the defendant's lawyer should only communicate with class members through the representative plaintiff's lawyer/lawyer for the class.<sup>75</sup>
- 7.82 Nicole Smith commented that it may also be appropriate for this rule to apply prior to certification. If the lawyer and funder are engaged in book building before certification, they will be disclosing information to potential class members.
- 7.83 Chapman Tripp considered the plaintiff's lawyer should have a duty to pass on communications from the defendant's lawyer. It said a lawyer should be able to seek directions from the court if required. In some cases, the court might direct it is appropriate for the defendant's lawyer to communicate directly with members of the plaintiff class.
- 7.84 Bell Gully said the defendant itself should still be free to contact class members directly, and the defendant and class members should not be more restricted in this regard than in any other proceeding.
- 7.85 Two submitters indicated a more case-specific approach might be appropriate. Shine Lawyers submitted that communications between the defendant's counsel and class members should be governed by a protocol and/or court supervision, particularly where they relate to settlement. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said it would be most appropriate for the defendant's lawyer to communicate with the representative plaintiff's lawyer post-certification. However, given the complexities created by opt-out proceedings, it said it would be preferable for the court to make directions at certification, rather than having a blanket rule about communication that applies in all cases.

### Recommendation

**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.

- 7.86 In light of our recommendation that the representative plaintiff's lawyer should become lawyer for the class upon certification, we consider that the defendant's lawyer should direct any class communications to the lawyer for the class after certification.<sup>76</sup> We think

<sup>74</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Woodsford Litigation Funding.

<sup>75</sup> Bell Gully, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>76</sup> Subject to any exceptions that apply in Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.4.

it would be too broad for the no-contact rule to apply prior to certification, except with respect to class members who have entered into individual retainer agreements with the representative plaintiff's lawyer or their own lawyer.

- 7.87 We see no good reason why a defendant's lawyer should not have to comply with the no-contact rule that applies in other litigation once the representative plaintiff's lawyer is deemed to be representing the class. We acknowledge that in some cases it may be difficult for a defendant's lawyer to know whether a person is a class member. In an opt-out case, the identity of all class members may be unknown to the plaintiff's lawyer as well. However, we note that the no-contact rule only prohibits direct communication with a person "who the lawyer knows is represented by another lawyer in that matter".<sup>77</sup> In Chapter 8, we recommend a defendant should be able to seek an order that the representative plaintiff provide it with information on class members who have opted in or opted out, which will assist it to determine who is a class member.
- 7.88 We have considered the suggestion that the lawyer for the class should have a duty to pass on communications from the defendant's lawyer. As discussed above, we suggest NZLS consider how the rule on disclosure and communication of information to clients should apply in class actions.<sup>78</sup> A blanket requirement to pass on all communications from the defendant's lawyer to the entire class could be expensive and burdensome, particularly in an opt-out class action where the identity of all class members is unknown. Given that the representative plaintiff is responsible for making decisions in the litigation on behalf of the class, it may not be necessary for all communications to go to all class members. We think communications to all class members should generally be governed by notice requirements, which we discuss in Chapter 8.
- 7.89 On the other hand, where the defendant's lawyer sends a communication that relates to a specific class member who the lawyer for the class is able to contact, it would seem reasonable to expect the communication to be passed on. Whether a rule is required to this effect could be considered as part of any assessment of how the disclosure and communication of information requirements should apply in class actions.
- 7.90 We acknowledge the concern expressed by some submitters that the defendant should not be prevented from contacting class members as they may have an ongoing business relationship. Our recommendation only restricts the defendant's lawyer from communicating directly with class members and will not prevent the defendant from contacting class members directly themselves. The only situation where direct communications by a defendant may be restricted is when it relates to individual settlements. We discuss this issue in Chapter 11.

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<sup>77</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.4.

<sup>78</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 7.

## CHAPTER 8

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# Steps during a class action

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## INTRODUCTION

8.1 In this chapter, we discuss the following steps that may occur during a class action:

- (a) Notice to class members.
- (b) The opt-in or opt-out process.
- (c) Case management of class actions.
- (d) Discovery and other requirements to provide information.
- (e) Appointing sub-classes.
- (f) Staged hearings of class actions.
- (g) Determining individual issues in a class action.

## NOTICE TO CLASS MEMBERS

8.2 Class members need to be notified of particular events in a class action in order to make informed decisions about their participation. In this section we discuss the events that should trigger notice to class members, the contents of notices, the method of notice and whether the defendant should have any obligations with respect to notice.

### When class members should be given notice

8.3 In the Supplementary Issues Paper, we said the most critical stages for notice are when class members have an initial opportunity to opt into or opt out of a class action, and when there is a settlement. However, we said notice should generally be required where an event would affect class member interests.<sup>1</sup>

8.4 We said that, at minimum, the following events should trigger notice:

- (a) When a class action has been certified and an individual 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.

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<sup>1</sup> Supplementary Issues Paper at [4.5].

- (e) When the court issues a judgment determining the common issues.
  - (f) A proposed or approved settlement.
- 8.5 We also said the court should have a general power to order notice in any other case.
- 8.6 We asked submitters whether they agreed with our proposed list of events that should trigger notice to class members.

### *Results of consultation*

- 8.7 We received 11 submissions on this issue.<sup>2</sup> Submitters largely agreed with our proposed list of events that should trigger notice. Shine Lawyers thought certification should not necessarily trigger notice and it may be more appropriate for the initial opt-in or opt-out notice to go out once the class action had progressed further, such as following evidence.<sup>3</sup>
- 8.8 Additional events that submitters thought could trigger notice were:
- (a) An appeal of a judgment on the common issues.<sup>4</sup>
  - (b) A material change to the legal retainer or funding agreement, or a change of interest in respect of the lawyer or funder.<sup>5</sup>
  - (c) Where a defendant applies to strike out the case for want of prosecution or other default by the plaintiff.<sup>6</sup>
- 8.9 Two submitters commented that the importance of notice had to be balanced against the cost and practicalities. Maurice Blackburn/Claims Funding Australia said the court should have a discretion not to order notice where “it is just to do so”, to provide a protection against notices that are overused, costly or unnecessary in the circumstances. It said notice should be limited to non-trivial matters that affect the legal rights and interests of class members, particularly stages in the proceeding that invite or require class members to take an active step. It said overdisclosure to class members could confuse class members and information about the proceeding would always be available from the lawyer for the class. Shine Lawyers said a balance was necessary so significant cost and delay was not incurred through multiple rounds of notice.

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<sup>2</sup> Bell Gully, Chapman Tripp, Gilbert Walker, IBA Antitrust Committee, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>3</sup> It also said that two settlement notices were unnecessary and only a notice of proposed settlement should be required. We discuss the settlement notice requirements in Chapter 11.

<sup>4</sup> Chapman Tripp.

<sup>5</sup> IBA Antitrust Committee.

<sup>6</sup> Gilbert Walker.



## Recommendation

### 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.

8.10 Notice to class members is a critical safeguard of a class actions regime. There are several stages in a class action where a class member must take an active step to benefit from the class action, such as signing up to an opt-in class action or providing the necessary documentation to receive a settlement payment. There are also steps where a class member has an opportunity to participate in the class action, such as filing an objection to a proposed settlement or seeking to be substituted as the representative plaintiff. A class member can only participate in these stages of a class action if they are aware of them. We discuss below the events we think should trigger notice, as well as our recommendation that a court should have a discretion to order that notice is not required.

### When an individual has an opportunity to opt into or opt out of the class action

8.11 It is essential for individuals to be given notice of the opportunity to opt into or opt out of a class action. Where a class action is brought on an opt-in basis, individuals cannot benefit from a class action unless they take steps to opt into it. In an opt-out class action, individuals will be bound by a class action and unable to bring their own individual proceedings unless they opt out of the class action. The initial opt-in or opt-out notice can inform class members about the consequences of their decision on whether to participate in the class action. We discuss the contents of the opt-in or opt-out notice later in this chapter.

8.12 While we referred to notice of certification in the Supplementary Issues Paper, we now refer to notice that an individual has an opportunity to opt into or opt out of the class action. While this notice will go out after certification, it is the court setting the opt-in or opt-out date that will determine when notice should go out, rather than the certification date. There may be appeals of certification or issues such as approval of a funding agreement that need to be resolved before notice can go out, so there may be a long period between certification and the opt-in or opt-out notice to class members. However,

we think it should go out as soon as practicable after a matter is certified and think it is unlikely to be appropriate to wait until after evidence is filed.

### **Where the representative plaintiff seeks to discontinue a class action**

- 8.13 We consider class members should be given notice when the representative plaintiff applies to discontinue a class action. In Chapter 11 we recommend a class action may only be discontinued with the leave of the court. A class member should have notice of this proposed discontinuance in case they wish to seek leave to be heard on the application or to apply to replace the representative plaintiff.

### **When the representative plaintiff applies to withdraw as representative plaintiff**

- 8.14 Having a representative plaintiff is an essential requirement for a class action. Class members should be notified if the representative plaintiff seeks to withdraw from the role because the matter cannot continue as a class action without a suitable representative plaintiff. Receiving notice will enable class members to decide whether to seek to be substituted as the representative plaintiff.

### **Where individual participation of class members is required**

- 8.15 A class member should be notified when they are required to participate in the class action, such as giving discovery or giving evidence in relation to their individual claim. In some cases, it will not be possible to prove a class member's claim without their individual participation. If there is any possibility of adverse costs being awarded, the class member should be advised of this.<sup>7</sup> The notice could advise class members whether they should consider obtaining their own legal representation or whether the lawyer for the class will be assisting them with this step.

### **Where the court issues a judgment determining the common issues**

- 8.16 The court's judgment on the common issues is a significant event in a class action. It involves the substantive determination of the common issues in the proceeding and will generally establish whether the defendant is liable to the class. All class members are bound by the decision on common issues. Given the significance of this judgment, we think it should trigger a requirement to give notice.
- 8.17 We suggest the notice should not go out to class members until the period for filing any appeals has concluded. This will enable the notice to advise class members of the next step in the proceeding, for example:
- (a) If the plaintiff was successful and no appeal has been filed by the defendant, the matter will proceed to determination of stage two issues (if there has been a staged hearing).<sup>8</sup>
  - (b) If the unsuccessful party has appealed, the likely time frames for the appeal process.

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<sup>7</sup> In Chapter 12, we recommend a court should be able to order adverse costs against a class member with respect to issues determined on an individual basis.

<sup>8</sup> A common method of managing common and individual issues in class actions is to have staged hearings. Typically, the 'stage one' hearing will determine common issues (and sometimes the entirety of the representative plaintiff's claim) and the 'stage two' hearing will determine individual issues. We discuss staged hearings below.

- (c) If the proceeding was unsuccessful and no appeal has been filed, the proceeding is at an end. As we discuss in Chapter 10, a class member will only be able to bring an appeal if they successfully apply to replace the representative plaintiff.
- 8.18 We prefer this approach to requiring a separate notice that an appeal has been filed, given that an appeal will generally be filed within a short time of the judgment on common issues.

#### **Where the representative plaintiff intends to abandon an appeal on common issues**

- 8.19 We also recommend class members be given notice if the representative plaintiff intends to abandon an appeal against the judgment on common issues, as this will bring the class action to an end. It also ensures class members have the opportunity to apply to replace the representative plaintiff for the purposes of the appeal.<sup>9</sup> We do not think notice should be required where the representative plaintiff abandons an appeal of any other decision, given there could be many appeals of interlocutory issues during a proceeding.

#### **Where there is a proposed or approved settlement**

- 8.20 We consider class members should be given notice of a proposed settlement, so they can lodge an objection to the settlement if they wish. In some cases, notice of an approved settlement will also be necessary. We discuss this in more detail in Chapter 11.

#### **Any other situation where the court considers notice is appropriate**

- 8.21 Rather than list all the situations where notice may be needed, we think the court should have discretion to order notice in any other situation where it considers it appropriate.
- 8.22 We have considered the suggestion that notice of changes to funding or legal representation should trigger notice. We think it is difficult to prescribe the exact situations where such changes might require notice, but notice could be ordered under the court's general discretion where the court considers it appropriate. This may include where the representative plaintiff is seeking reapproval of a litigation funding agreement because the terms have been amended.<sup>10</sup>
- 8.23 We have also considered whether there should be a requirement to provide notice where the defendant applies to strike out the case for want of prosecution or other default by the representative plaintiff.<sup>11</sup> We think notice is likely to be appropriate where there is a genuine risk of the proceedings being struck out and class members could take steps to seek to remedy the situation, such as applying to replace the representative plaintiff or providing security for costs. However, we suggest this could be dealt with under the court's general discretion to require notice in appropriate cases. There may be some cases where it is not necessary, such as where class members were advised that the proceeding may be struck out in an earlier notice.

#### **Court discretion to order that notice is not required**

- 8.24 We recommend the court have discretion to order that notice of a particular event is not required where it considers this is unnecessary to protect the interests of class members.

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<sup>9</sup> We discuss this issue in Chapter 10.

<sup>10</sup> We discuss this issue in Chapter 17.

<sup>11</sup> We note that in Australia, a notice is required where the defendant applies to dismiss the proceedings for want of prosecution: see Federal Court of Australia Act 1976 (Cth), s 33X(1)(b).

We envisage this discretion will be exercised sparingly. Some situations where notice may not be required are as follows:

- (a) Where the court has declined to approve a settlement and the parties submit a new application to approve a settlement with very similar terms, except for a small adjustment that will benefit class members (such as a decrease in a funder's rate of commission). It may be unnecessary to give class members a second notice of proposed settlement.
- (b) Where the court has approved a settlement, it may be unnecessary to give notice of an approved settlement if there was extensive notice of the proposed settlement and the defendant can distribute money directly to class members.<sup>12</sup>
- (c) Where there are multiple representative plaintiffs and one seeks to withdraw. If there is no real impact on representation of the class and it is not proposed to substitute another representative plaintiff, it may not be necessary to provide notice of the withdrawal of the representative plaintiff.
- (d) Where a settlement is reached prior to certification, there will be a single notice advising of the proposed settlement and the right to opt in or opt out, rather than two separate notices.<sup>13</sup>

### The contents of notice

8.25 In the Supplementary Issues Paper, we said notices should use clear language that class members can easily understand. We proposed relatively detailed requirements for opt-in and opt-out notices so that class members would have sufficient information to make an informed decision about whether to participate in the class action. We suggested these notices should include:<sup>14</sup>

- (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 the class description and the identity of the defendants.
- (d) What a class member must do to opt into or opt out of the claim (as appropriate), and the date by which they must do so.
- (e) An explanation of the binding effect of a class action judgment on class members.
- (f) Who to contact if the class member would like further information about the class action.
- (g) Disclosure of any potential conflicts of interest.
- (h) Anything else the court considers appropriate.

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<sup>12</sup> We discuss this issue in Chapter 11.

<sup>13</sup> We discuss settlement prior to certification in Chapter 11.

<sup>14</sup> Supplementary Issues Paper at [4.20].

- 8.26 We suggested notice requirements could be set out in the High Court Rules 2016 (HCR) and that consideration could also be given to developing a standard opt-in/opt-out notice that could be added to the forms in Schedule 1 of the High Court Rules.
- 8.27 We asked submitters whether they agreed with our proposed requirements for an opt-in/opt-out notice.

### *Results of consultation*

- 8.28 We received 15 submissions on the contents of the opt-in/opt-out notice, with submitters generally agreeing with our proposed requirements for this notice.<sup>15</sup> Chapman Tripp and Consumer NZ indicated that this would provide an appropriate level of detail to enable class members to make an informed decision about whether to participate.
- 8.29 Some submitters suggested the notice should also include the key terms of any litigation funding agreement or the funder's identity.<sup>16</sup> This could include the legal fees and funding commission that would be deducted from any return, the process of agreeing to a settlement and the funder's ability to withdraw from the proceeding. The International Bar Association (IBA) Antitrust Committee suggested the notice should include details of the legal retainer.
- 8.30 Several submitters supported developing a standard opt-in/opt-out notice.<sup>17</sup> However, Maurice Blackburn/Claims Funding Australia and Shine Lawyers also noted the importance of the court exercising its discretion to determine the appropriate form of notice in a particular case. The IBA Antitrust Committee suggested a contradictor should be required to approve the terms of any opt-in/opt-out notice.
- 8.31 Four submitters referred to the need to use clear language in notices.<sup>18</sup> Shine Lawyers noted that class demographics vary so class member communications need to be appropriately tailored. For example, communicating with shareholders in a securities class action is very different to communicating with remote indigenous communities about a human rights class action. It encouraged a flexible and progressive approach to make notices easy to understand and said audio-visual notices could be appropriate in some cases. Similarly, Maurice Blackburn/Claims Funding Australia said the content of notices should be informed by class member attributes such as literacy levels, language spoken and disability.

### *Recommendations*

**R51**

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

<sup>15</sup> Bell Gully, Chapman Tripp, Consumer NZ, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Woodsford Litigation Funding.

<sup>16</sup> Bell Gully, Insurance Council, IBA Antitrust Committee, Omni Bridgeway and Shine Lawyers.

<sup>17</sup> Consumer NZ, Maurice Blackburn/Claims Funding Australia, Shine Lawyers and Simpson Grierson.

<sup>18</sup> Consumer NZ, Maurice Blackburn/Claims Funding Australia, Shine Lawyers and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

**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.

### Court approval of notices

- 8.32 We recommend the court approve the contents of notices before they are sent to class members, to ensure the notices appropriately communicate the required information to class members and will not be misleading. Court review of notices is required in our main comparator jurisdictions.<sup>19</sup>
- 8.33 Notices should use clear, concise language and be designed to effectively communicate with the intended audience. Many concepts in a class action are likely to be unfamiliar to class members and will need to be carefully explained, without using ‘legalese’ or jargon.

<sup>19</sup> See Federal Court of Australia Act 1976 (Cth), s 33Y(2); Class Proceedings Act SO 1992 c 6 (Ontario), s 20(3); The Competition Appeal Tribunal Rules 2015 (UK), r 81(1); United States Federal Rules of Civil Procedure, r 23(c)(2)(B) and 23(d)(1)(B).

In the United States, the opt-out notice is expressly required to be stated in “plain, easily understood language”.<sup>20</sup>

- 8.34 In some cases, it will be appropriate to make notices available in te reo Māori or other languages, or to provide accessible formats of notices such as easy read, large print or braille. It may also be desirable to make notices available in audio or video format, including in New Zealand Sign Language. The overarching goal should be to ensure that notice is effective, in light of the intended audience.
- 8.35 As well as the language used in notices, their visual design can have a significant impact on how easy they are for class members to understand, including:<sup>21</sup>
- (a) Having a carefully crafted headline to get the reader’s attention.
  - (b) Avoiding excess capitalisation and small fonts.
  - (c) Using headings and sub-headings to organise information.
  - (d) Ensuring the design of any envelope distinguishes it from junk mail.
  - (e) Using graphics and diagrams (and including accessible alternative text for any graphics, diagrams and images).
  - (f) Leaving plenty of white space.
  - (g) Using a Q&A format or bullet points.

### Contents of opt-in or opt-out notice

- 8.36 Given the importance of the opt-in or opt-out stage and settlement, we think it is desirable to have specific guidance on the requirements of these notices in the High Court Rules. We discuss the contents of settlement notices in Chapter 11.
- 8.37 The opt-in or opt-out notice needs to provide enough information to class members to enable them to understand the consequences of participating in the class action and what steps they need to take. At the same time, the notice should not overwhelm the reader with information. We discuss below a list of matters we think should be contained in an opt-in or opt-out notice. We also recommend the court should have discretion to require any other information to be provided in the notice, to allow notices to be tailored to the circumstances of a particular case.
- 8.38 Te Komiti mō ngā Tikanga Kooti | Rules Committee may wish to consider developing a sample opt-in or opt-out notice to be included in Schedule 1 to the High Court Rules. This could provide helpful guidance for litigants, although the exact language of the notice will need to be tailored to the particular class action. The Rules Committee may wish to draw on the expertise of communications professionals and experts in accessible

<sup>20</sup> United States Federal Rules of Civil Procedure, r 23(c)(2)(B). Commentary to this requirement describes it as “a reminder of the need to work unrelentingly at the difficult task of communicating with class members”, noting the difficulty of providing information about class actions that is both accurate and easily understood by class members who are not lawyers: United States Federal Rules of Civil Procedure, r 23 (Notes of Advisory Committee on Rules—2003 Amendment).

<sup>21</sup> We have drawn on: Todd B Hilsee, Shannon R Wheatman and Gina M Intrepido “Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More Than Just Plain Language: A Desire to Actually Inform” (2005) 18 The Geo J Legal Ethics 1359 at 1377–1380; Margaret Hagan “A Human-Centred Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly” (2018) 6 Ind J L & Soc Equal 199 at 234; and Federal Judicial Center *Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010).

communication when developing a sample notice.<sup>22</sup> We think it would be desirable for the sample notice to comply with any relevant accessibility guidelines or standards.<sup>23</sup>

### **General information about a class action**

- 8.39 We recommend the notice contain some general information on what a class action is, before discussing the particular class action at issue, as the concept of a class action may be unfamiliar to many people. If, as we recommend in Chapter 18, Te Tāhū o te Ture | Ministry of Justice develops a guide to assist class members to understand the class action process, it may also be appropriate for the notice to direct potential class members to that guide for further information.

### **Description of the proceeding**

- 8.40 The notice needs to provide potential class members with basic information about the class action. This should include the facts giving rise to the class action, the nature of the legal claims, the remedies sought and who the claim is brought against. This information can help potential class members to understand whether they may benefit from participating in a class action.

### **Class definition**

- 8.41 The notice should refer to the class definition as set out in the court's certification order. It should also inform potential class members of any criteria they need to satisfy to fall within this class definition, such as purchasing a product within a certain time period or experiencing a particular kind of harm. In an opt-in class action, the notice should explain if the class definition requires class members to sign a legal retainer or litigation funding agreement.

### **What a class member must do to opt in or opt out**

- 8.42 Potential class members should be advised what they must do to opt into or opt out of the class action and the date by which they must do so. There should be clarity on the deadline, such as advising that a form must be completed on a website by 5pm New Zealand standard time or post-marked by a certain date. Later in this chapter we recommend the Class Actions Act should specify that a class member may opt into or out of a class action in the time and manner specified in the notice (or according to a specific direction of the court).

### **Binding effect of a judgment or settlement**

- 8.43 The notice should explain that a judgment on common issues or a settlement of the class action will be binding on all class members, which will limit their ability to bring their own proceedings against the defendant. It should explain that if a person does not wish to be bound by a judgment on common issues or a settlement, they should not opt into the class action or should opt out of the class action.

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<sup>22</sup> The Victorian Law Reform Commission recommended the Supreme Court should consider drafting Plain English standard form opt-out and settlement notices in consultation with the Victorian Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings: Report* (March 2018), Recommendation 21.

<sup>23</sup> See Digital.govt.nz "Designing documents for print" (3 November 2020) <[www.digital.govt.nz](https://www.digital.govt.nz/)>.



### *Information about the representative plaintiff and lawyer*

- 8.44 The notice should identify the representative plaintiff and explain what their role involves, such as giving instructions to the lawyers and making decisions about settlement. The notice should explain the representative plaintiff's duty to act in what they believe to be the best interests of the class. If the representative plaintiff will be supported by a litigation committee, the committee's role should be explained.
- 8.45 Class members should also be informed of the identity of the lawyer acting for the representative plaintiff and the class and their role. The notice should explain the lawyer's duty to act in the best interests of the class and advise where class members can find a more detailed explanation of the obligations of the lawyer for the class (such as on Te Kāhui Ture o Aotearoa | New Zealand Law Society website).
- 8.46 We have removed 'disclosure of conflicts of interest' from our list of requirements, as we think it is more meaningful for a class actions regime to prevent or effectively manage conflicts of interest. We recommend measures to achieve this, such as assessing whether a representative plaintiff may have a conflict of interest as part of the certification test. However, the notice should explain that a representative plaintiff's duty to the class requires them to avoid, or manage, any conflicts of interest that may affect their role.

### *Class member participation and liability for adverse costs*

- 8.47 We recommend the notice should explain the circumstances in which a class member may need to actively participate in the class action. It could explain that while the representative plaintiff and the lawyer will have responsibility for the conduct of the class action, it may be necessary for a class member to provide evidence or information to support their claim or to give discovery. It could also explain that a class member's participation may be required when individual issues are determined.
- 8.48 The notice should also explain that the representative plaintiff will generally be liable for any adverse costs with respect to the common issues and outline the circumstances in which a class member could be liable for adverse costs. We discuss this issue in Chapter 12.

### *Litigation funding*

- 8.49 Where a class action is litigation funded, the notice should identify the funder and explain how the funding commission will be calculated. If the court has made a cost sharing order the notice should include an explanation of that order.<sup>24</sup> We do not suggest requiring notices to explain key funding terms, as this could make notices overly long and deter potential class members from reading them. However, they should advise class members how they can obtain a copy of the funding agreement.

### *Contact for further information*

- 8.50 The notice should advise class members how they can obtain further information about the class action. We envisage this would include contact details for the lawyer for the class and details of any class action website.

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<sup>24</sup> We discuss cost sharing orders in Chapter 9.

## Method of notice

- 8.51 In the Supplementary Issues Paper, we said the court should have a power to determine how notice must be given to class members, and there should not be a presumption in favour of any particular method of notice. The appropriate means of notice would depend on factors such as the size and nature of the class and whether all class members are known.<sup>25</sup>

## Results of consultation

- 8.52 While we did not specifically ask a question on the appropriate method of class member notice, some submitters provided feedback on this issue. GCA Lawyers said the focus must be on whether notice is effective. It said some cases might require more than one round of communication, or methods such as radio or television advertisements or targeted social media. The submission from Philip Skelton QC, Kelly Quinn and Carter Pearce said the court should consider what is the best and most efficient (including cost-efficient) way of ensuring notices are brought to the attention of class members.
- 8.53 Maurice Blackburn/Claims Funding Australia said print media communications may not reach the intended class due to demographic preferences in media and information consumption. It said in these circumstances, using social media may be critical to effectively communicating with the class, particularly where they are young or in remote or isolated communities. It said a multi-layer strategy to distribute notices may be required, which could include direct mail, website and email, print media and social media (such as targeted Facebook and digital platform advertising).
- 8.54 These submissions underscore the importance of carefully considering the most effective way of giving notice to class members in the circumstances of a particular case.

## Recommendation

### R54

The Rules Committee should consider developing a High Court Rule to empower 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.

- 8.55 We recommend the Rules Committee consider developing a High Court Rule that would empower the court to order any method of notice to class members that it considers appropriate in the circumstances. We think it is undesirable for the rule to be prescriptive as to the form of notice, as the most suitable method of communicating with class members will differ depending on the nature of the class action, the type of notice and the demographics of class members.<sup>26</sup> A broad discretion will also allow methods of notice to change with technological developments. The focus should be on ensuring that notice is effective in reaching as many class members as possible, while also being cost-effective. A combination of direct notice and advertising will often be required. To

<sup>25</sup> Supplementary Issues Paper at [4.10].

<sup>26</sup> For example, in an opt-in case, it should be easy to provide subsequent notices to class members once they have opted in and provided contact details.

determine whether notice has been effective, we recommend the court should have a power to require a report on the outcome of notice, such as the proportion of messages that were opened or a click-through rate to a class action website.<sup>27</sup> If necessary, the court could order additional methods of notice.

- 8.56 Notice should be sent directly to class members or potential class members where possible.<sup>28</sup> One option is to send notices by post. Disadvantages of this approach include difficulty in obtaining up-to-date addresses for class members and the inability to tell whether mail has been received or opened. Postal notice can be effective where there is a registered address for each class member (such as on a share register). It may be less effective at reaching groups who tend to move frequently, such as university students or renters, or where many class members have recently relocated (for example, because of a natural disaster).<sup>29</sup>
- 8.57 In some cases, email notice will be appropriate. The costs of this are likely to be minimal and it enables the sender to get information about which emails have been opened and any that have bounced. There is a risk that emails will be caught by spam filters, although careful design can help to mitigate this. Another option is contacting class members via text message with a link to an online notice, although there is the risk that recipients will be suspicious of a legal message sent in this way. Text message and email notice will also rely on having accurate contact details for potential class members.
- 8.58 Advertising may be needed instead of or in addition to individual notice, particularly where the identity and contact details of some class members are unknown. Various methods of advertising might be appropriate depending on the characteristics of class members.
- 8.59 Newspaper and magazine advertising is one option, although declining print readership may limit its effectiveness at reaching some class members.<sup>30</sup> In some cases there may be a specialist publication that is widely read by class members. For example, a notice in *Kōrero Mō te Ture / Law Talk* might reach many lawyers and a notice in an in-flight magazine could be an effective way of reaching airline passengers. Print media notices may have greater reach if they are also made available on digital platforms.
- 8.60 Radio and television advertisements are another avenue for notice, although viewership and listenership may be low among some groups and the cost of advertising may be high. As with print media, using digital versions to advertise notices may improve their reach. Considering the demographics of the class may also help to make radio or television advertising more likely to reach the target audience.<sup>31</sup>

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<sup>27</sup> In most cases it would be the representative plaintiff who would give the report, but as we discuss below, in appropriate circumstances the court might order the defendant to give notice.

<sup>28</sup> The initial opt-in or opt-out notice will be sent to 'potential class members' and subsequent notices will be sent to class members. For simplicity, we refer to class members throughout this section.

<sup>29</sup> See Alexander W Aiken "Class Action Notice in the Digital Age" (2017) 165 U Pa L Rev 967 at 979.

<sup>30</sup> Figures show 584,000 people read the print version of the New Zealand Herald in an average seven-day period (year to June 2021). In comparison, over the same period, 1,598,000 people read the digital version of the New Zealand Herald. See Roy Morgan "Almost 3 million New Zealanders read newspapers and nearly 1.8 million read magazines in 2021" (13 September 2021) <[www.roymorgan.com](http://www.roymorgan.com)>. See also Roy Morgan "Readership in New Zealand, 12 Months to December 2021" <[roymorgan.com](http://roymorgan.com)> for similar figures.

<sup>31</sup> For example, commercial radio network rankings show that a radio station's audience share differs by age bracket: Radio Broadcasters Association and Growth from Knowledge "Commercial Radio reaches almost 3.5m New Zealanders" (press release, 29 April 2021).

- 8.61 The internet could also be used to facilitate notice to class members, including through banner and pop-up advertisements on websites, notices placed on a defendant company's website, advertisements that appear when a person searches for certain key words, or websites dedicated to the class action.<sup>32</sup> Social media platforms could be used to send direct messages to class members or post material on relevant pages, or the court could require the defendant to post information.<sup>33</sup> Advantages of using the internet to facilitate notice to class members include being cheaper than other forms of advertising, reaching a larger and more diverse audience, lasting longer and allowing greater interaction (such as allowing immediate feedback from class members).<sup>34</sup>
- 8.62 There may be other creative options for bringing notice to the attention of class members. For example, in one United States case, an abbreviated notice was required to be printed on the defendant's milk cartons.<sup>35</sup>

### **Defendant's obligations with respect to notice**

- 8.63 In the Supplementary Issues Paper, we noted that in some circumstances the defendant will be in a better position than the representative plaintiff to identify and contact class members, such as where class members are current customers of the defendant. We said that in such a case, it may be appropriate for a defendant to facilitate notice to class members or to provide a list of class members to the representative plaintiff.<sup>36</sup> We observed this has already occurred in representative actions in Aotearoa New Zealand and that in other jurisdictions, courts have powers to require the defendant to assist with notice to class members.<sup>37</sup>
- 8.64 We proposed the court should have a power to order the defendant to provide relevant information or to assist in giving notice to class members. This would allow the court to decide whether this is appropriate in the circumstances of a particular case.

### **Results of consultation**

- 8.65 We received 13 submissions on the defendant's obligations with respect to notice.<sup>38</sup>

### **Providing contact details to the representative plaintiff**

- 8.66 Ten submitters supported the court having a power to order the defendant to disclose names and contact details of potential class members to the representative plaintiff.<sup>39</sup> Reasons given by submitters included:

<sup>32</sup> Alexander W Aiken "Class Action Notice in the Digital Age" (2017) 165 U Pa L Rev 967 at 990–994.

<sup>33</sup> Alexander W Aiken "Class Action Notice in the Digital Age" (2017) 165 U Pa L Rev 967 at 1011–1013.

<sup>34</sup> Alexander W Aiken "Class Action Notice in the Digital Age" (2017) 165 U Pa L Rev 967 at 994–995.

<sup>35</sup> Todd B Hilsee, Shannon R Wheatman and Gina M Intrepido "Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More Than Just Plain Language: A Desire to Actually Inform" (2005) 18 The Geo J Legal Ethics 1359 at 1364.

<sup>36</sup> Supplementary Issues Paper at [4.12].

<sup>37</sup> Supplementary Issues Paper at [4.13]–[4.15].

<sup>38</sup> Bell Gully, Chapman Tripp, GCA Lawyers, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>39</sup> Bell Gully, Chapman Tripp, GCA Lawyers, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Shine Lawyers, Philip Skelton QC/Kelly Quinn/Carter Pearce and Nicole Smith.

- (a) A representative plaintiff cannot easily discharge their duty to act in the best interests of the class without knowing the identity of class members and being able to communicate with them.
  - (b) The defendant will often have the best source of class member contact details. In some cases, the defendant will be the only party with information about the class.
  - (c) There is often asymmetry of information between the representative plaintiff and defendants.
  - (d) It can be efficient, minimise legal costs and be more effective in ensuring group members are contacted directly.
  - (e) In previous cases, defendants have raised concerns about breaches of the Privacy Act 2020. It is desirable to have a statutory obligation to disclose contact details so the “required by law” exception in the Privacy Act can apply.
- 8.67 Two submitters did not support the defendant providing the names and contact details of potential class members to the representative plaintiff. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said disclosure of customer information to the representative plaintiff would likely breach obligations in the Privacy Act, as it is not one of the reasons for which the information was collected. It would require amending disclosure statements, which would be costly and negatively impact customer relationships. It said there were other effective ways for a representative plaintiff to contact a class that would not impact on obligations to customers and commercially sensitive information. Simpson Grierson said the privacy and confidentiality interest of both potential class members and defendants needs to be protected. It said it would be better for the representative plaintiff to contact potential class members through advertising, public notices and media reporting.
- 8.68 Johnson & Johnson said a defendant should only be required to provide class member names where it has that information and is not restricted from providing it to the plaintiff. Shine Lawyers acknowledged that in some cases, such as those involving financial institutions, the defendant may be subject to privacy considerations.

### Giving notice directly to class members

- 8.69 Ten submitters supported the court having a power to order a defendant to give notice directly to class members.<sup>40</sup> Reasons included:
- (a) In many cases only the defendant will have the systems in place for communicating with class members and the resources to do so.
  - (b) Defendants have greater financial capacity to support this administrative exercise. The burden of notice may otherwise dissuade class actions.
  - (c) In some instances, notice will be less intrusive and more even-handed if the defendant communicates with class members, such as where class members are ongoing customers of the defendant.
  - (d) It can keep legal costs down and be more effective in ensuring group members are contacted directly.

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<sup>40</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Shine Lawyers, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

- (e) The defendant could engage a third party provider to contact group members.
- 8.70 Several submitters were less supportive of requiring the defendant to give notice directly. Simpson Grierson said it is not the defendant's role to assist the representative plaintiff to recruit class members. While the defendant might consent to giving notice in some cases, this is likely to be rare. Johnson & Johnson said that, while defendants should participate in reviewing notices, they should not be involved in processes such as organising mailouts to class members. GCA Lawyers thought it would seldom be appropriate for the defendant to arrange for notice in isolation, given its conflict of interest. Shine Lawyers acknowledged there may be cases where it would not be appropriate for the defendant to have any contact with class members, such as cases about institutional abuse.

#### Other points made by submitters

- 8.71 Some submitters thought the court's powers to order the defendant to provide class member information or assist with giving notice should only be exercised in limited cases. Bell Gully opposed a presumption that the defendant must assist with notice. It said the defendant should only be required to disclose information on class members or assist in giving notice where it agrees or where the plaintiff satisfies the court there is a good reason for requiring it. Chapman Tripp said that, in most cases, the defendant should not need to be involved in identifying or contacting class members.
- 8.72 Several submitters thought the court should be able to order the representative plaintiff to meet the defendant's reasonable costs in assisting with notice.<sup>41</sup> Maurice Blackburn/Claims Funding Australia said the court should be empowered to make orders that appropriately apportion the costs of notice, noting that costs could be significant. It suggested the defendant should bear the cost of distributing notice where it has class member contact information, particularly where its database systems mean it can distribute notices at lower cost.

#### Recommendations

**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.

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<sup>41</sup> Bell Gully, Chapman Tripp and Gilbert Walker.

### Power to order the defendant to provide contact details or assist with notice

- 8.73 We recommend the Rules Committee consider developing a High Court Rule to empower the court to order the defendant to provide class member contact details to the representative plaintiff. This will ensure a defendant will not be in breach of its obligations under the Privacy Act 2020 with respect to disclosure when it provides this information.<sup>42</sup> Where the representative plaintiff receives information about class members from the defendant, we propose that it should be restricted to using this information for the purposes of the proceeding. A similar restriction applies with respect to documents obtained through discovery.<sup>43</sup>
- 8.74 In some cases, the potential distress to class members from having their contact details passed on to the representative plaintiff will militate against the use of this power, such as in cases involving sensitive allegations.
- 8.75 We recommend the rule should also empower the court to order the defendant to assist with giving notice to class members. This assistance could involve sending notice directly to class members or placing the notice on its website.
- 8.76 Notice is an essential element of a class actions regime, and in some cases the defendant will have much better information about potential class members than the representative plaintiff. Requiring the defendant to assist with notice could avoid the need for an expensive and broad advertising campaign. In some cases, it will be in the defendant's interest to ensure that class members are notified, such as in an opt-out class action where notice may result in class members opting out. We do not think it will be necessary or appropriate to involve the defendant in all cases. We envisage this will be a case-specific inquiry, so we think it is preferable to for the court to have a wide discretion.

### Costs of notice

- 8.77 In some cases, the cost of providing notice will be considerable. We have considered who should bear those costs.
- 8.78 In Australia, the court may make an order relating to the costs of notice.<sup>44</sup> The general rule is that the costs of giving notice of the right to opt out should be borne by the representative plaintiff unless there are special reasons to justify departing from that rule.<sup>45</sup> Similarly, the Ontario regime allows the court to make an order it considers appropriate with respect to the costs of notice, including an order apportioning costs among parties.<sup>46</sup> The normal rule is that the representative plaintiff has to bear the costs of the certification notice, but in an appropriate case it can order the costs to be shared or that the defendant should bear the costs entirely.<sup>47</sup> In the United States, the default

<sup>42</sup> See Privacy Act 2020, s 24. Relevantly, this provides that nothing in information privacy principle 11 (which relates to disclosure) affects a provision contained in any New Zealand enactment that authorises or requires personal information to be made available. An enactment means the whole or part of an Act or any secondary legislation: Legislation Act 2019, s 13.

<sup>43</sup> High Court Rules 2016, r 8.30(4).

<sup>44</sup> Federal Court of Australia Act 1976 (Cth), s 33Y(3)(d).

<sup>45</sup> *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2001] VSC 284 at [19].

<sup>46</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 22.

<sup>47</sup> See *Fantl v ivari* 2018 ONSC 4443 at [14].



rule is that the plaintiff should meet the costs of the certification notice, but there are circumstances where courts will order the defendant to bear these costs.<sup>48</sup>

- 8.79 We consider the court should have a power to make any orders it considers appropriate with respect to the costs of notice. We think that, in most cases, the starting point should be that the representative plaintiff will meet the costs of notice, given that it has chosen to bring the proceeding as a class action. However, there may be some circumstances where it would be appropriate for the defendant to meet some or all of the costs of notice.<sup>49</sup> We envisage this will depend on the event that has triggered notice and the circumstances, so we favour the court having a broad discretion.

## OPT-IN OR OPT-OUT PROCESS

- 8.80 In this section we discuss several additional issues that we have identified in the course of developing our recommendations. These are:
- (a) When a class member should be considered to have opted into or opted out of a class action.
  - (b) Who should be responsible for managing the opt-in or opt-out process.
  - (c) Whether the court should have a discretion to allow a class member an additional opportunity to opt in or opt out in limited circumstances.
  - (d) Whether arbitration clauses could prevent class members from becoming part of a class action.

## Recommendations

**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.

<sup>48</sup> William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §8.31–§8.33.

<sup>49</sup> There are examples of defendants being required to contribute to notice costs in other jurisdictions. For example, in Canada defendants have been ordered to contribute to notice costs where there has been financial hardship on the part of the plaintiff, where the litigation has a public interest dimension, and where the defendant is better placed to pay for the notice: Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 360. In the United States, circumstances include where the costs would be substantially reduced if the defendant undertook the notice rather than the plaintiff, when there is an existing fiduciary relationship between the parties, when the defendant is the party requesting certification, and when there has been some preliminary finding of the defendant's liability: William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §8.33.



**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.

### *Manner of opting in or opting out*

- 8.81 Once the initial notice has gone to potential class members, there needs to be a process by which individuals can exercise their right to opt into or opt out of the class action.
- 8.82 We recommend the Class Actions Act specify that a person may opt into or opt out of the class action in the manner specified in the opt-in or opt-out notice, or as otherwise directed by the court. The initial notice to class members should clearly specify what a class member must do to opt into or opt out of the class action and when they must do this by. For example, a class member might need to fill in and sign the opt-in or opt-out form and email it to the lawyer for the class by a certain date and time. Earlier in this chapter, we recommend the opt-in or opt-out notice should advise potential class members what they must do to opt into or opt out of the class action and the date by which they must do so.
- 8.83 We think this approach will provide greater flexibility than specifying a standard opt-in or opt-out procedure in the Class Actions Act or High Court Rules. For example, there may be opt-in class actions where signing a litigation funding agreement is part of the opt-in requirements. Earlier in this chapter we recommend the court should approve the contents of notices to class members, which means the court will approve the procedure for opting into or opting out of the class action.
- 8.84 We prefer this approach to specifying the opt-in or opt-out procedure in the certification order. The opportunity to opt in or opt out might occur a long time after certification, particularly if there is an appeal. Having the opt-in or opt-out process specified in the notice to class members will ensure it is up to date and avoids the need to amend the certification order.

### *Responsibility for managing the process*

- 8.85 The IBA Antitrust Committee raised the issue of who should be responsible for managing the opt-in or opt-out process. It said there was no reason why the representative plaintiff should be responsible for managing class member forms and that this could be done by the court registry, as in Australia.
- 8.86 We consider the representative plaintiff should be responsible for receiving opt-in or opt-out forms, rather than the court. We think it would be a significant burden on the court registry if it had to receive opt-in or opt-out forms and field queries from class members. It may also be necessary for a class member to sign up to funding arrangements as part of an opt-in process or to clarify with the lawyer whether they fall within the class definition. In practice, we envisage the lawyer for the class would manage the opt-in or opt-out process. This is consistent with the recommendation we make later in this chapter that the representative plaintiff should maintain a list of persons who have opted into or out of the class action. We also recommend the defendant should be able to seek an order for the representative plaintiff to provide this information.

### *Subsequent opt-in or opt-out opportunity*

- 8.87 In Chapter 11, we explain that we no longer think class members should have a general right to opt out of a settlement once it has been approved. Instead, the court should have a discretion to order that specific class members be given an opportunity to opt out. As we discuss in that chapter, we envisage this will be limited to cases where a real unfairness could arise if a particular class member (or category of class members) is required to be bound by a settlement. We also recommend the court should have a discretion to allow specific class members an additional opportunity to opt in at settlement, such as where they did not have sufficient capacity to understand the initial notice.
- 8.88 However, we think the court's discretion to allow a class member a second opportunity to opt in or opt out should not be restricted to the settlement stage. If there are circumstances that mean it would be unfair to require a person to remain in a class action, the court should be able to exercise its power to allow them to opt out at any stage of the proceeding. For example, if a person was unaware of the class action or did not have sufficient capacity to decide whether to opt out, it may be unfair for them to be bound by a judgment. Similarly, if some real unfairness would arise if a person could not opt into the proceeding after the initial opt-in date, the court should be able to consider the issue at any stage.
- 8.89 We recommend the Class Actions Act should empower the court to order that a class member (or potential class member) may have an additional opportunity to opt into or opt out of the class action where the interests of justice require it. We envisage such an order would only be granted in limited circumstances, and it would require more than a class member simply changing their mind. If the court does allow a class member to opt out, any limitation periods applying to their claim will no longer be suspended. We also think a court should only allow a person to opt in if the limitation period for their claim has not already expired. A class actions regime should not be used as a way of enabling a claim where a limitation period has expired.<sup>50</sup>

### *Whether arbitration clauses could prevent potential class members from being part of a class action*

- 8.90 We have considered whether potential class members could be prevented from opting into a class action (or be required to opt out of a class action) by the terms of a contract. A practice has developed in the United States in which a class action waiver clause is included in a contract alongside an arbitration clause. The combined effect of these provisions is to preclude a contracting party from taking part in a class action against the other contracting party and instead having to proceed with their claim through arbitration. These clauses have been used in particular by corporate defendants in their standard terms and conditions with consumers. This has been sharply criticised, as it can have the practical effect of denying access to justice for claimants who cannot afford to initiate arbitration proceedings.<sup>51</sup>
- 8.91 We doubt the practice will take hold in Aotearoa New Zealand, given the legislative framework for arbitration in this jurisdiction and the social utility of class action litigation.

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<sup>50</sup> We discuss limitation in Chapter 4.

<sup>51</sup> Jessica Silver-Greenberg and Robert Gebeloff "Arbitration Everywhere, Stacking Deck of Justice" *The New York Times* (online ed, New York, 31 October 2015).

There is a risk the arbitration clause would be deemed contrary to public policy and therefore not enforceable.<sup>52</sup> Courts are generally reluctant to find that a matter is not capable of settlement by arbitration, including where the impediment to arbitration is alleged impecuniosity. However, the leading case law deals with commercial transactions. Claims that are more amenable to the class action procedure have not been examined for their arbitrability. In addition, the Arbitration Act 1996 contains special protections for consumers. An arbitration agreement with a consumer is only enforceable against the consumer if they agree in writing to be bound after a dispute has arisen.<sup>53</sup> The Act does not specify a monetary limit for consumer transactions. The evident policy is to discourage consumer arbitration, given the likelihood of inequality of bargaining power, standard form contracts, and the absence of true consent.<sup>54</sup> Unless all consumers agree to be bound by the arbitration clause in accordance with this requirement, a defendant will face the prospect of proceedings in multiple fora. Other legislation limits the availability of arbitration in employment<sup>55</sup> and insurance contexts.<sup>56</sup>

## CASE MANAGEMENT OF CLASS ACTIONS

- 8.92 In the Supplementary Issues Paper, we said class actions would need close case management to ensure they proceed efficiently and in a way that protects the interests of class members.<sup>57</sup> We outlined some options for promoting the efficient case management of class actions.
- 8.93 The court could be given a general power to make any orders necessary for the just and efficient conduct of a class action, as in some overseas class actions regimes. However, we preferred relying on specific powers as much as possible and said the court's existing powers would be sufficient to manage situations that were not provided for.<sup>58</sup> We also discussed the options of having specific class action rules for case management conferences, rules to streamline interlocutory applications and a dismissal for delay provision.<sup>59</sup>
- 8.94 We asked submitters whether the court had adequate powers to ensure the efficient management of class actions or whether specific provisions were needed.

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<sup>52</sup> Arbitration Act 1996, s 10(1). Arguments for not enforcing class action waiver clauses are presented in Nikki Chamberlain "Contracting-Out of Class Action Litigation: Lessons from the United States" [2018] NZ L Rev 371 at 386–390.

<sup>53</sup> Arbitration Act 1996, s 11.

<sup>54</sup> Te Aka Matua o te Ture | Law Commission *Arbitration* (NZLC R20, 1991) at [235].

<sup>55</sup> Employment Relations Act 2000, s 155. Under this provision, the Arbitration Act 1996 (including its enforcement mechanisms) does not apply to arbitrations of employment relationship problems. A party is also entitled to make an application to the Employment Relations Authority or Employment Court, notwithstanding any arbitration.

<sup>56</sup> Insurance Law Reform Act 1977, s 8, provides that an arbitration agreement entered into by an insured otherwise than in trade is not enforceable against the insured.

<sup>57</sup> Supplementary Issues Paper at [4.22].

<sup>58</sup> Supplementary Issues Paper at [4.23]–[4.27].

<sup>59</sup> Supplementary Issues Paper at [4.28]–[4.33].

## Results of consultation

8.95 We received 14 submissions on this question.<sup>60</sup>

### *General power to make necessary orders*

8.96 Four submitters supported the court having an express power to make orders necessary in a class action.<sup>61</sup> Reasons for this included:

- (a) Class actions are complex and can raise unique issues. It is impossible for a class actions regime to fully predict all issues that may arise and the court needs the ability to address these.
- (b) The court is sometimes hesitant to use the inherent jurisdiction in novel circumstances, so a specific empowering provision is necessary.
- (c) It would give the court the flexibility to respond to the circumstances of individual cases and to ensure class actions proceed as efficiently and fairly as possible.
- (d) A general power could be worded to avoid the issues that have arisen in Australia. Providing express powers (as well as a general power) could also help to avoid these issues.

8.97 Seven submitters did not consider the court needed a general power to make any orders necessary in a class action, noting the High Court Rules and the court's inherent jurisdiction provide sufficient flexibility to manage class actions.<sup>62</sup> The joint submission by Philip Skelton QC, Kelly Quinn and Carter Pearce noted that a general power to make orders is more important in a court such as the Federal Court of Australia, which is created by statute. By contrast, Te Kōti Matua | High Court is a court of inherent jurisdiction and necessarily has broad inherent powers to make orders necessary to exercise that jurisdiction. Shine Lawyers said the court should have a general power to make orders required to progress a class action, whether in statute or pursuant to the inherent jurisdiction.

### *Case management conferences*

8.98 Chapman Tripp and the Insurance Council supported having specific provisions on class actions case management conferences. Other submitters suggested this could be dealt with in a Practice Note.<sup>63</sup> Gilbert Walker and Simpson Grierson thought it was unnecessary to have special rules for case management conferences in class actions.

### *Interlocutory applications*

8.99 Submitters suggested more efficient management of interlocutory applications could be achieved by:

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<sup>60</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith, Tom Weston QC and Woodsford Litigation Funding.

<sup>61</sup> IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson.

<sup>62</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith, Tom Weston QC and Woodsford Litigation Funding.

<sup>63</sup> IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Shine Lawyers.

- (a) Including guidance on expediting interlocutory applications in a Practice Note.<sup>64</sup>
- (b) Determining interlocutory applications on the papers unless the complexity and importance of the application means a hearing is necessary.<sup>65</sup>
- (c) Using judicial settlement conferences more frequently to resolve interlocutory applications.<sup>66</sup>

8.100 Gilbert Walker thought special rules were unnecessary for interlocutory applications in class actions. Simpson Grierson did not think interlocutory applications in class actions were unique and said some would be suitable to be dealt with on the papers or in an expedited way, and others would not. Tom Weston QC commented that interlocutory applications in class actions will usually be complex so it is unlikely they could be disposed with on the papers.

### *Automatic dismissal*

8.101 The Insurance Council thought a class action that has not been progressed within six months should be automatically dismissed. Simpson Grierson supported an express provision empowering the court to dismiss a class action if genuine efforts had not been made to progress the proceeding. Three submitters thought it was unnecessary to have an automatic dismissal provision.<sup>67</sup> Submitters noted delays can be managed through case management and timetabling procedures, along with the court's jurisdiction to stay or dismiss a proceeding for want of prosecution.

### *Other suggestions*

8.102 Some submitters made other suggestions for ensuring the efficient case management of class actions. Chapman Tripp and the IBA Antitrust Committee said a class action could be managed by the same judge throughout.<sup>68</sup> Tom Weston QC suggested it may be appropriate for all interlocutory applications in class actions to be heard by a judge rather than an associate judge. Johnson & Johnson suggested the court should be able to direct the parties to attend mediation. Nicole Smith said the court should be able to propose mediation of competing class actions.

### **Recommendation**

#### **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.

8.103 We do not think the court needs an express power to make any orders necessary in a class action. Our preference has been to make recommendations on specific class actions

<sup>64</sup> Maurice Blackburn/Claims Funding Australia.

<sup>65</sup> Insurance Council and Shine Lawyers.

<sup>66</sup> Chapman Tripp.

<sup>67</sup> IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Shine Lawyers.

<sup>68</sup> Although Chapman Tripp acknowledged this may not be realistic given the court's resourcing constraints.

rules, which we think will help to provide certainty to parties as to the procedure to be followed. We acknowledge some situations will arise that are not contemplated by class actions rules. However, we consider the court will be able to make orders it considers appropriate by relying on the existing High Court Rules and its inherent jurisdiction.<sup>69</sup> As practice on class actions develops, the Rules Committee may wish to consider developing additional rules to manage class actions.

- 8.104 We recommend the Rules Committee consider developing a schedule to the High Court Rules listing the issues to be addressed at case management conferences that are held before and after certification. We note there is a separate schedule listing matters to be addressed at case management conferences in judicial review proceedings.<sup>70</sup> The initial stages of a class action will proceed quite differently to other litigation because of the additional steps required. The first case management conference in a class action is likely to focus on the certification hearing and whether there are any concurrent class actions. It would not make sense to discuss many of the matters that would normally be discussed at a first case management conference in ordinary litigation.<sup>71</sup> Matters to be discussed at a post-certification case management conference might include whether there is an application for approval of a funding agreement, for a cost sharing order, for the approval of notice to class members and for security for costs.
- 8.105 We do not consider rules on streamlining interlocutory applications in class actions are needed and think the nature of the application will determine whether a hearing is required. Nor do we recommend a provision requiring automatic dismissal of class actions that are not progressed in a timely way. We think the court's usual case management powers and the power to dismiss or stay a proceeding for want of prosecution will be sufficient to manage this issue.<sup>72</sup>
- 8.106 While we agree it is likely to be efficient for the same judge to case manage a class action proceeding throughout, this is ultimately a matter of judicial resourcing and we do not make any recommendations on this.

## DISCOVERY AND OTHER REQUIREMENTS TO PROVIDE INFORMATION

- 8.107 In the Supplementary Issues Paper, we explained that we envisaged the general rules relating to discovery and inspection, interrogatories and notices to admit facts would apply to class actions, as with other civil litigation.<sup>73</sup>
- 8.108 We noted the representative plaintiff is a party to the proceeding and will have an obligation to meet discovery requirements. However, the situation of class members differs as they are not parties to the proceeding. We said a class actions regime could

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<sup>69</sup> We also note there is a rule for "cases not provided for": High Court Rules 2016, r 1.6. This provides that if a case arises where no procedure has been prescribed, the court must dispose of the case "as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case". If there are no such rules, the court must dispose of the case in a manner the court thinks is best calculated to achieve the objective of the High Court Rules.

<sup>70</sup> High Court Rules 2016, Sch 10.

<sup>71</sup> High Court Rules 2016, rr 7.3, 7.3(A) and Sch 5.

<sup>72</sup> High Court Rules 2016, r 15.2.

<sup>73</sup> Supplementary Issues Paper at [4.51].

specify a procedure for obtaining discovery against class members, but we did not think it was necessary given the ability to seek an order for non-party discovery.<sup>74</sup>

- 8.109 Where the 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. We suggested a representative plaintiff should be required to keep a list of class members who have opted into or out of a class action. We proposed the defendant should be able to request a list of persons who have opted into the class action or the number of persons who have opted out of the class action.<sup>75</sup>
- 8.110 We asked submitters whether current rules for discovery and information provision are adequate for class actions or whether specific rules are required. In particular, we asked whether there should be a specific rule permitting discovery by class members or whether the defendant should be entitled to any information about class member claims.

## Results of consultation

- 8.111 We received 14 submissions on discovery and other requirements to provide information.<sup>76</sup>

### *Class member discovery*

- 8.112 Five submitters supported having a specific rule allowing the court to order discovery from class members.<sup>77</sup> Their reasons included the following:
- (a) The non-party discovery rule was developed to recognise the burden of imposing discovery obligations on a person who has no interest or role in the litigation. This is not true of class members, who stand to benefit from the class action and who have either opted in or had the option of opting out.
  - (b) The party seeking discovery usually pays the reasonable costs of non-party discovery. It would be inappropriate for a defendant to pay the costs of class member discovery.
  - (c) It would be better to have clear rules rather than leave it to the court. It would avoid the time and cost of an application for non-party discovery.
- 8.113 Some submitters thought the rule should allow class member discovery at stage two of the proceedings (when individual issues are considered), while others thought class member discovery might also be appropriate at the common issues stage. Bell Gully supported the factors that Canadian courts must consider when deciding whether to grant an application for class member discovery.<sup>78</sup>

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<sup>74</sup> Supplementary Issues Paper at [4.52]–[4.56].

<sup>75</sup> Supplementary Issues Paper at [4.57]–[4.61].

<sup>76</sup> Bell Gully, Chapman Tripp, Te Tari Ture o te Karauna | Crown Law Office, Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Tom Weston QC.

<sup>77</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Simpson Grierson and Tom Weston QC.

<sup>78</sup> Those factors are: the stage of the class action and the issues to be determined at that stage; whether there are subclasses; whether the discovery is necessary given the claims or defences of the party seeking it; the monetary value



- 8.114 Six submitters thought it is unnecessary to develop a specific rule on class member discovery.<sup>79</sup> Reasons for this included:
- (a) The current rules are adequate.
  - (b) Discovery from class members is unnecessary at the common issues stage.
  - (c) It would add unnecessary cost and delay.
  - (d) In most instances the defendant will know more about the class members than the representative plaintiff.
  - (e) Discovery against class members should be the exception, rather than the rule. A judge should carefully consider any request for class member discovery.
  - (f) Class members may be deterred from joining a class action due to the potential cost of complying with discovery orders. The defendant could also use discovery to intimidate class members into abandoning their claims.
- 8.115 In their joint submission, Philip Skelton QC, Kelly Quinn and Carter Pearce suggested the court should have discretion to order discovery by class members in appropriate circumstances but they did not have a view on whether a new rule was required.

### *Register of class members*

- 8.116 Six submitters thought the representative plaintiff should keep a register of class members who opt in or opt out and should provide the defendant with this information on request.<sup>80</sup> Reasons given by submitters were:
- (a) It is important that those organising class actions keep good records of class numbers at any given point in time, both as a protection for class members and so the parties know the size and scope of the claim.
  - (b) It is fundamental to the administration of justice for the defendant to know the size of the claim against it.
  - (c) Having this information may help to facilitate settlement.
- 8.117 The IBA Antitrust Committee thought the court should receive opt-out notices and could provide the parties with information on the number and identity of those who have opted out. It said defendants may be unable to settle individual claims without confirming that the person has opted out of the class action. It also supported an express obligation on the plaintiff to provide information on the estimated size of the class.
- 8.118 Three submitters did not think the defendant should generally be entitled to information on the identity of class members.<sup>81</sup> However, two of these submitters thought the court

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of individual claims; whether discovery would be oppressive or result in undue annoyance, burden or expense for class members; any other matter the court considers relevant. See Class Proceedings Act SO 1992 c 6 (Ontario), s 15(3). There are similar provisions in most other Canadian class actions regimes.

<sup>79</sup> IBA Antitrust Committee, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Shine Lawyers.

<sup>80</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Omni Bridgeway and Simpson Grierson. Note that in opt-out cases, some submitters anticipated the representative plaintiff would provide a list of those who had opted out, while others thought only the number of persons opting out would be provided. Crown Law Office said the current rules were probably adequate for opt-in class actions, although having a register of class members would enable the defendant to understand the identity and circumstances of class members.

<sup>81</sup> Maurice Blackburn/Claims Funding Australia, Shine Lawyers and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).



should have the power to consider this on a case-by-case basis.<sup>82</sup> Maurice Blackburn/Claims Funding Australia said in many instances the defendant will hold more information about the class than the representative plaintiff. It did not think ensuring the defendant has sufficient information about class members was a significant issue, unless this was needed for genuine settlement purposes. Shine Lawyers said there is often a power imbalance between class members and a defendant, and in some cases the identity of class members needs to remain confidential. It also said many institutional clients will not participate in a shareholder class action if there is a risk their identity will be disclosed without their written consent and this could lead to potential class actions being stifled.

### *Other feedback on information requirements*

8.119 Some submitters suggested other information requirements:

- (a) In opt-in cases, the defendant should be provided with the estimated value of each class member's claim.<sup>83</sup>
- (b) The defendant should be entitled to other information gathered from class members during the opt-in process.<sup>84</sup>
- (c) There should be a requirement to provide an estimate of the class size at certification and an obligation to update this estimate as the claim progresses.<sup>85</sup>
- (d) There should be rules on obtaining particulars and discovery from class members in opt-out class actions.<sup>86</sup>
- (e) The defendant should have to provide critical information at an early stage. The main problem with discovery in class actions is the expense and delay associated with defendant discovery, with insufficient attention to producing a focused set of documents at an early stage.<sup>87</sup>

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<sup>82</sup> Maurice Blackburn/Claims Funding Australia and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>83</sup> Simpson Grierson.

<sup>84</sup> Chapman Tripp. It said not having sufficient information about class member claims could lead to a claim or class size appearing larger than it is. Information about class member claims could also allow a more informed consideration of the framing of common issues and sub-classes.

<sup>85</sup> Chapman Tripp.

<sup>86</sup> Crown Law Office.

<sup>87</sup> Maurice Blackburn/Claims Funding Australia.

## Recommendations

**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. The 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.

### *Class member discovery*

8.120 We agree with submitters that the non-party discovery rule is not well suited to class member discovery, because it is designed to apply to persons who are not part of the litigation. While class members are not parties, the proceeding is brought on their behalf and the outcome will be binding upon them. Additionally, the costs rule for non-party discovery presumes that the party seeking discovery will meet the reasonable costs of the non-party.<sup>88</sup> This seems inappropriate in a situation where discovery is sought from someone involved in the litigation.

8.121 Accordingly, we recommend the Rules Committee consider developing a new High Court Rule to empower the court to order one or more class members to provide discovery. We consider applications for class member discovery should be as confined as possible, and it will not generally be appropriate for a class member to have to provide standard discovery. We have identified several factors that might be relevant for the court to consider when deciding whether to order a class member to provide discovery and the extent of that discovery.<sup>89</sup>

8.122 First, we think the stage of the class action and the issues to be determined at that stage will be highly relevant. Discovery against class members should generally be limited to the stage of proceedings where individual issues are considered. However, we do not recommend excluding the possibility of ordering class member discovery at the common

<sup>88</sup> High Court Rules 2016, r 8.22(3), and Andrew Beck and others (eds) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at HR8.22.02.

<sup>89</sup> In developing these factors, we have drawn on Class Proceedings Act SO 1992 c 6 (Ontario), s 15(3).

issues stage, as there may be circumstances where this is appropriate. For example, it could be that a particular class member has documents relevant to a common issue that are not held by the representative plaintiff.

- 8.123 Second, we suggest the court could consider whether discovery is necessary in all the circumstances of the case, including the discovery that can be obtained from parties to the proceeding. In our view, it is preferable to seek discovery from the representative plaintiff and any sub-class representative plaintiffs rather than from class members. In some cases, it may be that limited discovery from a small group of class members is sufficient.
- 8.124 Third, we think the court could consider whether discovery would result in unfairness or undue burden or expense for class members. A class action is designed to require minimal participation for class members, and it is undesirable for burdensome discovery obligations to disincentivise participation in class actions. Therefore, we think it is relevant for a court to consider the breadth of a discovery request and the time and cost involved in complying with it. We also think the court should have discretion to take into account any other matter it considers relevant.
- 8.125 We think the costs of class member discovery, such as the costs incurred by the lawyer for the class in responding to the application, should generally be met by the representative plaintiff or class member, depending on whether discovery is sought for a common or individual issue. However, if this would be manifestly unjust, the court should be able to order the defendant to meet some or all of those costs.<sup>90</sup>

### *Class member particulars*

- 8.126 Earlier in this chapter, we said the representative plaintiff should be responsible for receiving opt-in or opt-out notices, rather than the court. We recommend the Rules Committee consider developing a High Court Rule requiring the representative plaintiff to maintain a list of persons who have opted into or opted out of the class action.
- 8.127 We have considered whether there should be an obligation to provide this information to the defendant on request. While we think a defendant should generally be entitled to this information, we have decided it is preferable for the court to decide the exact parameters of the information to be provided and when. Therefore, we think it would be desirable to have a High Court Rule enabling the defendant to seek an order that the representative plaintiff provide it with information about class members who have opted in or out.
- 8.128 In an opt-out case, the defendant should be entitled to know the number of class members who have opted out, at minimum. We do not think the names of those who have opted out should be provided to the defendant as a matter of course. While someone who has opted into a class action can reasonably expect that the defendant will be informed of this, the same cannot be said of someone who has decided not to be involved in the class action. However, there may be cases where it is appropriate for a defendant to be given the names of class members who have opted out. An example is where the identity of all potential class members is known (such as in a shareholder class action where the potential class can be identified through the share registry).<sup>91</sup> A

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<sup>90</sup> High Court Rules 2016, r 8.22.

<sup>91</sup> Alternatively, in such a case, it would be possible to determine who has remained in the class action and provide that information to the defendant.

defendant might also seek confirmation that specified persons have opted out, in order to respond to individual proceedings against them or finalise a settlement.

- 8.129 In an opt-in case, it will generally be appropriate for the defendant to be given a list of class members who have opted in. In some cases, the court might consider the defendant is entitled to information above and beyond the names of class members. For example, in a class action alleging damage to residential properties, the court might consider the defendant should be given the addresses of the properties in question.

## SUB-CLASSES

- 8.130 In the Supplementary Issues Paper, we said it may be necessary to have sub-classes in a class action.<sup>92</sup> We identified three situations where sub-classes had been used in other jurisdictions:

- (a) Where groups of class members have conflicting interests.
- (b) Where all class members share a common issue, but there are additional issues that are not common to all class members. In this situation, sub-classes may assist to make litigation more efficient and manageable.
- (c) Where there is no issue common to all class members, but there are several related sub-classes.

- 8.131 Our preliminary view was that sub-classes may be appropriate in the first two situations, but not the third. We thought it was important to have a common issue across all class members.<sup>93</sup> We asked submitters when sub-classes should be allowed.

## Results of consultation

- 8.132 We received 10 submissions on this issue.<sup>94</sup> All of those submitters agreed that a class actions regime should allow for sub-classes in some circumstances. Reasons included:

- (a) Defendants may otherwise be unable to exercise defences that only apply to some class members and not others.
- (b) Sub-classes can divide large and complex claims into manageable pieces and allow the proceeding to be managed and progressed more efficiently and cost effectively. They can avoid what would otherwise be separate but similar class actions.
- (c) Sub-classes can reduce the potential for artificially inflated class actions, with meritless claims “hiding” among claims with more merit.

- 8.133 Four submitters supported sub-classes where there is a conflict of interest among class members.<sup>95</sup> An example given was a class that contained both injured class members (who sought generous immediate payments) and class members who might only manifest an injury in the future (who sought an ample, inflation-protected fund for the future).<sup>96</sup> Maurice Blackburn/Claims Funding Australia said if the conflict is such that separate legal

<sup>92</sup> Supplementary Issues Paper at [1.105]–[1.107].

<sup>93</sup> Supplementary Issues Paper at [1.108].

<sup>94</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>95</sup> Bell Gully, Insurance Council, Johnson & Johnson and Maurice Blackburn/Claims Funding Australia.

<sup>96</sup> The example came from *Anchem Products v Windsor* 521 US 591 (1997) and was cited by Johnson & Johnson.

representation is required, it may be inappropriate to bring the claims as a class action because of the inefficiency and cost involved.

- 8.134 Seven submitters thought sub-classes are appropriate where there is a common issue across all class members, as well as additional issues shared only by a sub-group.<sup>97</sup> An example is creating sub-classes for different time periods in a class action that covers a significant date range.
- 8.135 Chapman Tripp thought sub-classes could be appropriate where there is no common issue across the class, but the factual or legal issues are sufficiently related to justify them proceeding together. Other submitters said sub-classes would not be appropriate in this situation.<sup>98</sup> Reasons for this view included the following:
- (a) The common issue principle is central to a class actions regime and sub-classes should not be used to get around this. If there is no common issue across class members, the case should not be certified.
  - (b) The benefits of class actions are more able to be realised where there is a common issue across all the claims.
  - (c) Without a common issue, managing numerous sub-classes would lead to increased cost and delay.
  - (d) It would create uncertainty for defendants and could complicate settlements.
- 8.136 Omni Bridgeway thought the court should have discretion to order sub-classes where appropriate in a particular case, relying on a general power to make orders in class actions.
- 8.137 Other comments made by submitters on sub-classes:
- (a) Sub-classes should not need their own representative plaintiff. This is overly prescriptive and may lead to unnecessary expense. Instead, issues in relation to the sub-class may be dealt with through sample class members giving evidence at trial or could be addressed following the initial trial.<sup>99</sup>
  - (b) A class actions statute does not need to provide for sub-classes, as the court can consider these as part of its general case management powers.<sup>100</sup>
  - (c) The court should have a power to create sub-classes at any stage of the proceeding, not just at certification.<sup>101</sup>
  - (d) The court should only create a sub-class if the issue meets the certification requirement that a class action is an appropriate procedure for the efficient resolution of class member claims.<sup>102</sup>

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<sup>97</sup> Bell Gully, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Simpson Grierson and Nicole Smith.

<sup>98</sup> Bell Gully, Insurance Council, Rhonson Salim and Simpson Grierson.

<sup>99</sup> Maurice Blackburn/Claims Funding Australia.

<sup>100</sup> Maurice Blackburn/Claims Funding Australia and Omni Bridgeway.

<sup>101</sup> Shine Lawyers. A similar point was made by Maurice Blackburn/Claims Funding Australia, which said a class actions regime should not require a sub-class representative plaintiff to be identified at an early stage of the proceeding.

<sup>102</sup> Insurance Council.

## Recommendation

**R63**

The Class Actions Act should empower a 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 subclass 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.

8.138 We recommend the Class Actions Act should empower a sub-class to be created in two situations. The first category is where there is, or is likely to be, a conflict between the interests of different groups of class members. The second category is where there is an additional issue shared by a group of class members, but it does not give rise to a conflict. There are different rationales underlying these two types of sub-class, so they should be treated differently.

8.139 While sub-classes will be beneficial in some cases, they may require a separate sub-class representative plaintiff and legal representation, which will add to the expense and complexity of the class action. Therefore, careful consideration should be given to whether a sub-class is necessary in a situation.

### *Conflict of interest sub-classes*

8.140 A sub-class may be appropriate where the interests of groups of class members conflict, such as where the relief sought by some class members could harm the interests of other class members. Examples of where an intra-class conflict might arise include where the class is made up of both former and current franchisees, former and current shareholders, or class members with present injuries and class members with possible future injuries.<sup>103</sup> Where there is a conflict of interest, the purpose of a sub-class is to ensure that all class members are fairly and adequately represented.

8.141 In some cases, the conflict will be apparent at the outset of litigation. If a sub-class is not created, it might prevent the case from being certified on the basis that the proposed representative plaintiff cannot fairly and adequately represent both groups of class members. In this case, the court could appoint a sub-class representative plaintiff when it certifies the class action. There may also be situations where a conflict is not apparent until after certification, such as after the class has been formed or when a settlement is proposed. In this case, a separate application could be made to appoint a sub-class representative plaintiff.

<sup>103</sup> See Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 285.

- 8.142 A sub-class will not always be needed where there is a conflict of interest. For example, it may not be necessary if the conflict is minor or only hypothetical. There may be alternative ways of managing a conflict without creating a sub-class, such as having a series of hearings to determine relief.<sup>104</sup>
- 8.143 If a sub-class is created because of a conflict between groups of class members, we think it will generally be necessary to appoint a separate sub-class representative plaintiff. The existence of a conflict will make it difficult for one representative plaintiff to adequately represent both groups of class members. We think a sub-group representative plaintiff should have to meet the same test as for the representative plaintiff. This means they must be suitable and able to fairly and adequately represent the sub-class. In Chapter 12, we propose that a sub-class representative plaintiff can be liable for adverse costs for issues determined on a sub-class basis.
- 8.144 Because we propose the lawyer for the class should take instructions from the representative plaintiff, we think it will generally be necessary to have separate legal representation for the sub-class in relation to sub-class issues.

### **Additional issue sub-classes**

- 8.145 A sub-class might also be appropriate where there are additional issues that apply to a group of class members but where no conflict of interest arises. This might include defences that apply to some class members and not others. Using a sub-class where there are additional issues can help the litigation to proceed in an efficient and manageable way.
- 8.146 A sub-class representative plaintiff will not necessarily be required when this type of sub-class is created, given there is no conflict of interest. It will depend on whether the representative plaintiff is able to fairly and adequately represent sub-class members with respect to the additional issues. There could be cases where a representative plaintiff has insufficient understanding of the sub-class issues and is unable to give informed instructions to the lawyer for the class about those issues. In such a case, it might be appropriate to appoint a sub-class representative plaintiff, although we do not think separate legal representation would be required because of the lack of conflict.
- 8.147 An alternative approach is to have a ‘sample class member’ give evidence on sub-class issues, without that person fulfilling the role of sub-class representative plaintiff.<sup>105</sup>

### **Common issue still required**

- 8.148 Our commencement and certification provisions require the claims of class members to have a common issue of fact or law. We do not propose any exception to this where there are related sub-classes, as the benefits of class actions are better realised where there is a common thread across each class member’s claim. There was little support for allowing a class action to proceed where there is no issue common to all class members, but there are several related sub-classes. In this situation, we think it would be preferable

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<sup>104</sup> In the United States, methods used to address intra-class conflicts other than sub-classing include: having separate liability and damages trials; appointing a judge or “special master” to hear individual damages proceedings; decertifying the class after the liability trial and giving class members notice as to how they can prove damages; and, altering or amending the class. See William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §7:31.

<sup>105</sup> For example, see *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355 at [15]–[21].

for separate proceedings to be brought. The court could exercise its case management powers to ensure the proceedings are managed and heard in an efficient way, such as consolidating the proceedings or hearing them together.

### *Reflecting sub-classes in legislation*

- 8.149 For simplicity, our draft legislation refers to classes rather than sub-classes throughout. We think a more developed version of the Class Actions Act should reflect the possibility that a class action will also have sub-classes. One option would be to have a provision specifying that the provisions of the Class Actions Act apply to sub-classes with any necessary modifications. Alternatively, specific provisions could refer to a sub-class as well as to a class.

## **STAGED HEARINGS**

- 8.150 In the Supplementary Issues Paper we explained that a common method of managing common and individual issues in class actions is to have staged hearings (also known as split trials). Typically, the stage one hearing will determine common issues (and sometimes the entirety of the representative plaintiff's claim) and the stage two hearing will determine individual issues.<sup>106</sup>
- 8.151 We suggested a class actions regime should have a provision on staged hearings, with a presumption they will be appropriate. We envisaged the first hearing determining the common issues as well as any individual issues relating to the representative plaintiff. However, we favoured the court having some flexibility as to which issues would be determined at each hearing.<sup>107</sup>
- 8.152 We asked submitters whether they agreed with our proposed approach.

### **Results of consultation**

- 8.153 We received 13 submissions on this issue.<sup>108</sup> Eight submitters agreed with a presumption in favour of staged hearings,<sup>109</sup> while three submitters preferred the court having a general flexibility to determine whether and how to determine the issues.<sup>110</sup> Comments made by submitters included:
- (a) Staged hearings will be sensible in most class actions.
  - (b) Staged hearings are a useful mechanism, but the court should still be able to order a single trial if appropriate.
  - (c) Each class action should be managed according to its particular needs.

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<sup>106</sup> Supplementary Issues Paper at [4.35]–[4.40].

<sup>107</sup> Supplementary Issues Paper at [4.41].

<sup>108</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith, Tom Weston QC and Woodsford Litigation Funding.

<sup>109</sup> Bell Gully, Chapman Tripp, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Shine Lawyers, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>110</sup> IBA Antitrust Committee, Omni Bridgeway and Woodsford Litigation Funding.



- (d) Whether staged hearings will be efficient and reduce costs will depend on the circumstances of the case. A Practice Note could provide a non-exhaustive list of circumstances in which staged hearings should be considered.
- 8.154 The Insurance Council thought the presumption in HCR 10.15 in favour of a single trial should apply because staged proceedings can increase the parties' legal costs without improving efficiency. Gilbert Walker commented this presumption is not hard to displace, particularly in large cases, and that the debate was more often over which issues would be determined at each trial.
- 8.155 Submitters generally agreed with the need to have flexibility as to which issues are determined at each hearing. Simpson Grierson favoured a presumption that the stage one hearing would determine the representative plaintiff's case in its entirety as well as all common issues, with the stage two hearing determining all remaining individual issues.

## Recommendation

### 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.

- 8.156 The feedback we received indicates that it will often be appropriate to have staged hearings in class actions, with common issues considered together and individual issues considered together. However, it is important to ensure the court has sufficient flexibility to address the circumstances of each case.
- 8.157 We recommend the Rules Committee consider developing a High Court Rule to empower the court to make orders to promote efficiency in the hearing of a class action. This could include an order that the hearing should be heard in stages and an order as to which issues should be determined at each stage. The court could, for example, order that the common issues should be heard together, sub-class issues should be heard together and individual issues should be heard together. However, the court's powers should not be limited to grouping the issues in this way. For instance, there may be a sub-set of individual issues that would be efficient to determine at stage one.
- 8.158 The power we recommend will ensure parties do not have to overcome the presumption in favour of a single hearing in HCR 10.15. An express provision also reflects the importance of ensuring that class actions are efficiently managed.

## DETERMINING INDIVIDUAL ISSUES IN A CLASS ACTION

- 8.159 If the representative plaintiff obtains a successful judgment on the common issues, the individual issues (such as loss suffered) will need to be determined. Determining individual issues can be challenging if the class is large, so it is important to consider how such issues can be resolved in a just and efficient way.<sup>111</sup>

<sup>111</sup> Supplementary Issues Paper at [4.42].

- 8.160 In the Supplementary Issues Paper, we said the court should have some flexibility as to how to determine individual issues.<sup>112</sup> We suggested the court's powers could include the following:
- (a) Appointing a court expert who could report back to the court on particular issues. The expert would not necessarily determine individual issues, but they might 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. The parties might agree to a particular form of evidence, such as standardised forms.
- 8.161 We asked submitters how individual issues in a class action could be determined in an efficient way, such as through the court powers we suggested.

### Results of consultation

- 8.162 We received 11 submissions on this issue.<sup>113</sup> Most submitters agreed with the court having flexibility as to how individual issues should be determined, including the mechanisms we suggested. Comments made by submitters included:
- (a) It is unlikely to be feasible to require each class member to give evidence on individual issues.
  - (b) It is important that individual issues can be determined fairly and efficiently, without overwhelming the courts.
  - (c) Our proposed mechanisms may streamline the process.
  - (d) There is a balance to be struck between precision of assessment and efficiency. It is for the court to consider how the balance is achieved, empowered by wide powers.
  - (e) The process for determining individual issues should be considered at an early stage in the proceeding, preferably at certification.
- 8.163 Submitters also identified some additional mechanisms for determining individual issues, including:
- (a) The use of sub-classes.
  - (b) Tiered dispute resolution processes, which could include establishing standardised approaches for assessing damages and causation issues.
  - (c) A power for the court to direct mediation to occur.
  - (d) Using standard forms and digital cross-checking of information.
  - (e) Orders limiting the parties to a single expert for each discrete topic.
  - (f) The parties seeking to settle the remaining issues amongst themselves after a decision in favour of the representative plaintiff at stage one.

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<sup>112</sup> Supplementary Issues Paper at [4.50].

<sup>113</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith and Tom Weston QC.

- 8.164 While Chapman Tripp supported the court having flexibility in how individual issues are determined, it said it is important that issues are properly determined on appropriate evidence. It said the plaintiff's decision to use the class action procedure should not prejudice the defendant, and there should not be a risk of the defendant having to pay unsubstantiated claims.

## Recommendation

### 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.

- 8.165 For the sake of clarity, we recommend the Class Actions Act should empower the court to determine issues on an individual basis.<sup>114</sup> We also recommend the court have a power to give directions with respect to determination of individual issues, to ensure this can occur in a fair and efficient way.
- 8.166 It would be a significant burden on the court to hold numerous stage two hearings, with large numbers of class members giving individual evidence. This could undermine the efficiency objective of class actions and lead to significant expense.<sup>115</sup> At the same time, alternative methods of determining individual issues must be fair to the parties and should not allow individuals to recover when they could not have succeeded in individual proceedings. While the court does have existing powers to make directions as to the conduct of hearings, an express power will help to ensure the parties turn their mind to how individual issues can be efficiently determined.
- 8.167 The provision could list some of the directions that could be given, but we do not think these should be exclusive. The court should have flexibility to consider what will be appropriate in the circumstances of the case.
- 8.168 One option is for the court to appoint an expert to inquire into individual issues. The expert would not necessarily determine individual issues, but they may be able to simplify the court's task, such as by categorising individual claims into groups. The appropriate expert would depend on the type of case and could include a lawyer, accountant or building expert. It may also be possible for experts engaged by the plaintiff and defendant to confer and agree on the categorisation of groups of class members. We envisage the parties would meet the cost of the expert rather than the court.

<sup>114</sup> We note the Ontario legislation refers to the court being able to determine individual issues in further hearings: Class Proceedings Act SO 1992 c 6 (Ontario), s 25(1)(a). The Australian federal class actions legislation refers to the court's ability to make an award of damages for individual class members: Federal Court of Australia Act 1976 (Cth), s 33Z(1)(e).

<sup>115</sup> We also note that class members may have adverse costs liability for issues determined on an individual basis, as we discuss in Chapter 12.

- 8.169 Another option is for the court to give directions as to the form or way in which evidence on individual issues may be given. An example might be standardised forms, which could avoid the need for each class member to give oral evidence. It may also be possible for an expert witness to give evidence with respect to a formula for determining individual damages awards.<sup>116</sup>
- 8.170 We think the approach of having a selection of individual class members giving evidence that is then extrapolated to other class members is less likely to be appropriate. It would be difficult to establish that the selected individuals are truly representative and that their evidence can fairly be applied to other class members.<sup>117</sup> However, the court's findings on a selection of individual cases might help to facilitate settlement of remaining claims.
- 8.171 A third option is for the individual issues to be determined through a non-judicial process. Although some submitters thought this should not require the parties' consent, we think it would be preferable to have the participants agree to any non-judicial process for determining individual issues. Parties and class members should remain entitled to have the class action resolved by judicial determination unless they agree to an alternative process. A process such as mediation is also more likely to be successful where the participants are willing to take part in it. We note that the High Court Rules enable a judge "with the consent of the parties" to make an order directing the parties to attempt to settle a dispute by mediation or other alternative dispute resolution process "agreed to by the parties".<sup>118</sup>
- 8.172 In Chapter 7, we noted that in some cases a class member may retain their own lawyer with respect to individual legal issues. Whether this is necessary may depend on how individual issues will be determined. If separate legal representation is needed, it could simply involve helping a class member to fill out a standardised form that is being used instead of oral evidence. While the lawyer for the class could assist with this, it may not be practicable to provide individual assistance to a large number of class members. In Chapter 18 we recommend that options for providing free legal advice to class members should be explored, such as creating a class actions law clinic.

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<sup>116</sup> This approach has been allowed by some courts in the United States: see William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §12:5.

<sup>117</sup> Courts in the United States have been reluctant to allow this approach: see William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §11.21 and §12.5. See also *Houghton v Saunders* [2019] NZHC 142 at [22], where the Court expressed reluctance about the proposed approach of bringing evidence from a sample of group members, along with additional evidence to show the Court's findings on that evidence could be properly applied to others.

<sup>118</sup> High Court Rules 2016, r 7.79(5). We note that consent is not required to convene a judicial settlement conference under r 7.79(1), although it is usual practice for the judge to take the parties' views into account: Andrew Beck and others (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at HR7.79.01.

## CHAPTER 9

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# Cost sharing orders

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## INTRODUCTION

- 9.1 In this chapter, we discuss:
- (a) The ‘free-rider’ problem in opt-out class actions.
  - (b) The use of cost sharing orders to address this problem.

## THE ‘FREE-RIDER’ PROBLEM IN OPT-OUT CLASS ACTIONS

- 9.2 In an opt-in proceeding, signing an agreement with a litigation funder may be a condition of joining the class action. However, in an opt-out proceeding a class member does not need to take any steps to become a class member. While the representative plaintiff 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 damages award, while only those who have signed the litigation funding agreement will be required to contribute to costs under that agreement, including the funder’s commission. This situation where only some class members are contractually required to contribute to the costs of the opt-out class action is often referred to as a ‘free-rider’ problem.

## Common fund orders and funding equalisation orders in Australia

- 9.3 In Australia, mechanisms have been developed to manage the ‘free-rider’ problem, including common fund orders and funding equalisation orders.<sup>1</sup> These mechanisms provide a way of sharing the costs of bringing a class action between all class members, regardless of whether they have signed the funding agreement.
- 9.4 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 agreement.<sup>2</sup> An application for a common fund order is often made at an early stage of the proceedings but can also be made at a later stage (for example, at settlement).

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<sup>1</sup> Another mechanism is ‘closed classes’, where the class is defined so that it only includes claimants who have entered into an agreement with the litigation funder. We do not discuss this mechanism further, as it is similar in effect to an opt-in class action and we have proposed that opt-in class actions should be available in Aotearoa New Zealand.

<sup>2</sup> 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]. For further discussion on common fund orders, see Supplementary Issues Paper at [4.68]–[4.83].

- 9.5 A key feature of common fund orders 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 before damages are distributed. The court may also indicate a maximum commission that the funder may be paid.
- 9.6 Common fund orders can improve the economics of opt-out class actions for litigation funders, as it means the funder does not need to engage in book building — the process of identifying class members and signing them up to the litigation funding agreement. Book building may be an expensive process, although it is not inevitably so. In the Supplementary Issues Paper, we said that without common fund orders we would expect funders to prefer opt-in class actions, where signing up to funding arrangements can be a requirement of the opt-in process.
- 9.7 A funding equalisation order deducts an amount from the settlement or damages award paid to non-funded class members that is equivalent to the funding commission deducted from funded class members' payments. The amount deducted from non-funded class members is pooled and distributed pro rata to all class members. This ensures 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 funder. The funder is only entitled to be paid a funding commission from class members it has entered into an agreement with. This means a funder is incentivised to book build to ensure a class action has sufficient funded class members to be economically viable. Another feature of Australian funding equalisation orders, which differs from common fund orders, is that the court does not assess the reasonableness of the funding commission.
- 9.8 The Australian experience shows that considerable uncertainty can result from relying on a court's general powers to provide for common fund orders. A common fund order was first made by the Federal Court of Australia in 2016.<sup>3</sup> Subsequently, common fund orders became a standard feature of Australian class actions.<sup>4</sup> 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 of the Federal Court of Australia Act 1976.<sup>5</sup> 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 following judgment, relying instead on the court's power to make orders with respect to the distribution of any money paid under a settlement.<sup>6</sup> The

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<sup>3</sup> *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191.

<sup>4</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [9.13].

<sup>5</sup> *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627.

<sup>6</sup> 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]; *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 at [22]–[38]. There have also been some divergent decisions on this point: see *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [418]–[421].

Australian Parliamentary Inquiry and the Australian Law Reform Commission have recommended legislative clarity in this area.<sup>7</sup>

### Cost sharing in Aotearoa New Zealand representative actions

- 9.9 Courts in Aotearoa New Zealand have not yet had to determine an application for a common fund order in relation to representative proceedings under rule 4.24 of the High Court Rules 2016 (HCR). A common fund order was 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.<sup>8</sup> Te Kōti Pira | Court of Appeal said 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 Te Kōti Matua | High Court. However, it was confident 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.<sup>9</sup> The High Court declined an application by the representative plaintiffs to require the defendant to set aside 15 per cent of any settlement reached with an individual class member until the application for a common fund order was determined.<sup>10</sup> The parties settled the litigation before the High Court could determine the application for a common fund order.<sup>11</sup> We are aware of another representative action where the plaintiffs have applied for a common fund order.<sup>12</sup>

### CONSULTATION QUESTIONS

- 9.10 In the Supplementary Issues Paper, we asked whether the court should have an express power to make common fund orders or funding equalisation orders. If common fund orders should be available, we asked submitters when in a proceeding they should be made. For example:<sup>13</sup>
- (a) At an early stage of the proceedings, with the court setting a fixed rate at this stage.
  - (b) At an early stage of the proceedings, with the court indicating a provisional or maximum rate at this stage and setting the final rate at a later stage.
  - (c) After the common issues have been determined.

<sup>7</sup> 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); 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] (Recommendation 3).

<sup>8</sup> The judgment also noted that the plaintiffs might seek a common fund order (or in the alternative, a funding equalisation order) at the end of the proceeding: *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2454 at [3], [10], [23]–[24] and [27]–[29].

<sup>9</sup> *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 at [110].

<sup>10</sup> *Ross v Southern Response Earthquake Services Ltd* at [2021] NZHC 2454 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' application for a common fund order.

<sup>11</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497.

<sup>12</sup> See "What is a 'common fund order'?" Banking Class Action <[www.bankingclassaction.com](http://www.bankingclassaction.com)>.

<sup>13</sup> We discussed these options in the Supplementary Issues Paper at [4.86]–[4.95].

- (d) At a late stage of the proceedings, such as at settlement or before damages are distributed.

## RESULTS OF CONSULTATION

### Express power to make cost sharing orders

- 9.11 Submitters generally supported clarity in this area. Eighteen submitters supported the courts having an express power to make common fund orders.<sup>14</sup> Of those, nine also supported the court having a power to make funding equalisation orders.<sup>15</sup> Three submitters did not support the courts having the ability to make common fund orders.<sup>16</sup> Bell Gully supported an express power for the courts to make funding equalisation orders but not common fund orders. Gilbert Walker thought any provision for common fund orders or funding equalisation orders should be expressly provided for in legislation, but did not comment on whether either or both of those mechanisms should be available.
- 9.12 Some submitters in favour of common fund orders in opt-out actions said such orders will improve the economics of opt-out class actions for funders — for example, by providing greater certainty for funders and removing the need for book building.<sup>17</sup> This in turn will improve access to justice.<sup>18</sup> Shine Lawyers said the availability of common fund orders in Australia has reduced the risks of funding class actions, which has increased market competition and placed downward pressure on funding commissions. Others noted that common fund orders address the ‘free-rider’ problem and achieve fairness as between class members.<sup>19</sup>
- 9.13 Submitters who did not support common fund orders, or were not persuaded they were necessary or desirable, said:
- (a) It is not the role of the courts to improve the economics of class actions for funders.<sup>20</sup>
  - (b) They result in windfall profits for funders, despite very few class members having actually signed up to the class action.<sup>21</sup>

<sup>14</sup> Chapman Tripp, Consumer NZ, GCA Lawyers, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, International Bar Association (IBA) Antitrust Committee, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Russell Legal, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Woodsford Litigation Funding. Michael Duffy said common fund orders can be of assistance, but these must be subject to stringent notice requirements to class members.

<sup>15</sup> Chapman Tripp, Consumer NZ, GCA Lawyers, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission). Michael Duffy said funding equalisation orders are a useful tool in equalising funding burdens.

<sup>16</sup> Bell Gully, Johnson & Johnson and Tom Weston QC.

<sup>17</sup> LPF Group, Russell Legal, Shine Lawyers, Simpson Grierson and Woodsford Litigation Funding.

<sup>18</sup> Russell Legal and Shine Lawyers.

<sup>19</sup> Zane Kennedy, Russell Legal, Simpson Grierson, Michael Duffy, GCA Lawyers, IBA Antitrust Committee and Maurice Blackburn/Claims Funding Australia.

<sup>20</sup> Bell Gully referred to comments to this effect by the majority of the High Court of Australia in *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.

<sup>21</sup> Bell Gully.



- (c) While funding equalisation orders can be seen as in the interests of fairness between class members by spreading costs, common fund orders are purely for the benefit of funders by improving the economics of opt-out class actions.<sup>22</sup>
  - (d) Funders appear to be managing without common fund orders.<sup>23</sup>
- 9.14 Submitters who supported funding equalisation orders said they can address the ‘free-rider’ problem and achieve fairness as between class members.<sup>24</sup> They can also avoid the problem of funders potentially receiving windfall profits under a common fund order.<sup>25</sup>
- 9.15 Maurice Blackburn/Claims Funding Australia and Russell Legal were critical of funding equalisation orders when compared to common fund orders. While not expressly opposing the availability of funding equalisation orders, Russell Legal noted they adversely affect the market for funding and access to justice because:
  - (a) Funding equalisation orders fail to meet funders’ concern that their costs will not be met, which means funders are still required to book build.
  - (b) They do not incentivise claimants to sign the litigation funding agreement.
  - (c) They will cause funders to charge higher commissions to reflect “the greater risk associated with compensation uncertainty”.
- 9.16 Some submitters considered both common fund orders and funding equalisation orders should be available.<sup>26</sup> Reasons given were that both orders ensure those who benefit from the class action are required to contribute to the costs, and that the court should have the discretion and flexibility to make the most appropriate order in the circumstances of the case.
- 9.17 Maurice Blackburn/Claims Funding Australia supported the availability of funding equalisation orders, but cautioned against preferring them over common fund orders. It said funding equalisation orders incentivise book-building, which increases the overall costs of the proceeding. It also suggested factors the court could consider when determining which order would be most appropriate.<sup>27</sup>
- 9.18 Some submitters considered the court’s power to make cost sharing orders should not be confined to the mechanisms that have developed in Australia. In their joint submission, Philip Skelton QC, Kelly Quinn and Carter Pearce said the court should have sufficient flexibility to develop and make any cost sharing order it likes, without being tied to the common fund order or funding equalisation order approach. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) also supported the availability of both orders, but said

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<sup>22</sup> While Gilbert Walker reserved comment on whether funding equalisations orders and/or common fund orders should be available, it said it “would require greater persuasion that the latter is required than the former” for this reason.

<sup>23</sup> Tom Weston QC.

<sup>24</sup> Bell Gully, Chapman Tripp, Consumer NZ, Michael Duffy, GCA Lawyers, IBA Antitrust Committee and Maurice Blackburn/Claims Funding Australia. Bell Gully thought funding equalisation orders could achieve this more effectively than common fund orders.

<sup>25</sup> Chapman Tripp.

<sup>26</sup> GCA Lawyers, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>27</sup> For example: the distribution and weighting of losses as between the funded and unfunded class members; whether the funding agreement allows the funder to recover its commission from the “grossed up” amount (that is, whether the funding commission is calculated as a percentage of funded class members’ recovery including or excluding the amount redistributed to them from unfunded class members); whether only the representative plaintiff is funded (in which case a funding equalisation order would not be appropriate).

they may not need different names, given that both aim to ensure funding is made on a fair and equal basis.

- 9.19 We also discussed common fund orders and funding equalisation orders at our consultation workshops on the Supplementary Issues Paper. Like submitters, participants expressed a range of views, including support for legislation to clarify the uncertainty.

### Timing of cost sharing orders

- 9.20 We received 13 submissions on when common fund orders, if available, should be made.<sup>28</sup>
- 9.21 Ten of these submissions supported common fund orders being made at an early stage of the proceedings,<sup>29</sup> with the funding rate being set at that stage,<sup>30</sup> or a provisional funding rate being set at that stage and finalised later in the proceedings.<sup>31</sup> Those who attended our consultation workshops generally also favoured common fund orders being made at an early stage. The main reason for this view was that it will provide funders and class members with greater certainty and transparency at the outset. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand also said it will ensure potential class members have the necessary information to decide whether to opt out of the class action, and assist defendants to assess their potential costs exposure.
- 9.22 Submitters who favoured a provisional rate being set at an early stage and finalised at a later stage considered this will strike the right balance between certainty and transparency for funders and class members. It will also give the court flexibility to determine a fair and reasonable funding commission once it has better information (for example, the number of class members, the quantum of the claim and the actual costs).
- 9.23 Two submitters favoured common fund orders being made at a later stage in the proceedings.<sup>32</sup> Bell Gully said such orders should be made at settlement or before damages are distributed, to encourage funders to book build and to ensure the court has all the information it needs before it “effectively improve[s] the returns for funders”.
- 9.24 Two submitters thought the court should have a discretion to make common fund orders at any stage in the proceedings, rather than being too prescriptive.<sup>33</sup> Carter Pearce said this will enable the parties and the court to experiment with different funding approaches and discover those that best satisfy the goals of the statutory class actions regime as the regime matures.

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<sup>28</sup> Bell Gully, Chapman Tripp, Insurance Council, IBA Antitrust Committee, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Nicole Smith, Russell Legal, Shine Lawyers, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Woodsford Litigation Funding. While Philip Skelton QC, Kelly Quinn and Carter Pearce made a joint submission, there were some issues on which the submitters expressed separate views.

<sup>29</sup> Chapman Tripp, LPF Group, Insurance Council, IBA Antitrust Committee, Zane Kennedy, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Russell Legal, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Woodsford Litigation Funding.

<sup>30</sup> Chapman Tripp, LPF Group and MinterEllisonRuddWatts.

<sup>31</sup> Insurance Council, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Philip Skelton QC.

<sup>32</sup> Bell Gully and Nicole Smith.

<sup>33</sup> Shine Lawyers and Carter Pearce (while Philip Skelton QC, Kelly Quinn and Carter Pearce made a joint submission, there were some issues on which these submitters expressed separate views). Chapman Tripp also said “the court should have flexibility in any power to make common fund orders”, but suggested a presumption in favour of making the order at an early stage in the proceeding.

## RECOMMENDATIONS

**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 the 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.

### Power to make cost sharing orders

- 9.25 We recommend the court should be expressly empowered to order that the litigation costs of a class action (including the legal fees and funding commission) be equitably spread among all class members, even if they have not signed up to the funding agreement (a cost sharing order). This will allow the court to address ‘free-rider’ problems in class actions.
- 9.26 We consider the court should have flexibility as to the terms of the cost sharing order. This will allow the court to either require all class members to contribute a share of their settlement or damages award to cover the costs of the proceeding, or to give a share of their settlement or damages award to class members who have signed a funding agreement with the litigation funder.
- 9.27 However, we do not think it is necessary for Aotearoa New Zealand to be constrained by the dichotomy of common fund orders and funding equalisation orders that has developed in Australia. Those two orders reflect Australia’s particular class actions history. We contemplate a broader power for the court to make any order it sees fit to ensure the costs of a class action, including the funding commission, are spread equitably between all class members who benefit from the action. The broader language we propose provides flexibility for cost sharing approaches to develop as the class actions regime matures.
- 9.28 If a court determines it is appropriate to make a cost sharing order, we think it should consider what form of cost sharing order is most appropriate to enable the legal and funding costs of a class action to be spread equitably among all class members. In some instances the representative plaintiff may apply for an order similar in form to a funding equalisation order, because it may result in a lower total sum being deducted from class members. However, in some instances a cost sharing order more akin to a common fund order will be more appropriate. For instance, this may be the case where only the representative plaintiff has entered into the funding agreement, as a funding equalisation-

type order in that scenario could mean a funder is not reasonably compensated for the risk they incurred.<sup>34</sup>

- 9.29 When considering what form of cost sharing order to make, we think relevant considerations could include:
- (a) The distribution and weighting of losses between funded and unfunded class members.<sup>35</sup>
  - (b) Whether the funding agreement entitles the funder to recover from the ‘grossed up’ amount redistributed to funded class members from unfunded class members recoveries.<sup>36</sup>
  - (c) Whether the funding agreement includes other expenses that would be levied on unfunded class members under a funding equalisation-type order but not necessarily a common fund-type order.<sup>37</sup>
- 9.30 These factors may favour an order more similar to a common fund order or to a funding equalisation order, depending on the particular circumstances of the case and its funding arrangements. The court should also consider the representative plaintiff’s wishes.
- 9.31 While Australian cost sharing orders can provide a useful reference point for the courts, the broader power we propose is intended to provide flexibility so the courts can respond to the circumstances of each class action.
- 9.32 We have not limited the ability to apply for a cost sharing order to opt-out class actions. There may be occasions where a representative plaintiff in an opt-in class action would want to seek an order that the costs of an opt-in class action be shared equitably among class members. We anticipate that these occasions would be rare, however, given that signing a litigation funding agreement can be a condition of opting into a class action.

### Power to set provisional funding commission

- 9.33 A cost sharing order that enables the litigation funder to receive a funding commission from those who have not signed an agreement with it will make the class action more profitable for the funder. Some submitters thought it is not the role of courts to make class actions more economic for funders and that this could result in windfall profits for funders. While it is not the court’s role to assist funders to make profits, if some class actions are not economically viable for funders (for example, because they have to book-

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<sup>34</sup> See *Webster v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [119].

<sup>35</sup> See *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [162]. Whether a common fund type order or a funding equalisation type order would deduct less from class members will involve an assessment of the ratio of unfunded class members compared to funded class members, and the relative weight of the claims as between class members. This second factor may be important where a small number of class members’ claims are significantly larger than the average class member.

<sup>36</sup> Under a funding equalisation order in Australia, when a percentage amount is deducted from the unfunded class members and added back pro rata across all class members, that incrementally increases the recovery for each funded class member. Litigation funders may then assert that they are contractually entitled to an additional amount (that is, a percentage on the incremental amount). The Full Federal Court of Australia discussed this issue in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [56]–[57]. See also *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* [2017] FCA 330, (2017) 343 ALR 476 at [99(d)].

<sup>37</sup> For example, the funding agreement may impose costs on funded class members in addition to legal fees and the funding commission, which will then be spread across all class members pursuant to a funding equalisation order. See *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [167], where the court noted a common fund order, unlike a funding equalisation order, would avoid class members incurring the \$756,402 project management fee.

build) then it will limit the range of class actions that can be brought and ultimately impact on access to justice.

- 9.34 To limit the risk of cost sharing orders facilitating windfall profits for funders, we think the court should be empowered to set a provisional funding commission (or range of commissions) when granting an application for a cost sharing order that enables the funder to receive a funding commission from class members who have not signed a funding agreement. We think this should occur at the same time the court considers the representative plaintiff's application for approval of the funding agreement (usually immediately after certification).<sup>38</sup> As part of approving the funding agreement, we have recommended that the court should consider the estimated returns to the funder in a range of scenarios. We anticipate that the funding commission (or range of commissions) approved by the court will then become the provisional basis for any cost sharing order. We discuss the risk of excessive funder profits, and further recommendations to mitigate this risk, in Chapter 17.

### Power to vary funding commission

- 9.35 If the court makes a cost sharing order that enables the litigation funder to receive a funding commission from those who have not signed an agreement with it, we think the court should also have the power to vary the funding commission at a later date (for example when damages are determined, or before damages are distributed). This will allow the court to be satisfied that the funding commission is fair and reasonable in light of the actual costs and circumstances of the class action.
- 9.36 For instance, it might be appropriate for the court to vary the funding commission if, during the class action, there has been a material change in the factors that formed the basis for the court's approval of the funding agreement and the provisional funding commission (or range of commissions) set out in the initial cost sharing order.

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<sup>38</sup> In Chapter 17, we recommend that the Class Actions Act should require the representative plaintiff to apply to the court for approval of the funding agreement, in order for the funding agreement to be enforceable by the funder. We also make recommendations as to when the representative plaintiff should apply for court approval of the funding agreement, and factors the court may consider when determining the application.

## CHAPTER 10

# Judgments, relief and appeals

## INTRODUCTION

- 10.1 In this chapter, we discuss:
- (a) Class action judgments, including their binding effect on class members.
  - (b) The court's powers to assess and order relief on an individual and aggregate basis.
  - (c) Appeal rights in class actions.
- 10.2 We also set out draft legislative provisions that could give effect to our recommendations on class action judgments and the court's powers to assess and order relief.

## CLASS ACTION JUDGMENTS

- 10.3 Judgments are generally only binding between the parties. A key feature of a class action is that the court's decision on the common issues is also binding on class members, who are not parties to the litigation.<sup>1</sup>
- 10.4 In the Supplementary Issues Paper, we discussed several principles relevant to the binding effect of judgments:
- (a) The doctrine of *res judicata*, which precludes a litigant from accessing the courts where they seek to reopen a dispute that has already been determined.<sup>2</sup>
  - (b) The court's power to stay a proceeding that is an abuse of process. This power protects against conduct that, left unchecked, "would strike at the public confidence in the Court's processes".<sup>3</sup> Abuse of process can take a number of forms, but is usually concerned with frivolous claims brought for an improper purpose or claims that seek to improperly relitigate matters already determined.<sup>4</sup>

<sup>1</sup> Supplementary Issues Paper at [5.1].

<sup>2</sup> Supplementary Issues Paper at [5.5]. *Res judicata* means "a matter judged".

<sup>3</sup> *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J.

<sup>4</sup> Supplementary Issues Paper at [5.6], citing *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.

- (c) The rule in *Henderson v Henderson*. 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.<sup>5</sup>
- 10.5 We said a judgment on common issues should be binding on class members, otherwise the common issues would not be resolved and the efficiencies of a class action would not be achieved. However, we also said a class actions regime should safeguard the interests of class members, who have little control over the class action and may not even be aware of it. We suggested it was desirable for a class actions regime to provide clarity on the binding effect of judgments on class members and set out a draft provision.
- 10.6 We proposed that class members should be bound by a judgment to the extent it determines a common issue that is set out in the certification order, relates to a claim described in the certification order, and relates to relief sought in the certification order.<sup>6</sup> Class members would only be bound by a common issues judgment if they had opted in or had not opted out of the proceeding.<sup>7</sup>
- 10.7 We asked submitters whether they agreed with our draft provision and, if not, how it should be amended.

### Results of consultation

- 10.8 We received 10 submissions on the binding effect of a class action judgment.<sup>8</sup>
- 10.9 Most submitters agreed class members should be bound by the judgment on common issues.<sup>9</sup> Submitters said this was a central purpose of class actions, a key way of achieving efficiency, and that it was important to have clarity on who is bound and on what basis. Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland) suggested a minor amendment to clarify that, where a class action judgment deals with issues not common to the entire class, class members are still bound by the issues that are relevant to them.
- 10.10 Several submitters agreed the binding effect should be limited to the common issues.<sup>10</sup> Reasons included:
- (a) Class member interests need to be protected as they have little control over the proceeding and may not be aware of the proceeding.
  - (b) The simplicity of the proposed provision will be undermined if class members can be bound by additional issues that should have been raised and dealt with in the litigation.
  - (c) This is the approach adopted in Ontario and Australia.

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<sup>5</sup> *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) at 115. Supplementary Issues Paper at [5.7].

<sup>6</sup> Draft legislation, cl 5(1) (September 2021 version).

<sup>7</sup> Draft legislation, cl 5(2) (September 2021 version).

<sup>8</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Simpson Grierson and Nicole Smith. Andrew Barker QC also discussed the application of *res judicata* to class members in his Issues Paper submission and suggested the Commission give thought to this issue.

<sup>9</sup> Seven submitters made this point expressly: Bell Gully, Nikki Chamberlain, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim and Simpson Grierson.

<sup>10</sup> Nikki Chamberlain, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim and Simpson Grierson.

- 10.11 Chapman Tripp submitted it was important to have clarity about who is bound by a judgment and supported a provision that was expressed not to apply to those who opted out or did not opt in to the class proceeding. Nicole Smith queried whether it was appropriate for the binding effect of a judgment to extend to relief. She was concerned that a class action that seeks damages would preclude a class member from pursuing an injunction or specific performance in a subsequent proceeding.
- 10.12 Some submitters indicated that the binding effect of a judgment should be wider than the common issues. Bell Gully thought class members should be precluded from bringing subsequent proceedings on issues that could have been raised in the class action. It said limiting the binding effect to the common issues raised would create indeterminate liability and undermine the efficiency of the class actions regime. Gilbert Walker did not think it was unfair for a class member to be subject to the rule in *Henderson v Henderson*. It said, under this rule, class members would only be prohibited from bringing subsequent proceedings raising an issue that could have been addressed in the class action if this would amount to an abuse of process.
- 10.13 Three submitters commented on which class members the provision should apply to. Maurice Blackburn/Claims Funding Australia agreed the judgment should not bind those who have opted out of the class action or did not opt in. However, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said class members who opt out of a class action should be bound by the judgment on common issues unless they bring their own proceeding. Rhonson Salim (Aston University) said it is important to have a clear opt-out date and limitation rules, so the defendant knows who is bound by the judgment.
- 10.14 Some submitters discussed whether the binding effect of a judgment should be tied to the certification order:
- (a) Chapman Tripp thought the binding effect of a class action judgment is better dealt with in the judgment itself. The risk of relying on the certification order as the foundation for the binding effect of a judgment is that it would not accurately reflect the evolution of the issues as the case progressed.
  - (b) Gilbert Walker queried whether it would be feasible to set out the common issue, claim and relief in the certification order. It said attempting this at the outset would be contentious and onerous, and it is inevitable the claim will be amended.
  - (c) Maurice Blackburn/Claims Funding Australia said that, if proceedings must be certified (which it did not support), it is logical to link back to the certification order. This would make it easy for class members to establish whether a judgment would be binding on a given issue.
  - (d) Simpson Grierson said that, if the court gives judgment on common issues not listed in the certification order, class members should still be bound by those issues.
- 10.15 Concern about locking the common issues into the certification order was also raised at our consultation workshops. Some participants suggested it may be better to have the common issues set out in the judgment, rather than the certification order.



## Recommendations

**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 that:

- 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 set out 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 issues 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.

- 10.16 The ability of a judgment on common issues to bind all class members is a central feature of a class actions regime. If class members were not bound by this judgment, the common issues would not be resolved, and the efficiencies of a class actions regime would not be achieved. We think the Class Actions Act should seek to uphold, to the extent possible, the principle that there should be finality in litigation.
- 10.17 The key issue is the extent to which the judgment on common issues should bind class members. We think the fairest approach is to restrict the binding effect to the common issues as set out in the certification order. We recommend the Class Actions Act should specify a judgment on a common issue binds every class member but only to the extent the common issue is set out in the certification order, relates to a cause of action described in the certification order and relates to relief sought by class members as set out in the certification order.<sup>11</sup>
- 10.18 We think tying the binding effect of a judgment to the common issues set out in the certification order will provide clarity and certainty for class members. As we explained in Chapter 6, one purpose of the certification order is to provide clear information to class members about the nature and scope of the class action so they can decide whether they wish to be part of it. As the certification order establishes the common issues that will be determined in a class action, we think it is logical for it to determine the extent of the binding effect of a class action judgment on class members.

<sup>11</sup> Draft legislation, cl 9(1).

- 10.19 We agree with submitters it is important to ensure the common issues can evolve during the class action and are not restricted to those in the initial certification order. In Chapter 6 we recommend the Class Actions Act should specify that a court may amend a certification order. We also recommend the Class Actions Act should require a judgment on a common issue to include the class definition, a description of the common issues of law or fact, a description of the causes of action that were pleaded, and the relief sought by the class. This description of the common issues of law or fact will reflect any amended version of the certification order.
- 10.20 We do not recommend the binding effect of a judgment on common issues should extend to expressly precluding class members from bringing proceedings with respect to issues that could have been brought in the class action. We acknowledge this means a class member may be able to bring further litigation on issues that were not raised in the proceeding, even if they could have been.<sup>12</sup> This means the defendant may not always know the full extent of their liability to a class member in one proceeding. However, given class members' lack of control over the class action, we do not think they should be statutorily bound to more than the common issues determined in the judgment. A court could still exercise its powers to rule that a subsequent proceeding amounts to abuse of process.<sup>13</sup>
- 10.21 For the avoidance of doubt, we also recommend 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 and (b) a person who opted out of the proceeding.<sup>14</sup>

### Other powers relating to judgment

- 10.22 We have considered whether a class actions regime needs to provide the court with any other powers in relation to judgment. Section 33Z(1) of the Federal Court of Australia Act 1976 provides the court with specific powers to make certain determinations and orders in its judgment.<sup>15</sup>
- 10.23 We do not think it is necessary for the Class Actions Act to contain a judgment provision such as this. In Aotearoa New Zealand, many of the powers similar to those contained in section 33Z(1) are already held by Te Kōti Matua | High Court or contemplated elsewhere in our proposed regime. For example, we recommend the court have the power to assess

<sup>12</sup> In this respect, our approach aligns with Canada and Australia, see the Supplementary Issues Paper at [5.12]–[5.15] and [5.18].

<sup>13</sup> In Aotearoa New Zealand, the principle in *Henderson v Henderson* is conceptualised as an abuse of process, see *Craig v Stringer* [2020] NZCA 260 at [19], citing *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [25]. See also *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [59]. It appears *Henderson v Henderson* (or its equivalent) is conceptualised as an estoppel in Canada and Australia, see *Allan v CIBC Trust Corporation* (1998) 39 OR (3d) 675 (ONCJ) at 7–8 and *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 at [27]. However, both jurisdictions also have abuse of process. In the two cases where it was argued *Henderson v Henderson* applied to class members, the defendants also ran abuse of process in the alternative (albeit unsuccessfully): *Allan v CIBC Trust Corporation* (1998) 39 OR (3d) 675 (ONCJ) and *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44.

<sup>14</sup> Draft legislation, cl 9(2).

<sup>15</sup> Federal Court of Australia Act 1976 (Cth), s 33Z(1) provides the court may determine an issue of law; determine an issue of fact; make a declaration of liability; grant any equitable relief; make an award of damages for group members, sub-group members or individual group members; award damages in an aggregate amount; make such other orders as the court thinks just. The Rules Committee proposed a similar clause in its Class Actions Bill: *Class Actions Bill* (Te Tari Tohutohu Pāremata | Parliamentary Counsel Office, PCO 8247/2.13, 2009), s 12(2).

and order aggregate monetary relief, assess and determine individual issues and create sub-classes. There are also similarities between the powers in section 33Z(1) and provisions in the High Court Rules 2016 (HCR). For example, HCR 11.2 provides that a judgment may (among other matters) “deal with any question or issue” and “order any accounts, inquiries, acts or steps that the court considers necessary”.

### Draft judgment provision

10.24 Below we set out a draft legislative provision that could give effect to our recommendations on the binding effect of a judgment on a common issue on class members.

#### 9 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 cause of action 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.

### RELIEF IN CLASS ACTIONS

10.25 If the court finds the defendant is liable to class members, it will need to consider whether class members may be entitled to relief. In this section we discuss:

- (a) The court’s powers to assess and order individual relief.
- (b) The court’s powers to assess and order aggregate monetary relief.
- (c) Distribution of aggregate monetary relief.
- (d) Alternative distribution.

#### Individual relief

10.26 In some cases, after the representative plaintiff obtains a successful judgment on the common issues in a class action, relief may need to be assessed and ordered on an individual basis. In a class action, the relief sought will generally be damages or other monetary relief. However, in Chapter 4 we recommend that class actions should not be restricted to claims seeking monetary relief, so it is possible individual non-monetary relief may be sought.

10.27 In the Supplementary Issues Paper, we explained that individual assessment of monetary relief will likely be appropriate where the class is small and/or there is a simple method available for calculating the amount. It may also be necessary where individual issues must

be determined to address quantum, including contributory negligence, mitigation and the extent of the damage.<sup>16</sup>

- 10.28 In Chapter 8 we recommend the Class Actions Act should empower the court to determine issues applying to individual class members and to give directions with respect to those issues. This could include orders with respect to determination of individual relief. For example, the court could appoint an expert to give evidence on an appropriate formula for determining the quantum of individual damages awards.<sup>17</sup> If satisfied with that evidence, the court could then order individual relief on that basis.

### Aggregate monetary relief

- 10.29 Aggregate assessment of monetary relief is a technique where the total amount of the monetary relief that a class or subclass is entitled to is assessed on an aggregate basis, without calculating individual class member entitlements. It can be an efficient way of calculating monetary relief where the damage sustained by the class can be proved for the class as a whole.
- 10.30 There are a variety of situations where it may be appropriate for the court to make an aggregate assessment of monetary relief. For example:
- (a) Where the total number of class members and their individual loss is relevant to the aggregate quantum, but it can be proved without requiring individual class member participation. An example of this is where a defendant has overcharged class members, and the total liability can be calculated from the defendant's records without any need for class member involvement.<sup>18</sup> In this scenario, the representative plaintiff would prove the aggregate overcharge, but not the amounts to which each individual class member is entitled.
  - (b) Where the aggregate quantum can be established without knowing the number of class members or each class member's loss or damage. An example of this is *Allapattah Services v Exxon Corp*, a case where the class members alleged Exxon Corp had engaged in an intentional and systematic scheme to overcharge them for petrol.<sup>19</sup> In that case, the jury verdict established damages on a cents per gallon basis. The representative plaintiff sought aggregate monetary relief, calculated by multiplying the cents per gallon amount by the annual gallons of petrol sold by the defendant.
  - (c) Where the size of the class is large but can be determined on an approximate basis and the individual losses are small and fairly uniform. An example of this is *ACCC v Golden Sphere Intl Inc*, a case brought by class members who had invested in the defendant's bonds and lost money.<sup>20</sup> Class members had different amounts of loss because some had onsold their bonds. The representative plaintiff based its aggregate calculations based on loss of \$50 per class member, because not all class

<sup>16</sup> Supplementary Issues Paper at [5.21].

<sup>17</sup> This approach has been allowed by some courts in the United States: see William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §12:5.

<sup>18</sup> Rachael Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004) at 416–417.

<sup>19</sup> *Allapattah Services Inc v Exxon Mobil Corp* 157 F Supp 2d 1291 (7 August 2001).

<sup>20</sup> *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424.

members had suffered the maximum loss of \$150. This was multiplied by a rounded number of class members (11,000), reaching an aggregate total of \$550,000. The ACCC called a number of witnesses with varying degrees of loss and gave the names of all other class members. The respondent, while disputing the number, called no evidence in response. The court found ACCC's assessment was reasonably accurate.

- 10.31 In the Supplementary Issues Paper, we expressed the view that aggregate monetary relief should be available for class actions in Aotearoa New Zealand. We preferred the term “relief” to “damages”, to ensure all forms of monetary relief are available in a class action.<sup>21</sup>
- 10.32 Our draft provision on aggregate monetary relief provided that the court may award this form of relief if it is satisfied that it can make a reasonably accurate assessment of the total amount of monetary relief owed to class members and if no further question of fact or law must be determined to establish the amount of the defendant's liability.<sup>22</sup>
- 10.33 We asked submitters whether they agreed aggregate monetary relief should be available in class actions and whether they had comments on our draft provision.

### *Results of consultation*

- 10.34 We received 19 submissions on aggregate monetary relief.<sup>23</sup>
- 10.35 Seventeen submitters supported a power to award aggregate monetary relief in a class action.<sup>24</sup> Reasons for this included:
- (a) It may not be possible to assess damages on an individual basis.
  - (b) It can avoid a potentially expensive process of assessing relief individually.
  - (c) It can be an efficient way to resolve claims.
  - (d) It can provide all parties with finality, and this may otherwise be difficult to achieve in some class actions.
  - (e) It will give the court flexibility when dealing with issues of monetary relief.
  - (f) It will assist the court to determine quantum of damages on a global basis.
- 10.36 Bell Gully noted its concern that aggregate damages can be inflated. It cautioned that the basis for aggregate damages should reflect the overall compensatory objective of damages in the class actions regime, rather than serving a deterrent function.
- 10.37 Several submitters addressed our proposed test. Six submitters agreed with the requirement that a “reasonably accurate assessment” of the total amount of damages

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<sup>21</sup> Supplementary Issues Paper at [5.24]–[5.49].

<sup>22</sup> Draft legislation, s 11(1)(b) (September 2021 version).

<sup>23</sup> Andrew Barker QC (Issues Paper submission), Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith, Tom Weston QC and Woodsford Litigation Funding.

<sup>24</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Woodsford Litigation Funding.

should be made.<sup>25</sup> Nikki Chamberlain and Gilbert Walker agreed the court should also be satisfied that no question of law or fact remains to be determined. Maurice Blackburn/Claims Funding Australia queried whether the “no question of fact or law” limb is necessary, because this will be the position if the “reasonably accurate assessment” test has been met.

- 10.38 Several submitters proposed alternative tests or additional requirements, for example:
- (a) Aggregate monetary relief should only be available where individual assessment of loss is not possible or practicable.<sup>26</sup>
  - (b) Aggregate monetary relief should be available when it can reasonably be determined without proof by individual class members.<sup>27</sup>
  - (c) There should be a presumption that monetary relief is assessed on an individual basis.<sup>28</sup>
  - (d) The court should retain the ability to assess monetary relief on an individual basis if the class is relatively small.<sup>29</sup>
- 10.39 Some submitters addressed issues relevant to the application of our proposed test, such as the existence of defences. Gilbert Walker said it is unclear how individual defences, such as contributory negligence or contribution claims, will apply when aggregate monetary relief is awarded under our proposed provision. Simpson Grierson said aggregate damages would not be appropriate where a defendant has defences against some class members but not others, or where there is a dispute about quantum amongst class members. In contrast, Andrew Barker QC thought the existence of defences would not necessarily preclude aggregate monetary relief and could be taken into account when calculating quantum. The International Bar Association (IBA) Antitrust Committee suggested we consider clarifying the availability of aggregate damages where a class includes both injured and uninjured class members.
- 10.40 Tom Weston QC submitted there would be very few cases where aggregate damages would be appropriate in practice. He said there are likely to be few cases where a reasonably accurate assessment of the total amount of monetary relief owed to class members can be made.

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<sup>25</sup> Bell Gully, Chapman Tripp, Michael Duffy, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson

<sup>26</sup> Bell Gully and Chapman Tripp.

<sup>27</sup> Vince Morabito.

<sup>28</sup> Michael Duffy and Insurance Council.

<sup>29</sup> Simpson Grierson.

## Recommendation

### 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 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.

10.41 We recommend the Class Actions Act should specify that the court may make an aggregate assessment of monetary relief to which a class is entitled and make orders accordingly.<sup>30</sup> We prefer the term “monetary relief” over “damages”, to ensure all forms of monetary relief are available in a class action.<sup>31</sup> As we explained in the Supplementary Issues Paper, a class action might seek monetary relief other than damages. For example, a restitutionary claim is not easily conceptualised as a claim for ‘damages’ as the amount recoverable is determined by the defendant’s unjust enrichment, rather than the plaintiff’s loss.<sup>32</sup>

10.42 We think empowering the court to assess and order aggregate monetary relief will further the objectives of improving access to justice and managing multiple claims in an efficient way. In some cases, it will not be feasible or cost-effective to assess relief on an individual basis. Aggregate assessment of monetary relief can also help to ensure a class action achieves finality for all parties in a single judgment.

10.43 We recommend the Class Actions Act should specify that the court may only assess monetary relief on an aggregate basis if it is satisfied it can make a reasonably accurate assessment of the total amount to which class members are entitled.<sup>33</sup> The reference to “reasonably accurate” acknowledges that absolute precision in assessing the total amount may be impossible, particularly in an opt-out class action if the total number of class members is unknown. However, the court needs to be satisfied there is a sufficient basis on which to calculate the aggregate amount. We do not think a power to assess aggregate monetary relief should allow a person to be granted relief that they would not otherwise be entitled.<sup>34</sup> For example, aggregate monetary relief will be inappropriate

<sup>30</sup> Draft legislation, cl 10(1) and 10(3).

<sup>31</sup> Supplementary Issues Paper at [5.48]–[5.49].

<sup>32</sup> Supplementary Issues Paper at [5.47]–[5.48], Ontario Law Reform Commission *Report on Class Actions* (1982) vol II at 521. See also Rachael Mulheron “Restitutionary Relief in Competition Law Class Actions: An Evolving Landscape” (2018) 26 RLR 1 at 2, 7–13, where she discusses the difference between restitutionary damages and unjust enrichment giving rise to an account of profits and whether both are permissible under The Competition Appeal Tribunal Rules.

<sup>33</sup> Draft legislation, cl 10(1).

<sup>34</sup> This also aligns with the principle the courts have developed under High Court Rules 2016, r 4.24 that a representative action should not be allowed where it would deprive the defendant of a defence or allow a class member to succeed where they would not have succeeded if they brought an individual claim: *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11](i).

where the determination of relief is individualistic and dependent on factors unique to each class member.<sup>35</sup> We also think it is unlikely the court could make a reasonably accurate aggregate assessment if limitation or contributory negligence issues still need to be determined. However, if such concerns were not relevant to the entire class, it could be appropriate to use sub-classes so relief can be calculated for some class members on an aggregate basis, and others individually.

- 10.44 We no longer think it is necessary to include a requirement that no question of fact or law remains to establish the amount of the defendant's liability, as we think this requirement is duplicative of the "reasonably accurate assessment" test.<sup>36</sup> A court will not be able to make a reasonably accurate assessment of the amount to which class members are entitled unless the defendant's liability has been determined. For example, the power cannot be used where the fact of damage remains to be proved.
- 10.45 We also recommend that the Class Actions Act should specify that, where the court makes an aggregate assessment, individual class members should not need to establish the amount of loss or damage suffered.<sup>37</sup> The representative plaintiff should be able to prove the aggregate amount without requiring individual class member participation.
- 10.46 Once the court has made an aggregate assessment of monetary relief, we consider it should have a power to grant relief in the aggregate amount. We therefore recommend the Class Actions Act should specify the court may make an award in the amount assessed as the aggregate monetary relief.<sup>38</sup>

### Distribution of aggregate monetary relief

- 10.47 If the court makes an award of aggregate monetary relief, it may need to give orders on how that relief should be distributed.
- 10.48 In the Supplementary Issues Paper, we explained that in other class actions regimes, courts generally have a wide discretion to determine the appropriate method of distribution of aggregate monetary relief. Potential methods of distribution include distribution by the defendant, use of a fund and distribution by a third party.<sup>39</sup> We suggested the court should have a wide discretion as to the appropriate method of distributing monetary relief to class members, including the power to appoint an administrator to distribute class member entitlements.<sup>40</sup> We also proposed a reporting requirement and said a report with information about the process and outcome of the distribution of the award should be filed within 60 days of the distribution process being completed.

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<sup>35</sup> 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.

<sup>36</sup> The test proposed in the Supplementary Issues Paper incorporated the tests from both Canada and Australia. 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": Federal Court of Australia Act 1976 (Cth), s 33Z(3). In Canada, no further issues must be determined to establish the amount of the defendant's liability: see for example Class Proceedings Act 1992 SO c 6 (Ontario), s 24(1)(b).

<sup>37</sup> Draft legislation, cl 10(2).

<sup>38</sup> Draft legislation, cl 10(3).

<sup>39</sup> Supplementary Issues Paper at [5.34].

<sup>40</sup> Supplementary Issues Paper at [5.36].



- 10.49 We noted that part of an aggregate award might be left unclaimed by class members and that overseas jurisdictions have dealt with this issue in various ways. Unclaimed funds could be distributed pro rata to class members, paid towards the costs of proceedings, paid to an organisation or charity associated with the claim, revert to the defendant or be forfeited to the government. We said the court should have a discretion to make any orders it considers appropriate for managing unclaimed monetary relief and proposed the court's power to make orders with respect to distribution should extend to unclaimed monetary relief.<sup>41</sup>
- 10.50 Our draft provision on aggregate monetary relief included a power to make orders with respect to distribution. We asked submitters whether they had any comments on our draft provision.

### *Results of consultation*

- 10.51 Eight submitters commented on distribution of aggregate monetary relief.<sup>42</sup>
- 10.52 Several submitters commented on our proposed power for the court to make orders relating to distribution. Maurice Blackburn/Claims Funding Australia said the court should retain discretion and flexibility in deciding the method of distribution. Gilbert Walker said it is unclear how any agreement between class members and parties about distribution would interact with the court's orders on distribution. Nicole Smith asked whether individual claimants would be required to prove their entitlement to a share of the aggregate award. Shine Lawyers suggested the distribution power may sit better as a standalone provision so it can apply to any award of monetary relief, not just aggregate monetary relief.
- 10.53 Two submitters commented on reporting requirements. Maurice Blackburn/Claims Funding Australia was unsure whether one formal reporting requirement was sufficient. It suggested further oversight or reporting at regular intervals may be necessary where administration is complex. Gilbert Walker suggested that, if distribution is expected to take a long time, the administrator should be required to file interim reports.
- 10.54 Six submitters commented on distribution of unclaimed monetary relief, with submitters supporting divergent approaches.<sup>43</sup> Consumer NZ said pro rata distribution to class members who had made a claim will be preferable in most instances. However, Chapman Tripp did not support this, saying damages are intended to compensate class members and not to off-set legal costs or funding commissions.
- 10.55 Several submitters thought the default position should be that unclaimed damages are returned to the defendant.<sup>44</sup> Other submitters took a different view. Nikki Chamberlain disagreed with reversion to the defendant and supported alternative distribution of unclaimed damages. She said a desirable consequence of class action litigation is deterrence and this consequence should be reinforced by the legislation. Nicole Smith supported unclaimed monetary relief being paid to a fund that assists with access to

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<sup>41</sup> Supplementary Issues Paper at [5.39].

<sup>42</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Maurice Blackburn/Claims Funding Australia, Gilbert Walker, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>43</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Gilbert Walker, Simpson Grierson and Nicole Smith.

<sup>44</sup> Chapman Tripp, Gilbert Walker and Simpson Grierson.

justice or other alternative distribution. Bell Gully suggested our draft provision should clarify that any unclaimed damages can be distributed by way of alternative distribution.

## Recommendations

**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.

10.56 If the court makes an order for aggregate relief, it will likely need to order how that award will be distributed. We recommend 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.<sup>45</sup> Our proposed provision sets out some examples of the types of orders a court may make, but these are not exclusive.

10.57 We also recommend the Class Actions Act should require an administrator or the parties (if an administrator has not been appointed) to file a report with information about the process and outcome of the distribution of the aggregate monetary relief within 60 days of the distribution process being completed or at a later time if allowed by the court.<sup>46</sup>

10.58 We discuss the orders and steps we envisage may occur in a distribution process below.

### Orders on how the award will be distributed

10.59 The court may need to make orders to facilitate the distribution of the aggregate award to class members. It will need to be clear who is responsible for distributing relief to class members, and what steps (if any) class members need to take to establish their entitlement. The orders made by a court will depend on the circumstances of a case and might include:

- (a) An order that the defendant must distribute the award directly to class members. This may be appropriate where the defendant has class member details, such as through a share register or a customer database.
- (b) An order appointing a person as administrator to distribute the award to class members. This may be necessary where it is not possible for the defendant to make a direct payment or where the class member must take steps to establish their entitlement. We consider the court should have discretion as to whether to appoint an administrator and who should fulfil that role. We think a range of people could fulfil the role, such as a barrister, accountant or a corporate trustee. The appropriate person will depend on the circumstances of the case.
- (c) An order approving a process for class members to establish their entitlement to a share of the award. For example, the court might approve a process which requires class members to provide their sales receipt to establish their entitlement. Such an order will not always be necessary, such as when an aggregate award is based on the defendant's records, and those records show the individual losses.

### Orders on how any unclaimed portion of the award is to be distributed

10.60 It may not always be possible to distribute the entire aggregate award to class members, such as where some class members cannot be located or fail to submit a claim. We think the court should have discretion to make any orders it considers appropriate with respect to unclaimed funds.

10.61 We think the discretion should be exercised consistently with the objective of improving access to justice. This means it may be appropriate for the court to make further orders to facilitate payment of these unclaimed funds to the class members who are entitled to them. For example, the court could extend the period for claiming relief or order further notice to be given. In scenarios where the unclaimed relief exists because class members could not be located or did not submit a claim, we think alternative distribution (discussed below) will generally be more consistent with access to justice than alternatives such as pro rata distribution to known class members. If alternative distribution is used, non-

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<sup>45</sup> Draft legislation, cl 10(4).

<sup>46</sup> Draft legislation, cl 10(5).

claiming class members will at least receive an indirect benefit and class members who have already claimed will not receive more than they are entitled to.

### Orders on how the costs of distribution are to be met

- 10.62 We recommend the Class Actions Act should enable the court to make orders as to how the costs of the distribution are to be met, such as the costs of appointing an administrator or producing a distribution outcome report. We consider the court should have discretion in this regard, including the ability to order that costs be paid out of the aggregate award.

### Distribution outcome report

- 10.63 In the Issues Paper, we noted there was limited evidence on the extent to which class members achieve compensation or other forms of substantive justice through participating in a class action.<sup>47</sup> We think it is desirable for the court and public to have information about the outcome of the distribution of aggregate monetary relief to class members. This will improve transparency and enable the court to develop its expertise regarding the effectiveness of distribution procedures. We therefore think the administrator or the parties (if an administrator has not been appointed) should be required to file a distribution outcome report with the court.
- 10.64 We think it would be desirable for the parties to have guidance on what a distribution outcome report should contain. We recommend 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, if known, or an estimate of 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.
- 10.65 Some submitters suggested interim reports could be appropriate. We do not think this needs to be a requirement as the court could order this under its general power to make orders for distribution.
- 10.66 We think distribution outcome reports should be made available to class members and to the wider public. We recommend Te Tāhū o te Ture | Ministry of Justice should make distribution outcome reports available on a class actions webpage of ngā Kōti o Aotearoa | Courts of New Zealand website, subject to any confidentiality orders made by the court.<sup>48</sup> We think there is a 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. The number of class members who submit a claim to be paid from an award

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<sup>47</sup> Issues Paper at [5.24]–[5.25].

<sup>48</sup> In Chapter 5 we recommend a class actions webpage be created by Te Tāhū o te Ture | Ministry of Justice.

of aggregate relief and the amount they receive will be relevant to that assessment. If there is a cost sharing order, funding commissions will be deducted from the aggregate relief. Transparency around the returns to class members and litigation funders may help to facilitate a competitive litigation funding market.

- 10.67 Unlike a settlement outcome report (which we discuss in Chapter 11), there are fewer confidentiality concerns with a distribution outcome report because the aggregate monetary relief award will be made public in a judgment. However, if confidentiality is necessary (for example, to ensure the privacy of individual class members), the court could make appropriate confidentiality orders. We anticipate this will be rare.

### Alternative distribution

- 10.68 In the Supplementary Issues Paper, we explained that in some jurisdictions, monetary relief may be paid to an organisation or charity associated with the claim rather than to class members. This is typically done when distributing compensation to individual class members is impossible or impracticable. This is known overseas as *cy-près* damages, but we prefer the term “alternative distribution”.
- 10.69 Alternative distribution can be useful where it is difficult to identify class members or where the costs of distribution would be disproportionate to the small size of the individual awards. We said alternative distribution could be available for an entire award of aggregate monetary relief or could be limited to distributing unclaimed funds.
- 10.70 We explained that deterrence is a key rationale for *cy-près* awards in other jurisdictions and these awards help to ensure 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 have concluded that deterrence should not be an objective for class actions in Aotearoa New Zealand, we thought alternative distribution would need to be justified on the basis of improving access to justice or on efficiency grounds. We said alternative distribution could be seen as providing indirect compensation to class members if there is a close nexus between the beneficiary of the funds and the class claims.
- 10.71 We proposed alternative distribution should be available where it is not practicable or possible for monetary relief to be distributed to individual class members. We also said an alternative distribution award should usually be paid to a charity or organisation whose activities are related to the class action and are likely to directly or indirectly benefit class members. Where that is not possible, regulations could specify an eligible charity or organisation, such as a charity or an organisation that is associated with improving access to justice.
- 10.72 We asked submitters whether the court should be able to order alternative distribution of monetary relief and in what circumstances.

### Results of consultation

- 10.73 We received 14 submissions on alternative distribution.<sup>49</sup>

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<sup>49</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, GCA Lawyers, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Tom Weston QC.

- 10.74 Eleven submitters supported the court having some ability to order alternative distribution.<sup>50</sup> Of these, three submitted it should only be available for unclaimed damages.<sup>51</sup>
- 10.75 Eight submitters agreed (or generally agreed) with our proposal that alternative distribution should be permitted only where it is not practical or possible for monetary relief to be distributed to individual class members.<sup>52</sup> Reasons given in support of our proposal were:
- (a) Alternative distribution will help to achieve the objective of compensation in an indirect way.
  - (b) Alternative distribution should be limited because of our conclusion that deterrence should not be an objective of class actions and it is preferable for class members to be compensated directly, where possible.
  - (c) It will still operate to deter corporate and government wrongdoing.
  - (d) Alternative distribution is preferable to the other options for unclaimed funds, such as reversion to the defendant or pro-rata distribution amongst class members.
- 10.76 Chapman Tripp said alternative distribution should be available, though it expected the court would use the power rarely.<sup>53</sup> Appropriate situations could be where individual losses are very low and the administrative costs would be very high, or where class members are unlikely to participate in the distribution process.
- 10.77 Shine Lawyers submitted alternative distribution should be available when it was “in the interests of justice to not compensate class members directly”. It said alternative distribution would have greater utility where there is a small amount of unclaimed damages and the cost of distribution to individual class members would be greater than the amount of money each class member would receive.<sup>54</sup>
- 10.78 Two submitters commented on the recipient of an alternative distribution award. Nicole Smith supported paying unclaimed damages to a fund that assists with access to justice. Professor Vince Morabito (Monash University) said the judge should approve the recipient, bearing in mind any indirect benefits to class members and deterrence.<sup>55</sup>

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<sup>50</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, GCA Lawyers, Insurance Council, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Shine Lawyers, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>51</sup> Bell Gully, GCA Lawyers (although it only referred to unclaimed settlement money) and Nicole Smith.

<sup>52</sup> Bell Gully, Nikki Chamberlain, Consumer NZ, Insurance Council, Maurice Blackburn/Claims Funding Australia, Vince Morabito (he refers to his article that advocates for an express power to order *cy-près* distribution where it is “not practical or possible to compensate class members directly, using best but reasonable efforts”), Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith (by implication).

<sup>53</sup> For example, where individual losses are very low and the administrative costs of paying those amounts to individual class members would absorb a significant portion of the monetary relief award, or where class members are unlikely to participate in the process required to receive their portion of the monetary relief awarded

<sup>54</sup> It referred to the Palm Island class action settlement scheme (*Wotton v State of Queensland (No 10)* [2018] FCA 915) where if following two rounds of payments there was money left over from the settlement pool but the leftover money was less than \$100 per registered group member, this leftover money would instead be paid to the Cathy Freeman Foundation which provides support to Indigenous students on Palm Island.

<sup>55</sup> Vince Morabito referred us to the article Georgina Dimopoulos and Vince Morabito “*Cy-près Remedies in Class Actions – Quo Vadis?*” (2021) 95 ALJ 710 at 726.

- 10.79 Three submitters were opposed to alternative distribution. Johnson & Johnson said it could not be justified because deterrence is not an objective of the regime. Similarly, Simpson Grierson said any unclaimed damages should revert to the defendant, as damages are for the purposes of compensation, not general punishment. Where it is not practical for class members to be identified or damages distributed, this may be an indication that the claim is not appropriate to be brought as a class action. Tom Weston QC was opposed to alternative distribution and said such relief is not about access to justice, as it will only benefit the funder or deter the defendant.

### Recommendations

**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.

- 10.80 We consider the objective of improving access to justice will generally be best met by direct compensation of class members, as this will help class members to obtain substantive access to justice. We therefore think it is preferable for an award of aggregate monetary relief be distributed to each individual class member. However, there may be rare cases where individual payments to class members would be so small that they will be outweighed by the cost of distribution. There may also be circumstances where there are some unclaimed funds after the distribution process has been completed, such as where class members cannot be located. In these circumstances we think alternative distribution should be available. Accordingly, we recommend the Class Actions Act should specify that the court may order an award of aggregate monetary relief, or an unclaimed portion of it, to be paid to an appropriate organisation in instances where direct compensation is not practical, is not possible or is disproportionate to the amount they will receive.<sup>56</sup> This will ensure that orders for alternative distribution are only made in limited circumstances.

<sup>56</sup> Draft legislation, cl 11.

- 10.81 We also recommend the Class Actions Act should specify who can receive an award if the court makes an order for alternative distribution.<sup>57</sup> We think it is preferable for the award to be paid to a charity or organisation whose activities are related to the class action and are likely to directly or indirectly benefit class members. However, as it will sometimes be difficult to find a charity or organisation whose activities align with the class action claims, we also recommend eligible entities should be able to be prescribed by regulation. We envisage it could be an entity that improves access to justice, which could include the class action fund we recommend in Chapter 18.
- 10.82 As we have concluded that deterrence should not be an objective for class actions in Aotearoa New Zealand, we have not relied on it as a basis for alternative distribution. Rather, we think alternative distribution can be justified in limited circumstances on the basis of improving access to justice and managing multiple claims in an efficient way.<sup>58</sup> Our conception of access to justice includes obtaining a substantively fair result.<sup>59</sup> Where there is no better alternative, we think a substantively fair result can include an indirect benefit to class members that has some connection to their claim. For example, 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. The organisation's activities are related to the class action and are likely to indirectly benefit class members.
- 10.83 There is also a practical benefit to alternative distribution, which aligns with our objective of managing claims in an efficient way. It would not be efficient to spend more on distribution than the claims are worth. While a proceeding is unlikely to meet the "appropriate procedure" limb of the certification test where the cost of distribution would outweigh the likely relief, a development in the proceedings may result in the relief being much smaller than anticipated.

### Draft relief provisions

- 10.84 Below we set out draft legislative provisions that could give effect to our recommendations on aggregate monetary relief and alternative distribution.

## 10 Aggregate assessment and distribution of monetary relief

- (1) A court may make an aggregate assessment of the monetary relief to which a class is entitled (the **aggregate monetary relief**) if it is satisfied that it can make a reasonably accurate assessment of that amount.
- (2) 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.

<sup>57</sup> Draft legislation, cl 11(3).

<sup>58</sup> We note 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": Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [239] and [236]–[240].

<sup>59</sup> See Issues Paper at [5.24]–[5.28] and Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 51 and 70.



- (3) The court may make an award in the amount assessed as the aggregate monetary relief.
- (4) The court may also 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) 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 way of an alternative distribution under **section 11**;
  - (e) directing how the costs of the distribution are to be met.
- (5) 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 or at a later time if allowed by the court.

## 11 Alternative distribution

- (1) This section applies if—
  - (a) it is not practical or possible for an award made under **section 10** or any portion of it to be distributed to individual class members; or
  - (b) the costs of distributing the award made under **section 10** or any portion of it to class members would be disproportionate to the amount they would receive.
- (2) The court may order that the award or any portion of it 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; or
  - (b) an entity prescribed by regulations as an eligible charity or organisation for the purposes of this section.

## APPEALS IN CLASS ACTIONS

10.85 In this section we discuss the circumstances in which the parties and class members should be able to appeal a judgment in a class action.

### Party appeal rights

10.86 In the Supplementary Issues Paper, we said existing appeal rules should apply in class actions where possible, as many decisions will not be materially different to those in an

ordinary proceeding.<sup>60</sup> However, we thought the court's decisions on certification and settlement approval were sufficiently different to require specific consideration.

- 10.87 Given the significant implications of a court's decision on certification, we suggested the plaintiff and defendant should be able to appeal this as of right. We said the parties should also be able to appeal a decision to decline to approve a settlement with the leave of the court. We asked submitters whether they agreed with our conclusions on party appeal rights.

### *Results of consultation*

- 10.88 We received 12 submissions on party appeal rights.<sup>61</sup>
- 10.89 Nine submitters agreed both parties should be able to appeal a certification decision as of right.<sup>62</sup> Several submitters said this was merited given the significance of a certification decision in a class action proceeding.<sup>63</sup>
- 10.90 In their joint submission, Philip Skelton QC, Kelly Quinn and Carter Pearce thought only the plaintiff should be able to appeal a certification decision as of right. They said that denial of certification will often mean the class claims cannot be litigated. However, since the defendant can still contest the proceedings on the merits, certification is nothing like a final judgment and a right of appeal might lead to the defendant taking unnecessary appeals.
- 10.91 Seven submitters agreed the parties should only be able to appeal a decision to decline settlement approval with leave of the court.<sup>64</sup> Points made by submitters were:
- (a) Since the settlement application is made by both parties, there will be no party to appeal if the settlement is approved.
  - (b) Where a court declines approval, the parties will often be able to renegotiate the settlement to address any matters noted by the judge.
  - (c) Appeals should be limited in scope, in the style of judicial review, rather than a full appeal on the merits.
  - (d) Unnecessary appeals will be problematic where a settlement occurs immediately before or during trial.
- 10.92 Three submitters thought the parties should be able to appeal a decision declining settlement approval as of right.<sup>65</sup> Reasons included:
- (a) A decision on settlement approval should be treated as any other decision finally disposing of the proceeding.

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<sup>60</sup> Supplementary Issues Paper at [5.52].

<sup>61</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Simpson Grierson, Shine Lawyers, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith and Tom Weston QC.

<sup>62</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>63</sup> Bell Gully, Insurance Council, Johnson & Johnson (said it supported our approach 'for the reasons given'), Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Simpson Grierson and Shine Lawyers.

<sup>64</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Rhonson Salim, Nicole Smith and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>65</sup> Gilbert Walker, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

- (b) The parties should retain this right where there is an error of fact or law, even though in some circumstances it may be preferable to renegotiate a settlement.
- (c) Requiring leave would impose an unnecessary administrative burden. The leave test will be met in nearly all cases because a successful appeal would bring an end to the proceedings and would affect both the parties and class members.

10.93 More general comments on appeals made by submitters were as follows:

- (a) The regime should impose specific time limits for party appeals and decisions in such appeals. It should also allow specific pathways for appeals, such as ‘leap-frog’ appeals for certification and other key decision points.<sup>66</sup>
- (b) There should be an appeal as of right where a competing class action has been stayed, while another has been certified.<sup>67</sup>
- (c) Parties should be able to appeal interlocutory applications as of right, due to their significance.<sup>68</sup>
- (d) The funder may have an interest in an appeal.<sup>69</sup>

### Recommendation

#### 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.

10.94 Most decisions in a class action proceeding will not be materially different to those in an ordinary proceeding. With the exception of the court’s decisions on certification, concurrent class actions and settlement approval, we think the appeal rules in the Senior Courts Act 2016 should apply. This means that leave will not be required to appeal a decision on the common or individual issues or a decision that a proceeding will be struck out or dismissed or that summary judgment will be granted.<sup>70</sup> An appeal against any other

<sup>66</sup> Rhonson Salim.

<sup>67</sup> Simpson Grierson. Nicole Smith also suggested that, in the competing class actions context, the unsuccessful representative plaintiff should be able to appeal as of right.

<sup>68</sup> Shine Lawyers.

<sup>69</sup> Tom Weston QC.

<sup>70</sup> Senior Courts Act 2016, s 56(4)..

interlocutory decision will require leave.<sup>71</sup> We think specific appeal provisions are necessary with respect to certification, concurrent class actions and settlement approval as these stages are different to ordinary litigation.

- 10.95 Where the court makes a decision to grant certification or to decline to grant certification, on the basis that the certification test is met or not met, we recommend the Class Actions Act should specify that the parties may appeal the court's decision as of right. The implications of certification will be significant. While the court's decision that the certification test is not met and certification should be declined does not extinguish the claims, in practice the representative plaintiff and class members may be unable to proceed further with their claims. If certification is approved, the defendant will likely face a large and complex claim.
- 10.96 Where there is more than one concurrent class action proceeding which meets the certification test, the court must determine which class action proceedings will be certified.<sup>72</sup> In doing so, the court must consider which approach will allow the claims of class members to be resolved in a just and efficient way. We think the standard approach to appeals of interlocutory applications should apply to this decision, so leave should be required to appeal a court's decision on whether more than one concurrent class action will be certified. We think the implications of a court's decision as to which concurrent class action proceeding will be certified are less significant, as class members will still have the opportunity to participate in a class action.<sup>73</sup>
- 10.97 If the court decides that more than one concurrent class action will be certified, the defendant should be able to appeal this decision with the leave of the court. Where the court decides that a concurrent class action will not be certified (although it meets the certification test), the unsuccessful plaintiff should be able to appeal this decision with the leave of the court. For clarity, we recommend this is specified in the Class Actions Act. We think the court's decision as to which concurrent class actions will be certified (where more than one meets the certification test) is an exercise of discretion. We therefore envisage if leave is granted, an appeal would only be successful if there is an error of law or principle, the court took into account irrelevant considerations or failed to take into account relevant considerations, or the decision was plainly wrong.<sup>74</sup>
- 10.98 Where a court decides an application for certification of a concurrent class action will not be certified, our draft provision provides the application for certification must be dismissed. This consequential dismissal of an application for certification should not trigger any appeal rights.
- 10.99 We also recommend the Class Actions Act should allow the parties to appeal the court's decision declining to approve a settlement with leave of the High Court. If the court declines to approve a settlement, this will have a significant impact for the parties as it will mean the litigation must continue. However, we do not think this appeal should be available as of right. We think settlement is likely to be more fact-specific than certification. As well, the parties will still have the option of renegotiating the settlement

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<sup>71</sup> Senior Courts Act 2016, ss 56(3) and 56(5)-(6).

<sup>72</sup> See Chapter 5.

<sup>73</sup> Senior Courts Act 2016, ss 56(3) and 56(5)-(6).

<sup>74</sup> *May v May* (1982) 1 NZFLR 165 (CA) at 170, *Blackstone v Blackstone* [2008] NZCA 312, 19 PRNZ 40 at [8] and *K v B* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

rather than appealing the judgment. However, if there is an appealable error of law or fact in the decision, we think a party should be able to seek leave to appeal and not feel compelled to renegotiate the settlement.

### **Class member appeal rights**

- 10.100 In the Supplementary Issues Paper, we explained that as class members are not parties to the proceedings, it is not clear whether they would be entitled under general law to appeal decisions.<sup>75</sup> We therefore suggested any class member appeal rights should be provided in statute.
- 10.101 We proposed that 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. We said such an appeal should be with leave and the class member should have to apply to the court to act as the representative plaintiff for the purposes of the appeal.
- 10.102 We did not think a class member should be able to appeal a decision on certification or settlement approval given the delay this would cause especially for those wanting to proceed with implementation of an approved settlement. We acknowledged it was very unlikely the representative plaintiff or defendant would appeal, given they had proposed the settlement to the court. However, we thought the interests of class members would be sufficiently safeguarded by their right to object to the settlement or opt out of it, and by the fact that a settlement would only be approved when it is “fair, reasonable and in the interests of the class as a whole”.
- 10.103 We asked submitters whether they agreed that class members should be able to appeal a substantive judgment on the common issues with leave, and whether class members should be able to appeal any other decisions.

### **Results of consultation**

- 10.104 We received 12 submissions on class member appeal rights.<sup>76</sup>
- 10.105 Eleven submitters addressed class member rights to appeal against the judgment on common issues.<sup>77</sup> Nearly all submitters agreed that class members should be able to appeal a substantive judgment on common issues with leave.<sup>78</sup> Reasons for this were:
- (a) A class member who no longer has any opportunity to opt out of the litigation should have the opportunity to seek leave to appeal.
  - (b) The leave requirement ensures class members have an avenue for appeal if the representative plaintiff does not bring one, but also ensures appeals are only taken for a legitimate reason.

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<sup>75</sup> Supplementary Issues Paper at [5.63].

<sup>76</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>77</sup> Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>78</sup> Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers and Simpson Grierson. Nicole Smith supported such an appeal right if class members had previously opted in. Vince Morabito supported an appeal right and did not mention a leave requirement.

- (c) The requirements to seek leave and act as the representative plaintiff will protect the parties and class members from the risk of diverging or conflicting interests between the (new) representative plaintiff and other class members.
  - (d) The leave requirement is appropriate since class members are not parties to the proceeding.
- 10.106 Some submitters raised practical matters. Shine Lawyers commented that in practice class members would rarely exercise this appeal right. Tom Weston QC noted it is not clear what timeframe will apply to class members if they want to appeal the judgment on common issues and said the standard 20 working days is unlikely to be sufficient.
- 10.107 Nicole Smith said if the representative plaintiff does not appeal, a class member wanting to appeal should be required to go through an alternative dispute resolution process with the representative plaintiff and the funder.
- 10.108 Several submitters addressed whether the court's decision on settlement approval should be appealable by class members. Omni Bridgeway said class members should be able to appeal this decision as an alternative to opting out of the settlement. Chapman Tripp also supported an appeal as an alternative to opting out of settlement but said the appeal should require leave and be limited to the grounds of appeal against a discretion. It said class members should only be able to appeal if they objected to the settlement and the appealing class member should replace the representative plaintiff for the purposes of the appeal. Vince Morabito supported a class member right of appeal against the court's decision on settlement approval because such appeal rights play an important role in securing just settlements for class members. The Insurance Council said class members should not be able to appeal against the court's decision on settlement approval.
- 10.109 Bell Gully did not support class members having any appeal rights. It said only the representative plaintiff should be able to appeal, as the court has determined they are suitable to represent the class. If class members disagree with this approach, they should opt out of the class action. Allowing individual class members to appeal would undermine the efficiencies of a class actions regime.
- 10.110 Finally, several submitters said they did not think any other decisions in a class action require a class member appeal right.<sup>79</sup> Reasons for this were:
- (a) Appeal rights would undermine the efficiency achieved by allowing a representative plaintiff to bring a proceeding on behalf of the class.
  - (b) The court's involvement in certification and settlement is sufficient to safeguard class member interests.
  - (c) Alternative options (such as opting out or seeking to be substituted as the representative plaintiff) are a more suitable method of protecting class members.

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<sup>79</sup> Bell Gully, Johnson & Johnson, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

## Recommendations

**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 the 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 any 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.

### Appeal rights against judgment on common issues

- 10.111 While we recommend that class members are bound by the common issues judgment, it is the representative plaintiff who is responsible for making decisions about the conduct of the class action and giving instructions. When a representative plaintiff is deciding whether to appeal a judgment on the common issues, they will need to balance various considerations including the likely prospects of success, the risk of a cross-appeal by the defendant (where the claim was successful in some respects), the cost of the appeal and the prospect of adverse costs. When considering these matters, the representative plaintiff will need to act in what they believe to be the best interests of the class. While an individual class member may disagree with the representative plaintiff's decision not to appeal, this does not mean the decision was wrong or that the interests of the class have not been considered. If a class member can bring an appeal, this could also have significant consequences for other class members. For example, the defendant may be prepared to agree to a settlement in return for an appeal not being pursued.
- 10.112 For these reasons, we no longer think that class members should be able to appeal against the judgment on common issues. However, we also recognise the importance of this judgment to class members. Accordingly, we recommend that, if the representative plaintiff does not appeal or abandons an appeal against the common issues judgment, the Class Actions Act should specify a class member may apply to replace the representative plaintiff for the purpose of appealing. In doing so, the class member will need to establish that, in failing to bring or abandoning the appeal, the representative plaintiff has failed to fairly and adequately represent the class. Where a representative plaintiff does not appeal, we recommend a class member has 20 working days from the date on which notice of the judgment on the common issues is given to file any application to replace the representative plaintiff for the purposes of appealing. In Chapter 8 we recommend that notice of the common issues judgment should be sent to class members after the expiry of the appeal period so it can include information on any appeals. We

think it is important this notice goes out promptly after the appeal period ends, given it starts the timeframe for filing an application to replace the representative plaintiff. We anticipate the representative plaintiff will notify the court and the defendant when notice has been given.

- 10.113 As this application to replace the representative plaintiff will be filed after the expiry of the appeal period, we think it is necessary to provide a further appeal right if the class member's application is successful. We recommend that, if the court approves the class member's application to replace the representative plaintiff, the class member should then have 20 working days to lodge the appeal (as the representative plaintiff) in Te Kōti Pira | Court of Appeal.
- 10.114 Where a representative plaintiff wishes to abandon an appeal, we recommend any application to replace the representative plaintiff must be filed within 20 working days from the date on which notice of the intention to abandon the appeal against the common issues judgment is given. In Chapter 8, we recommend that, if a representative plaintiff intends to abandon an appeal against the common issues judgment, notice should be given to class members. We anticipate the representative plaintiff would also file a memorandum in the Court of Appeal explaining a notice of intention to abandon the appeal has been sent and, if no application to replace the representative plaintiff is filed or approved, a notice of abandonment will be filed in due course.
- 10.115 In this situation, if the application to replace the representative plaintiff is successful, an appeal against the judgment on common issues will still be active. We recommend that, if the High Court approves the class member's application to replace the representative plaintiff, the class member should then have 20 working days to file any amended notice of appeal in the Court of Appeal.
- 10.116 We think the ability to replace the representative plaintiff for the purposes of an appeal should be limited to the judgment on common issues. Many decisions such as matters of procedure will not substantially affect class member interests. For more substantive decisions such as certification and settlement, there are other steps class members can take to protect their interests. For example, if certification is declined because the representative plaintiff is unsuitable, it may be more appropriate to recommence the class action with a different representative plaintiff. Similarly, if a class member disagrees with a successful certification decision, they could simply opt out of the proceeding (or decide not to opt in). In settlement, class member interests are protected by their ability to object and the requirement for a court to consider whether a settlement is fair, reasonable and in the interests of the class. We also think it is desirable to avoid the delay an application to replace the representative plaintiff would cause for the parties wanting to proceed with implementation of an approved settlement.

### Appeal rights against individual issues

- 10.117 In Chapter 8 we recommend the court should have the power to determine individual issues. We think a class member should be able to appeal a decision or judgment that directly considers any individual issue that relates to them. Accordingly, we recommend the Class Actions Act should specify that class members have a right of appeal against a determination of any individual issue that relates to them. This should not require leave of the court.
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## CHAPTER 11

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# Settlement of a class action

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## INTRODUCTION

- 11.1 In this chapter, we discuss:
- (a) Requiring court approval of settlements in class actions.
  - (b) The process for court approval of a settlement.
  - (c) The test for approving a settlement.
  - (d) Finalising the class for settlement.
  - (e) Settlement administration and implementation.
  - (f) Settlements of individual claims.
  - (g) Discontinuance of a class action.
- 11.2 At the end of this chapter, we set out draft legislative provisions that could give effect to our recommendations on settlement.

## COURT APPROVAL OF SETTLEMENTS IN CLASS ACTIONS

- 11.3 In the Supplementary Issues Paper, we explained that a key feature of overseas class actions regimes is a requirement for court approval of settlements.<sup>1</sup> We observed that settlement is a stage where class member interests require particular protection. One reason is the “adversarial void” that exists because both the plaintiff and defendant are advocating for approval of the settlement. Another reason is the risk of conflicts of interest arising at settlement because both the representative plaintiff and funder could financially benefit from the litigation, potentially at the expense of class members.
- 11.4 We said court approval of a settlement is particularly important in opt-out class actions because of the risk that some class members will be unaware of the class action or the proposed settlement. However, 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 the interests of class members are protected. Class members do not have the status of parties and may have little contact with the lawyer for the class and no role in settlement negotiations. The adversarial void and risks of conflicts of interest at settlement are still

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<sup>1</sup> Supplementary Issues Paper at [6.2]–[6.3].

present. For these reasons, we thought judicial approval of settlement should be required in both opt-in and opt-out class actions.

- 11.5 We asked submitters whether the court should be required to approve class action settlements in both opt-in and opt-out proceedings.

### Results of consultation

- 11.6 We received 15 submissions on this issue.<sup>2</sup>
- 11.7 Thirteen submitters agreed the court should approve class action settlements in both opt-in and opt-out cases.<sup>3</sup> Reasons for this included:
- (a) It is part of the court exercising its supervisory jurisdiction to protect the interests of class members.
  - (b) There can be a significant divergence in interests at settlement, which can be difficult for defendants and potentially prejudicial for class members.
  - (c) Once a settlement is reached, the interests of the representative plaintiff and defendant are usually aligned.
  - (d) In both opt-in and opt-out cases there is a power imbalance between a litigation funder and class members, and a risk of their interests conflicting.
  - (e) It will assist lawyers, who may otherwise be facing conflicting duties due to class members having differing claims or expectations.
  - (f) Settlement approval is an important procedural safeguard to maintain public confidence in the integrity of the class actions regime.
  - (g) It will result in fairer outcomes in terms of the share of the proceeds that go to class members and a litigation funder respectively.
  - (h) The court could place emphasis on different matters depending on whether the case is opt-in or opt-out.
- 11.8 Gilbert Walker considered court approval of settlement is unnecessary in opt-in cases. If the court is to have a role in these cases, it should be limited to protecting against a settlement that amounts to an abuse of the court's process.
- 11.9 Some consultation workshop participants thought court approval should be required for all class action settlements. They suggested court approval will avoid the difficulty of getting class members to agree to a settlement and protect the lawyer if there are conflicts between class members. Others thought court approval of settlement may be unnecessary in opt-in cases and that an alternative would be class members agreeing to

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<sup>2</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Gilbert Walker, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Institute of Directors, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>3</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Insurance Council, Institute of Directors, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith. In addition, Vince Morabito referred us to his article "An Australian Perspective on the Judicial Review of Class Action Settlements" (2021) 29 New Zealand Universities Law Review 52, which tends to indicate support for judicial approval of settlements.

the settlement by majority vote. Participants also told us settlement approval could involve significant time and cost.<sup>4</sup>

## Recommendation

### 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.

- 11.10 We recommend the Class Actions Act should require court approval for the settlement of a class action to be binding, in both opt-in and opt-out class actions.<sup>5</sup> This is an important part of the court's supervisory role to protect the interests of class members, who are unlikely to be involved in negotiating the settlement but will be bound by its terms and conditions, including terms that extinguish some or all of their claims.
- 11.11 Class member interests will not necessarily be aligned with those of other participants at settlement because:
- (a) The litigation funder is likely to benefit from settlement, because they will get a proportion of the settlement amount and will not have to pay any further litigation costs.
  - (b) The lawyer may have a conditional fee agreement, where they can receive a premium (in addition to their normal fee) if the matter is successfully resolved through a settlement.
  - (c) The defendant will have an interest in resolving the litigation at the lowest cost possible.
  - (d) The representative plaintiff has an interest in settling their individual claim, finishing their role and removing their liability for adverse costs.
  - (e) The prospects of individual class member claims may differ, in which case there is greater litigation risk for some class members than others.
- 11.12 We consider court approval of settlement should be required in both opt-in and opt-out class actions because the risk of divergent interests and a conflict of interest at settlement is present in both. In opt-out class actions, there is the additional risk that a class member did not receive notice of the class action and is unaware of the proceeding or the settlement.
- 11.13 We consider the requirement for the court to approve a settlement should also apply to settlements reached before certification. Such a settlement will still involve binding persons who are not parties to the proceeding, and we think the court needs to consider the interests of those persons. Later in this chapter, we discuss certification for the purposes of settlement in such cases.

<sup>4</sup> We were told in Australia it typically costs \$200,000 to \$500,000 for the settlement approval process and takes three to six months to prepare for a settlement hearing.

<sup>5</sup> Draft legislation, cl 12(1).

- 11.14 Later in this chapter, we recommend court approval should be required where there is a realistic prospect that settlement of individual claims will effectively dispose of the class action.
- 11.15 The process we recommend for settlement approval will take some time as it will require notice to class members, an opportunity for class members to lodge objections to a settlement and, in some cases, a settlement approval hearing. We acknowledge such a process could be problematic if a settlement was reached during a hearing, as it could require a lengthy adjournment. It may be desirable to hold a judicial settlement conference prior to hearing to mitigate this risk.

## PROCESS FOR COURT APPROVAL OF SETTLEMENT

- 11.16 In this section, we discuss the following procedural issues:
- (a) Making an application for approval of a settlement.
  - (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.

### Application for approval of a settlement

- 11.17 In the Supplementary Issues Paper, we proposed an application for approval of a class action settlement would be filed jointly by the representative plaintiff and defendant.<sup>6</sup> We envisaged the court would normally hold a hearing to decide whether to approve the settlement, although we did not rule out the possibility of the application being determined on the papers in some cases.
- 11.18 We said guidance could be provided on the contents of an application to ensure the court has enough information to assess the proposed settlement.<sup>7</sup> We suggested that, at minimum, information should be provided about:
- (a) The terms of the proposed settlement.
  - (b) Any legal fees or litigation funding commission 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.
  - (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 the litigation.
  - (g) The potential relief that could be awarded if the case is successful.
  - (h) The proposed method of settlement distribution and administration, including any proposal for unclaimed monetary relief.
- 11.19 We anticipated the supporting information would primarily be provided by the representative plaintiff and could include an affidavit by their lawyer and any independent advice received on the settlement. We said it should be possible for each party to provide

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<sup>6</sup> Supplementary Issues Paper at [6.12] and [6.14] and draft legislation (September 2021 version), cl 6(2).

<sup>7</sup> Supplementary Issues Paper at [6.17].

information to the court on a confidential basis where appropriate, particularly where it relates to the prospects of the litigation.

- 11.20 We asked submitters whether they agreed with our proposed list of information that should be provided in support of an application to approve a class action settlement.

### *Results of consultation*

- 11.21 We received nine submissions on this question, with submitters largely agreeing with our proposed list of information.<sup>8</sup>
- 11.22 Chapman Tripp suggested the overarching consideration should be whether the information will assist the court in determining whether the approval test is met, and the specific information we listed could be sub-sets of that. Bell Gully and Maurice Blackburn/Claims Funding Australia thought the list should not be too prescriptive, to allow sufficient flexibility.
- 11.23 Several submitters highlighted the importance of being able to provide information on a confidential basis.<sup>9</sup> Chapman Tripp said confidentiality may be particularly important where there is a prospect of a competing class action or other litigation against the defendant. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said the parties need to be able to provide separate confidential information on the likely cost and duration of the class action if the litigation continued and the potential relief that could be awarded if the case was successful. Simpson Grierson said any information provided to the court as part of the application for settlement approval (as well as the terms of settlement recorded in any final judgment) should remain confidential and marked accordingly on the court file.
- 11.24 Maurice Blackburn/Claims Funding Australia said it would be inappropriate for the application to be made jointly, as this would give the defendant an inappropriate and disproportionate degree of input. Rather, the application should be made by the representative plaintiff and the orders sought by consent. The Insurance Council said it should be clear the primary responsibility for preparing the application rests with the representative plaintiff and noted the parties may not be able to reach agreement on each of the factors an application needs to cover.
- 11.25 Chapman Tripp suggested the settlement approval process should be undertaken by a judicial officer who is not the trial judge, as it may be inappropriate for the trial judge to see evidence on the risks, costs and benefits of proceeding with the litigation.

### *Recommendations*

**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 the proposed representative plaintiff.

<sup>8</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>9</sup> Chapman Tripp, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

**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.

11.26 While we had originally proposed there would be a joint application for approval of a settlement by the representative plaintiff and defendant, on reflection we think the application should be made by the representative plaintiff.<sup>10</sup> The application will need to indicate the basis upon which the settlement approval test is met, and we think the representative plaintiff is better placed to do this. It is not the defendant's role to show that a settlement is fair, reasonable and in the interests of the class. The need for some evidence to remain confidential from the defendant may also make it inappropriate to have a joint application.

11.27 We envisage the document filed by the representative plaintiff would be a standard interlocutory application.<sup>11</sup> The application should be supported by affidavit evidence to allow the court to assess whether the test for settlement approval is met. We anticipate this evidence would primarily be given by the representative plaintiff. To address matters such as the potential risks, costs and benefits of continuing with the litigation, their affidavit could provide a copy of legal advice they have obtained on the settlement from

<sup>10</sup> Draft legislation, cl 12(2). If the application is made prior to certification, it should be made by the proposed representative plaintiff.

<sup>11</sup> See High Court Rules 2016, r 7.19 and Form G 31.

the lawyer for the class or from an independent lawyer. This occurs in some other jurisdictions.<sup>12</sup> Confidentiality orders could be sought with respect to particular affidavit evidence, if appropriate, such as where it contains the advice of legal counsel or evidence on the risks of continuing with the litigation. If evidence on assessment of litigation risks is disclosed to the defendant, it might jeopardise the settlement or give the defendant a strategic advantage if the settlement is not approved and the case proceeds to hearing.

- 11.28 We think it would assist the representative plaintiff to have guidance on the matters to include in an affidavit in support of an application for settlement approval. We recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee consider developing a High Court Rule on what should be included in the affidavit.
- 11.29 We consider the representative plaintiff should provide sufficient information in support of an application for settlement approval to allow the court to consider whether a settlement is fair, reasonable and in the interests of the class. While we do not favour a mandatory list of information, we envisage the supporting evidence would generally 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) Whether the settlement proposes to treat class members differently and 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.
- 11.30 We have not included the intended method of notifying class members of the proposed settlement in this list. Rather, this could be addressed in an application for court approval of a notice of proposed settlement to class members, which we anticipate would be filed along with the application for settlement approval.
- 11.31 The defendant would be named as a respondent to the application for settlement approval. We anticipate the defendant would file a notice in support of the application

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<sup>12</sup> When applying for approval of a class action settlement in the Federal Court of Australia, supporting material will usually be required to address “the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding”: *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) at [15.5](j). In the United Kingdom Competition Appeal Tribunal, an application for settlement of a class action may include “any opinion of the applicants’ legal representatives as to the merits of the collective settlement”: *The Competition Appeal Tribunal Rules 2015 (UK)*, r 94(4)(c).

and, in some cases, a supporting affidavit. For example, the defendant might provide its estimate of the likely cost and duration of the class action if it continued, its assessment of any risks associated with continuing with the litigation, or information on how the settlement would be distributed to class members (if the defendant would be involved in that). Confidentiality orders may also be appropriate with respect to aspects of this evidence.

### Notice to class members about the settlement

11.32 In the Supplementary Issues Paper, we said class members should be given notice of a proposed settlement. As class members' legal rights would be affected by the settlement, they should have an opportunity to consider the proposed terms of the settlement and express any objection or support for the proposal.<sup>13</sup>

11.33 We suggested that, at minimum, this notice should include:<sup>14</sup>

- (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 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, or support for, the settlement.
- (h) Information 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.

11.34 Because we proposed class members should have the right to opt out of a settlement once it had been approved, we thought class members should also be given notice of an approved settlement.<sup>15</sup> We suggested the notice could contain the following information:<sup>16</sup>

- (a) The court's approval of a settlement that may affect their legal rights.
- (b) How to obtain further information about the settlement, including the court's judgment approving the settlement.

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<sup>13</sup> Supplementary Issues Paper at [6.24].

<sup>14</sup> Supplementary Issues Paper at [6.29].

<sup>15</sup> Supplementary Issues Paper at [6.25].

<sup>16</sup> Supplementary Issues Paper at [6.30].



- (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.
- 11.35 We asked submitters whether there should be a requirement to give class members notice of a proposed or approved class action settlement. We also asked whether submitters agreed with the information we proposed should be contained in these notices.

## **Results of consultation**

### **When notice should be required**

- 11.36 We received 14 submissions on whether notice should be required when a class action settlement is proposed and when it is approved.<sup>17</sup>
- 11.37 Thirteen submitters thought class members should be given notice of a proposed class action settlement.<sup>18</sup> Reasons for this included:
- (a) Class members should have an opportunity to object to or support the settlement.
  - (b) Class members should have the opportunity to seek independent advice.
  - (c) The degree of class member support is relevant to the court's consideration of whether to approve a settlement. Giving notice will ensure any feedback is generally representative of the class as a whole.
  - (d) The notice conveys critical information about class member claims and rights. In an opt-out class action, it is possible that some class members would not be previously aware of this information.
- 11.38 Eleven submitters thought class members should also be given notice of an approved class action settlement.<sup>19</sup> Several submitters thought this was necessary if there was a right to opt out of the settlement.<sup>20</sup>
- 11.39 Shine Lawyers did not think notice of an approved settlement should be required. It said requiring two settlement notices would add unnecessary cost and delay and may lead to confusion. Instead, it proposed all the required information could be provided in a single notice of proposed settlement. If a settlement was approved, it was in class members' interests for settlement administration to begin immediately, rather than being delayed by another notice. Maurice Blackburn/Claims Funding Australia thought there would be

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<sup>17</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>18</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>19</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Omni Bridgeway, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>20</sup> Nikki Chamberlain, Consumer NZ and Insurance Council.

circumstances where notice of an approved settlement would not be necessary, or the cost would be unduly burdensome and so favoured judicial discretion with respect to this.

- 11.40 Gilbert Walker said it could be cumbersome and expensive to give class members two settlement notices, unless it could be done through a website or other electronic means. It said many defendants would find it highly undesirable to give public notice of a settlement that has not been approved.
- 11.41 Chapman Tripp thought there should be flexibility to apply to the court for an order that notice is not required. For example, it may be onerous to bring the settlement to the attention of every potential class member.

### Contents of settlement notices

- 11.42 We received nine submissions on the contents of a notice of proposed or approved settlement.<sup>21</sup> Submitters largely agreed with our proposed list of information to be included in notices, but some suggested amendments.
- 11.43 Maurice Blackburn/Claims Funding Australia and Shine Lawyers thought the notice of proposed settlement should not need to include information that would allow class members to estimate their individual entitlement. This information would depend on individual circumstances and could be difficult for the plaintiff's lawyer to provide, and an estimate could be misleading. Maurice Blackburn/Claims Funding Australia suggested the notice could provide information on how individual entitlements would be assessed. However, Shine Lawyers thought even a general formula describing what might go into calculating a settlement could mislead class members into significantly overestimating or underestimating their likely compensation.
- 11.44 Simpson Grierson suggested the legal fees and litigation funding commission should be expressed as a percentage and not just an absolute amount, so class members could understand their estimated net individual entitlement.
- 11.45 Some submitters disagreed with referring to class members' right to opt out of a settlement in the notices. As we discuss later in this chapter, many submitters thought class members should not have the right to opt out of a settlement.
- 11.46 Bell Gully and Maurice Blackburn/Claims Funding Australia thought the list should provide guidance so the court would have sufficient flexibility with respect to notices.

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<sup>21</sup> Bell Gully, Chapman Tripp, Consumer NZ, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers and Simpson Grierson.

## Recommendation

### 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.

## When a settlement notice should be required

- 11.47 In Chapter 8, we make recommendations on the events that should trigger notice and say this should include a proposed or approved settlement. We also recommended the court should have a discretion to order that notice is not required if it considers this is not necessary to protect the interests of class members. In this section, we explain the circumstances in which we consider a notice of proposed or approved settlement would be required.
- 11.48 We think it will usually be necessary to give class members notice of a proposed settlement, because a settlement of the proceedings will usually bring the litigation to an end, extinguish class member claims and prevent class members from bringing another proceeding on the issue. Later in this chapter, we recommend class members should be able to file an objection to the settlement and any views of class members should be a factor the court must consider when deciding whether to approve the settlement. A class member needs to be aware of the proposed settlement to take up the opportunity to convey their views on it. There may be occasional situations where notice is not required, such as where the court has declined a settlement because of one specific term and the parties have filed a new application for settlement approval that addresses that term. In such situations, the court could exercise its discretion to order that notice is not required.
- 11.49 In the Supplementary Issues Paper, we suggested notice of an approved settlement is required so class members are aware of their right to opt out of a settlement. As we discuss later in this chapter, we no longer consider that class members should have a general right to opt out of a settlement. This removes a key rationale for the notice of approved settlement. In cases where the defendant will pay the settlement amount

directly to class members, it is unlikely to be necessary to provide class members with notice of an approved settlement. Requiring notice in such a case would cause additional expense and delay settlement administration.

- 11.50 However, we think notice of settlement approval will still be required in some cases. One situation is where the parties have agreed to provide class members with the ability to opt out of a settlement. Another is where the court has made an order that specific individuals must be given the right to opt out. Notice may also be required where a class member must take certain steps by a particular date to receive a benefit from the settlement. We therefore favour leaving it to the court to determine whether notice of an approved settlement is required in a particular case.

### Contents of settlement notices

- 11.51 As we discussed in Chapter 8, it is important that notices to class members use clear language and are designed to effectively communicate with the relevant audience.
- 11.52 We think it is desirable to provide guidance on the contents of a notice of proposed settlement. In our view, the notice should usually 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 about how individual entitlements will be assessed (we agree with submitters that it may be difficult to accurately provide information that will allow class members to estimate their individual entitlement).
  - (e) Information on 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.
- 11.53 Ultimately it should be up to the court to approve the contents of the notice, so we do not think this content should be mandatory. We recommend the Rules Committee consider developing a High Court Rule on the contents of a notice of proposed settlement and could develop a sample notice to be included in a schedule to the Rules.
- 11.54 Because we think a notice of approved settlement will not always be required, it is less important to develop guidance on the contents of this notice. It will ultimately depend on the reason why the notice is necessary, and what information has already been provided in the notice of proposed settlement. Where appropriate, a notice of approved settlement might include information on:

- (a) The court's approval of a settlement and how it may affect class members' legal rights.
- (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 a settlement and the deadline for doing so (where the parties have agreed to provide an ability to opt out of the settlement or the court has ordered specific class members should have a right to opt out).
- (d) Any steps a class member must take to submit a claim and the deadline for doing so.
- (e) Who has been appointed as the settlement administrator (if any) and how to contact them.

### **Class member objections to a proposed settlement**

- 11.55 In the Supplementary Issues Paper, we said it is important to give class members an opportunity to express any opposition to the settlement, given they will be bound by its terms if the settlement is approved.<sup>22</sup> The court may otherwise be unaware of those concerns given that both the representative plaintiff and defendant will be supporting the settlement.
- 11.56 We proposed the court must set a date for any objections to the settlement to be lodged by class members. We envisaged 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.
- 11.57 We asked submitters whether class members should be given an opportunity to object to a proposed settlement.

### **Results of consultation**

- 11.58 We received 12 submissions on this question.<sup>23</sup>
- 11.59 Ten submitters thought class members should have an opportunity to object to a settlement.<sup>24</sup> Maurice Blackburn/Claims Funding Australia noted this will enable class members to express genuine, well-founded concerns about the proposed settlement. In addition, the absence of objections will be a highly relevant consideration in support of a settlement.
- 11.60 Some submitters made suggestions on the process for objections:
- (a) There should be a very short timeframe for lodging objections. It is particularly important to have an efficient process when a settlement is reached mid-trial.<sup>25</sup>

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<sup>22</sup> Supplementary Issues Paper at [6.33].

<sup>23</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Consumer NZ, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>24</sup> Nikki Chamberlain, Chapman Tripp, Consumer NZ, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>25</sup> Chapman Tripp. Similarly, the Insurance Council said the timeframe should be reasonable but finite so that one class member cannot hold up the settlement process for an unduly long period of time.

- (b) Class members could be given guidance on how and where to file an objection, such as in a Practice Note.<sup>26</sup>
  - (c) The objection should be filed with the court registry at the class member's own effort and expense. This will help protect against unmeritorious objections.<sup>27</sup>
  - (d) Objections should be in writing, with leave required to appear at the settlement approval hearing.<sup>28</sup>
  - (e) There could be a standard form that is filed with the court and served on the parties.<sup>29</sup>
  - (f) Objecting class members should have to particularise and evidence their objections to the normal standard.<sup>30</sup>
  - (g) Class members should be able to attend the hearing and raise objections directly with the court. They may find the experience cathartic and it may allow any misunderstandings to be clarified.<sup>31</sup>
  - (h) If objecting class members have legal assistance this can ensure objections are well prepared and well founded. Class members could be given information on how to access legal assistance (such as through a free legal clinic).<sup>32</sup>
  - (i) The objecting class member's intention is a relevant consideration and should inform the weight the court gives to any objection.<sup>33</sup>
  - (j) Objections should occur through an alternative dispute resolution process.<sup>34</sup>
- 11.61 Bell Gully did not support class members having an opportunity to object to a settlement. It said the court should conduct a broad assessment rather than considering individual issues raised by class members. When a class member elects to opt into the class action or fails to opt out, this includes accepting any settlement reached on their behalf. Allowing class member objections would undermine the reasons for the court certifying the class action in the first place and would create additional delay and cost. It would also create uncertainty for a defendant, who will have fairly approached settlement negotiations on the basis that the representative plaintiff speaks for the class.

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<sup>26</sup> Maurice Blackburn/Claims Funding Australia.

<sup>27</sup> Maurice Blackburn/Claims Funding Australia.

<sup>28</sup> Nikki Chamberlain.

<sup>29</sup> Simpson Grierson.

<sup>30</sup> Maurice Blackburn/Claims Funding Australia.

<sup>31</sup> Shine Lawyers.

<sup>32</sup> Maurice Blackburn/Claims Funding Australia.

<sup>33</sup> Maurice Blackburn/Claims Funding Australia.

<sup>34</sup> Nicole Smith.

## Recommendations

**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.

- 11.62 We consider class members should have an opportunity to object to a settlement, given that it affects their rights and interests. Because both the representative plaintiff and defendant will be advocating for the settlement, this may provide the court with important information on any potential shortcomings of the settlement from the perspective of class members. Later in this chapter we recommend the views of class members should be a relevant factor for the court to consider when assessing whether the settlement approval test is met. It will assist the court to consider the existence, or absence, of class member objections when assessing that factor. We also think the possibility of class member objections will encourage the representative plaintiff and lawyer for the class to consider the interests of all class members when negotiating a settlement and to keep class members well informed about how the settlement has been designed.
- 11.63 The notice of proposed settlement should explain what a class member must do if they wish to object to a settlement. We recommend the Rules Committee consider developing a High Court Rule on the process for objecting. We suggest a written objection should be filed with the court by a specified date. Although it is standard practice for litigants to be required to serve court documents on other parties, we propose a class member should only have to file the notice of objection. The court could then provide any objections to the parties, and to any counsel to assist or expert who the court been appointed. We think this departure from usual practice is justified because class members are not parties, may be unfamiliar with court processes and be hesitant to communicate with the representative plaintiff or defendant (or their lawyers).
- 11.64 We think the objection process should be as straightforward as possible to enhance access to justice. There could be a template form on the class actions webpage of ngā Kōti o Aotearoa | Courts of New Zealand website that could indicate the nature of the information that a class member needs to provide in their objection. Te Tāhū o te Ture | Ministry of Justice already has many template forms and guides available for users of courts and tribunals, and we envisage the template form for objections could be made available in the same way.
- 11.65 The notice of proposed settlement could also provide the timeframe for filing any objection. The timeframe should give class members a reasonable period to consider the proposed settlement and prepare any objection (which could include instructing a

lawyer). We acknowledge that it is undesirable to significantly delay the settlement approval process, so the timeframe should not be lengthy.

- 11.66 While it would be desirable for class members to have legal representation to assist with the objection process, we do not think this should be required. In Chapter 18, we recommend options for facilitating free legal advice to class members should be explored, such as creating a class actions law clinic. This could provide class members with assistance in assessing proposed settlements and preparing appropriate objections.
- 11.67 We recommend a class member should only be able to appear at the settlement approval hearing with the leave of the court. This will enable the court to consider whether it would be assisted by hearing from a particular class member (or their legal representative). We think giving class members a right to appear could risk significantly and unnecessarily prolonging the settlement approval hearing.
- 11.68 Class members may also want to convey their support for a settlement. This could be conveyed through the evidence filed by the representative plaintiff, such as the results of a vote or survey of class members. We think it would be overly burdensome for the court to manage a large number of individual expressions of support from class members.

### Other participants in the settlement approval process

- 11.69 In the Supplementary Issues Paper, we proposed a power for the court to appoint a counsel to assist where it considers this would assist it to determine whether the settlement approval test is met. We said this may be one way of redressing the adversarial void that exists at the settlement approval stage. We also proposed a power for the court to appoint an expert if it would assist the court to determine whether the test for settlement approval is met. We thought this power could be particularly useful with respect to litigation funding commissions. We acknowledged the court already has general powers to appoint a counsel to assist or an expert. However, we thought a specific provision could lead to more frequent appointments with respect to settlement approval. We said the court should be able to order the parties to meet the costs of a counsel to assist or court expert.<sup>35</sup>
- 11.70 It might also be appropriate to allow an intervener to make submissions on settlement in appropriate cases. However, we considered it unnecessary to have an express provision on this. An intervener is likely to represent its own or systemic interests rather than those of class members and might only wish to submit on limited aspects of a settlement.<sup>36</sup>
- 11.71 We asked submitters whether there should be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval and whether the court should be able to order one or more of the parties to meet the cost of this.

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<sup>35</sup> Supplementary Issues Paper at [6.40]–[6.41].

<sup>36</sup> Supplementary Issues Paper at [6.42].



## Results of consultation

- 11.72 We received 11 submissions on this issue.<sup>37</sup> Seven submitters favoured an express power to appoint a counsel to assist or a court expert.<sup>38</sup>
- 11.73 Chapman Tripp commented that the court should be empowered to get the assistance it requires to be confident it is making an appropriate decision. However, it said it may not be necessary to appoint a counsel to assist or expert in every case and it would be relevant to consider whether this might delay the settlement approval process. It also suggested it might be useful to appoint a counsel to represent the interests of the class earlier in the proceeding.
- 11.74 Simpson Grierson thought the need for an independent counsel or expert on settlement is most likely to arise when there are potential conflicts of interest. It said it is preferable for conflicts to be resolved in the context of contractual arrangements between the parties, which might involve appointing an independent person to assess the suitability of the settlement with respect to all class members. If such a person is appointed by the parties, they would be able to assist the court if required. However, it also supported the court having a residual ability to appoint an independent counsel or expert.
- 11.75 Bell Gully did not think third parties needed to be involved in the settlement approval process and said this could slow down the process. It said the court would be well equipped to apply its judgement as to whether to approve the settlement. Omni Bridgeway thought it was unnecessary to have an express power and noted Australian courts could appoint a contradictor, costs assessor or other expert without an express power. Maurice Blackburn/Claims Funding Australia noted the existing powers available to the court to appoint a court expert or *amicus curiae*.
- 11.76 Several submitters agreed with our proposal that the court should have a broad power to order one or more parties to meet the costs of the counsel to assist or court expert.<sup>39</sup> Other suggestions given by submitters were:
- (a) A presumption that the representative plaintiff is responsible for these costs.<sup>40</sup>
  - (b) A presumption that the defendant pays for these costs.<sup>41</sup>
  - (c) That the costs should be shared equally between the parties.<sup>42</sup>
- 11.77 Some consultation workshop participants were supportive of an express power to appoint an independent lawyer or expert to assist the court at settlement approval.
- 11.78 Three submitters commented on the issue of interveners. Chapman Tripp agreed it is unnecessary to have a specific provision allowing the court to grant a third party leave to intervene and said excessive intervention in settlement evaluation was undesirable. Nikki

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<sup>37</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>38</sup> Nikki Chamberlain, Chapman Tripp, Insurance Council, Johnson & Johnson, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>39</sup> Nikki Chamberlain, Johnson & Johnson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) (although they did not express a view on whether an express power was necessary for the court to do this) and Nicole Smith.

<sup>40</sup> Chapman Tripp and Simpson Grierson.

<sup>41</sup> Maurice Blackburn/Claims Funding Australia.

<sup>42</sup> Insurance Council.

Chamberlain (Waipapa Taumata Rau | University of Auckland) thought having a specific power to allow an intervener could provide clarity. Tom Weston QC commented that a litigation funder may wish to intervene on an application to approve a settlement.

### Recommendation

**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.

- 11.79 As we have discussed, there may be an adversarial void at settlement because both the representative plaintiff and defendant are advocating for the settlement to be approved. While class members can object to a settlement, the experience of other jurisdictions indicates they may face barriers to doing so, such as a lack of legal assistance, difficulty in understanding the settlement agreement, and the small value of their individual claim making it uneconomic to object.<sup>43</sup>
- 11.80 In some cases, the court may find it beneficial to have an independent lawyer provide submissions to assist with its assessment of whether the settlement is fair, reasonable and in the interests of the class. We therefore think the court should have an express power to appoint a counsel to assist at settlement. This is unlikely to be necessary in every case and might depend on matters such as:
- (a) Whether any class members have filed objections to the settlement and whether those class members are legally represented.
  - (b) The complexity of the settlement, and whether there are any unusual features or indications that a settlement might not be in the interests of all class members.
  - (c) Whether the class is comprised of persons who might find it particularly difficult to consider the terms of a settlement or lodge an objection.
- 11.81 The court may also find it beneficial to have assistance from a court expert in some cases. We envisage the expert might assist the court on particular aspects of the settlement, such as advising on a formula that has been developed to allocate the settlement proceeds. The appropriate expert would depend on the issue but might include, for example, an accountant or auditor.
- 11.82 While the court has existing powers to appoint a counsel to assist or an expert, we think it is desirable to provide a specific power in the class actions regime.<sup>44</sup> We recommend 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.<sup>45</sup> We think this will encourage the appointment of counsel or an expert in appropriate cases. We also recommend the Class Actions Act specify the court may order one or both of the parties to meet the costs of

<sup>43</sup> Supplementary Issues Paper at [6.35].

<sup>44</sup> We have also taken this approach in the context of the court's power to approve funding agreements: see Chapter 17.

<sup>45</sup> Draft legislation, cl 17(1).

a counsel to assist or court expert.<sup>46</sup> This will also ensure these costs do not have to be met by the court.<sup>47</sup> We prefer the court having discretion to decide the appropriate allocation of costs in a particular case, rather than a presumption that one party should pay these costs.

## APPROVING A SETTLEMENT

- 11.83 In the Supplementary Issues Paper, we said the test for judicial approval of a settlement should be set out in legislation as this would provide clarity and certainty for the parties. We proposed the court should have to consider whether a proposed settlement is fair, reasonable and in the interests of the class as a whole. We said this should not mean a standard of perfection, as a settlement agreement is necessarily the result of a compromise between the parties.<sup>48</sup>
- 11.84 We also proposed the class actions regime should specify factors the court must consider when deciding whether to approve a settlement, while allowing the court discretion to consider any further relevant matters.<sup>49</sup> We suggested these factors should be:
- (a) The terms and conditions of the proposed settlement, which should include:
    - (i) Any relief that will be provided to class members.
    - (ii) Whether class members are treated equitably in relation to each other.
    - (iii) The proposed method of distributing any settlement amount to class members.
    - (iv) The proposed method of dealing with any unclaimed settlement amounts.
  - (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) The views of class members.
  - (e) The process by which the settlement was reached, including whether any potential conflicts of interest were properly managed.
- 11.85 We asked submitters whether they agreed with our proposed settlement test and list of factors for the court to consider in applying this test.
- 11.86 We also discussed the court's powers in approving settlement. We noted that 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. We thought this approach was generally appropriate. A settlement will be the result of a negotiation between the plaintiff and defendant, and the agreement may not be acceptable to both parties if a term or condition is changed. We said one exception may be the litigation funding commission payable in connection with a settlement.<sup>50</sup> We

<sup>46</sup> Draft legislation, cl 17(2).

<sup>47</sup> Where the court appoints a court expert on its own initiative, it may order the costs of the expert to be paid for by Te Tāhū o te Ture | Ministry of Justice: see High Court Rules 2016, r 9.41(3). The court can also order the costs of a counsel to assist to be paid out of public funds: see Senior Courts Act 2016, s 178.

<sup>48</sup> Supplementary Issues Paper at [6.49]–[6.50].

<sup>49</sup> Supplementary Issues Paper at [6.58]–[6.90].

<sup>50</sup> Supplementary Issues Paper at [6.91]–[6.99].

asked submitters whether the court should have an express power to amend litigation funding commissions at settlement.

### Results of consultation

- 11.87 We received 11 submissions on the test for settlement approval, with 10 of those agreeing with our proposed test.<sup>51</sup> Bell Gully commented that examining whether a settlement is “reasonable” allows for the fact that a settlement involves a compromise between the parties. Maurice Blackburn/Claims Funding Australia said the proposed test is consistent with the common law test that has developed in Australia.
- 11.88 Chapman Tripp preferred a test that would consider whether the settlement is fair and reasonable. This assessment should consider whether the settlement was (a) fair and reasonable as between class members and the defendant and (b) fair and reasonable as between all class members. It did not think the test should also include “the interests of the class as a whole” as the “fair and reasonable” test would include whether class members are treated equitably. It thought including “the interests of the class as a whole” was duplicative and was concerned the parties could try to give this a more expansive effect than ensuring fairness as between class members. If this aspect of the test remained, it should not be amended to “best interests”. It agreed a range of fair and reasonable settlements may exist and it should not be the court’s role to determine whether a better outcome may be possible.

### Factors relevant to settlement approval

- 11.89 We received 17 submissions on the factors a court should consider when applying the settlement approval test.<sup>52</sup>

### Terms and conditions of the settlement

- 11.90 Eight submitters agreed the terms and conditions of the settlement should be a factor.<sup>53</sup> Bell Gully described this as the primary factor for a court to consider.
- 11.91 Bell Gully and Chapman Tripp agreed it would be inappropriate for the settlement to include an additional payment to the representative plaintiff. However, Nikki Chamberlain and Shine Lawyers thought it would be justified to allow an additional payment to a representative plaintiff at settlement. Shine Lawyers noted the time and effort a representative plaintiff must spend on the litigation and said they could face public scrutiny and even abuse. It said a payment would usually be modest in comparison to the time and effort spent on the litigation and is unlikely to lead to a conflict of interest during settlement negotiations.

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<sup>51</sup> Submitters who agreed with the proposed test were: Bell Gully, Nikki Chamberlain, Insurance Council, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission). Chapman Tripp preferred a different test.

<sup>52</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>53</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Johnson & Johnson, LPF Group, Shine Lawyers and Simpson Grierson.

- 11.92 The IBA Antitrust Committee commented on the requirement for the court to consider the proposed method of distributing any settlement amounts to class members, including any unclaimed settlement amounts. It said immediate distribution of settlement funds may not be appropriate in all cases and that the lack of a distribution plan should not preclude settlement approval. Chapman Tripp did not think unclaimed settlement funds should be distributed pro rata to class members rather than the defendant.

### Legal fees and litigation funding commission

- 11.93 Eight submitters agreed the court should consider any legal fees or litigation funding commission that would be deducted from class member relief.<sup>54</sup>
- 11.94 Bell Gully said this would be part of determining the net amount that individual class members would receive and therefore whether a settlement is fair, reasonable and in the interests of the class as a whole. It would be particularly important in opt-out class actions, where class members may not have signed a legal retainer or litigation funding agreement.
- 11.95 Chapman Tripp said that, while the litigation funding commission should be a factor, settlement approval should not be denied solely on this basis. Simpson Grierson said this factor should be limited to assessing what proportion of a settlement sum would be deducted in legal fees and litigation funding commission.
- 11.96 Gilbert Walker was unclear about the relevance of a plaintiff's legal fees if the court did not have a power to adjust them. It said that, if the court has concerns about legal fees, it should be able to refer them to Te Kāhui Ture o Aotearoa | New Zealand Law Society or appoint an assessor to review them. In practice, this would encourage settlement approval applications to include evidence supporting the reasonableness of the fees claimed. Simpson Grierson said the court should not have the power to vary legal fees and noted that lawyers already have an obligation to charge a fair and reasonable fee.
- 11.97 MinterEllisonRuddWatts suggested expert costs could be subject to court scrutiny at settlement if they disproportionately reduce the return to class members.

### Potential risks, costs and benefits of continuing with the litigation

- 11.98 Six submitters agreed the court should consider any information that is readily available to the court about the potential risks, costs and benefits of continuing with the litigation.<sup>55</sup>
- 11.99 Bell Gully said this factor should not be mandatory and that it should not involve a merits assessment. Simpson Grierson said the court should be careful not to make a pre-emptive determination on any points in case the settlement was not approved.

### Views of class members

- 11.100 Seven submitters agreed the court should consider any views expressed by class members.<sup>56</sup>
- 11.101 Bell Gully did not think the court should invite the views of individual class members. It said the views expressed might be those of a vocal minority and not representative of

<sup>54</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Johnson & Johnson, LPF Group, Shine Lawyers and Simpson Grierson.

<sup>55</sup> Nikki Chamberlain, Michael Duffy, Johnson & Johnson, LPF Group, Shine Lawyers and Simpson Grierson.

<sup>56</sup> Nikki Chamberlain, Chapman Tripp, Michael Duffy, Johnson & Johnson, LPF Group, Shine Lawyers and Simpson Grierson.

the views of the class as a whole. Chapman Tripp said that, while the views of class members are important, the views of a small sub-set of the class should not prevent a settlement.

### Process by which the settlement was reached

- 11.102 Seven submitters agreed the court should consider the process by which the settlement has been reached, including whether any potential conflicts of interest have been properly managed.<sup>57</sup> Bell Gully agreed it was important to ensure a proper process was followed to avoid or mitigate conflicts of interest.
- 11.103 Chapman Tripp thought an independent evaluation of the settlement would only be necessary if there is some concern about conflicts in the process or perhaps if there is some opposition by class members.
- 11.104 Maurice Blackburn/Claims Funding Australia said this factor has a potentially expansive scope without a clear justification of the harm it is designed to protect against. It said it was unclear how this factor could be satisfied without requiring the parties to disclose privileged communications, without prejudice communications, or strategically or commercially sensitive negotiations. It suggested we clarify the factor's intended scope and purpose.
- 11.105 Simpson Grierson was less persuaded this needed to be its own factor given the views of class members must already be considered and the court will retain an ability to consider any other relevant factors.

### Other factors

- 11.106 Eight submitters agreed the court should have discretion to take into account any other factor it considers relevant.<sup>58</sup>
- 11.107 The Institute of Directors said the court should consider whether the defendant has been given a fair opportunity to access justice and defend the claim.

### Whether factors should be mandatory

- 11.108 Several submitters did not favour having a list of mandatory factors for the court to consider.<sup>59</sup> Reasons given by submitters included:
- (a) It is important for the court to have discretion and flexibility so it can appropriately balance the factors without being overly formulaic.
  - (b) The court should be able to consider any relevant factors as appropriate.
  - (c) The Australian and Canadian regimes do not have mandatory factors and there is no evidence this has resulted in poor outcomes for class members. The court could draw on the principles developed in those jurisdictions.
  - (d) If the factors are discretionary, it is less likely settlements will be challenged on the basis certain criteria were not considered or given appropriate weight.

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<sup>57</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Johnson & Johnson, LPF Group and Shine Lawyers.

<sup>58</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Johnson & Johnson, Omni Bridgeway, Shine Lawyers and Simpson Grierson.

<sup>59</sup> Maurice Blackburn/Claims Funding Australia, Omni Bridgeway (it agreed with our proposed list of factors as long as they were not exhaustive or mandatory) and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission). Some participants at our consultation workshops also suggested the factors should not be mandatory.

- 11.109 Other submitters supported setting out the factors in legislation.<sup>60</sup> Nikki Chamberlain said having a list of non-exhaustive factors the court must consider would provide the parties with some clarity and certainty. The Insurance Council said statutory factors would give the parties certainty at the outset rather than waiting for jurisprudence to develop and the factors would also be helpful for the parties when negotiating a settlement.
- 11.110 Chapman Tripp supported an approach where the court considers the factors together and is not required to conclude that every factor supports a finding of fairness. It said some factors might be given greater weight than others and ultimately it should be a discretionary exercise for the court. Similarly, Rhonson Salim (Aston University) said the court should undertake a multi-factorial balancing exercise.

### *The court's powers to vary litigation funding commissions*

- 11.111 The question of whether the court should have the power to vary a litigation funding commission when approving a settlement is part of the broader issue of the extent to which the court should have oversight of litigation funding commissions. We therefore discuss the feedback we received in response to this question in Chapter 17. We conclude the court should not have a power to vary funding commissions at settlement, except in the context of making a cost sharing order that enables the funder to receive a funding commission from class members who have not signed a funding agreement.<sup>61</sup>

## Recommendations

### 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.

<sup>60</sup> Nikki Chamberlain, Michael Duffy and Insurance Council.

<sup>61</sup> We discussed cost sharing orders in Chapter 9.

- 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.

### *Test for settlement approval*

- 11.112 We recommend the Class Actions Act should specify that the 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.<sup>62</sup> This is similar to the test we proposed in the Supplementary Issues Paper, which submitters generally agreed with. We have made a small amendment to our proposed test so it refers to “the interests of the class” rather than “the interests of the class as a whole”. We are concerned “as a whole” could be interpreted as requiring a focus on the overall relief to class members, regardless of how the settlement treats different groups of class members. We think it is important for the court to consider how the settlement allocates relief to different groups of class members and whether class members would be treated equitably.
- 11.113 We note the Ontario legislation uses a similar test, where the court will consider whether a settlement is fair, reasonable and in the best interests of the class, or sub-class members.<sup>63</sup> We have not used the “best interests of the class” standard as we think it could be too high. A settlement will necessarily involve a compromise between the parties and there will always be terms that could be more favourable to class members.
- 11.114 We have considered whether the test should expressly require the court to consider whether the settlement is fair and reasonable as between the defendant and the class, and as between class members. In the Australian Federal Court, the Court will consider these two matters when assessing whether a settlement is a fair and reasonable compromise of the claims of class members.<sup>64</sup> *Te Kōti Matua | High Court* took a similar

<sup>62</sup> Draft legislation, cl 14.

<sup>63</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 27.1(5). We discuss the tests applied in overseas jurisdictions in the Supplementary Issues Paper at [6.44]–[6.50].

<sup>64</sup> See *Prygodicz v Commonwealth of Australia (no 2)* [2021] FCA 634 at [85]; *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 at [15]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3)* [2017] FCA 330, (2017) 343 ALR 476 at [81].



approach in *Ross v Southern Response* when considering an application to approve a “settling discontinuance” of a representative action.<sup>65</sup> The test applied by the court was:<sup>66</sup>

...whether discontinuance, on the terms of the settlement, will be a fair and reasonable resolution of the plaintiffs’ claims in the interests of the members as a whole, both as between claimants and the defendant, and as between the claimants themselves.

- 11.115 We think our proposed test is broad enough for the court to consider the different dimensions of whether a settlement is fair and reasonable, and it is unnecessary for a statutory test to direct the court to carry out these two inquiries. It is also possible a settlement might not be fair, reasonable and in the interests of the class, even if it is fair as between the defendant and the class, and as between class members. An example is where the defendant has agreed to pay a substantial sum to settle each class member’s claim and class members are treated equitably in the settlement, but a large proportion will be deducted in litigation funding commission and legal fees. We think it is preferable for the overarching settlement approval test to be broad, with more specific considerations included as relevant factors.

### **Factors relevant to settlement approval test**

- 11.116 We recommend the Class Actions Act should specify the factors the court must consider when determining whether a settlement is fair, reasonable and in the interests of the class.<sup>67</sup> This will provide some certainty and clarity to litigants and is preferable to waiting for factors to develop through case law.<sup>68</sup>
- 11.117 We propose the court must consider the following factors:
- (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.

<sup>65</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497. The Court said at [61] that there was no reason to approach the approval of a “settling discontinuance” by a different standard to that applying to settlements.

<sup>66</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497 at [3] and [130].

<sup>67</sup> Draft legislation, cl 14.

<sup>68</sup> We discuss this issue in the Supplementary Issues Paper at [6.51]–[6.58].

(f) Any other factors it considers relevant.

11.118 We consider these factors should be mandatory. The court will need to consider the terms and conditions of a settlement in every case, and this should not be a discretionary factor. The other factors have some flexibility built in, such as referring to “any” views of class members and “any” legal fees or litigation funding commission that will be deducted, to recognise there may be cases where the factor is not applicable. We have also narrowed factor (e) so it no longer refers to “the process by which the settlement was reached”, which we think will lessen concerns about this factor being mandatory. We also recommend the court have discretion to take into account any other factors it considers relevant, which will allow flexibility to consider case-specific matters.

11.119 We discuss each of the factors we recommend below.

### **Terms and conditions of the settlement**

11.120 The court will need to consider the terms and conditions of a settlement to assess whether it is fair, reasonable and in the interests of the class. We envisage the proposed settlement agreement will be provided as an annexure to the representative plaintiff’s affidavit. In some jurisdictions, the parties develop a separate document outlining how the settlement will be allocated and distributed to class members, which is known as a Plan of Allocation or a Settlement Distribution Scheme.

11.121 We think the court needs to have information about how a settlement will be allocated and distributed to class members, so it can assess whether the settlement is fair as between class members and how difficult it will be for class members to obtain relief. Depending on the complexity of the arrangements, this information could be provided in the settlement agreement itself or in an appendix to the agreement.

11.122 While we anticipate some detailed or technical matters relating to settlement distribution will need to be finalised after settlement, we do not favour a process where the court approves a settlement between the parties and then separately considers how the settlement is allocated and distributed to class members.<sup>69</sup> We think it is important for the court to consider how a settlement proposes to allocate funds as between class members when assessing whether a settlement is fair, reasonable and in the interests of the class. We have slightly amended the list of sub-factors a court should consider when assessing the terms and conditions of a settlement to clarify the aspects of settlement distribution a court should consider.

### ***The type of relief to be provided to class members and the total amount of monetary relief***

11.123 A key feature of the settlement agreement will be the relief the defendant has agreed to provide to class members. This will include the total amount of any monetary relief to class members. A settlement could also include non-monetary relief.

11.124 While we do not propose limiting the types of relief that can be given to class members in a settlement, we think careful scrutiny is required in the following circumstances:<sup>70</sup>

(a) Where class members will only receive non-monetary benefits such as vouchers for the defendant’s product or discounts on future purchases.

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<sup>69</sup> In Australia, the court has separate powers to approve a settlement and make orders with respect to distribution of a settlement: Federal Court of Australia Act 1976 (Cth), s 33V(1) and 33V(2).

<sup>70</sup> We discuss these issues in the Supplementary Issues Paper at [6.64].

- (b) Where the defendant will make a payment to a charity rather than to individual class members. This type of payment should ordinarily be limited to cases where it would not be practical or possible to distribute payments to individual class members or where the cost of distribution would be disproportionate to the amount a class member would receive.<sup>71</sup>

### *How the benefits of the settlement will be allocated between class members*

11.125 We think the court should consider how the total settlement sum will be allocated to class members. Some settlements may have a formula or ratio to determine the proportion of a settlement that will go to different groups of class members. An example of this is in *Re Strahl*, where there was an agreement to settle a representative action brought by a group of investors.<sup>72</sup> A distribution methodology was developed that classified investors as Class A or Class B (with Class A claims seen as having a greater likelihood of success) and weighted the net settlement proceeds on a 75/25 per cent basis among the two groups.

### *Whether class members are treated equitably in relation to each other*

11.126 We think the court should consider whether class members are treated equitably in relation to each other, to ensure the interests of one group of class members have not been overlooked in favour of another. This should not prevent principled distinctions between class members, such as where one group of class members would be more likely to succeed in establishing liability or a higher quantum of loss if the matter proceeded to trial. In *Re Strahl*, the Court rejected the argument that anything other than a pro rata distribution would be unreasonable, noting that if the claims of one set of group members had less prospect of success than those of other group members, this would typically be reflected in the agreed settlement sum.<sup>73</sup> However, it considered the 75/25 per cent weighting should be adjusted to 67/33 per cent.<sup>74</sup>

11.127 We consider that a settlement should not include an additional lump sum payment to the representative plaintiff to compensate them for their role in the litigation. In Chapter 3, we concluded the representative plaintiff should be eligible to be paid for their role during the litigation. We think this is preferable to a payment as part of a settlement because of the risk it could cause a representative plaintiff to agree to a settlement that is not in the interests of the class.<sup>75</sup>

### *The proposed method of determining individual class member entitlements*

11.128 We think the court should consider how class member entitlements will be determined, for example whether:

- (a) Each class member will receive a fixed amount.
- (b) A formula will be developed to calculate individual entitlements.

<sup>71</sup> This is in line with our recommendations on when a court should be able to award aggregate monetary relief to be paid on an alternative distribution basis, which we discuss in Chapter 10.

<sup>72</sup> *Re Strahl* [2021] NZHC 3608.

<sup>73</sup> *Re Strahl* [2021] NZHC 3608 at [63].

<sup>74</sup> *Re Strahl* [2021] NZHC 3608 at [86]. We note this was an application to approve a proposed methodology for the distribution of settlement funds, rather than an application to approve the settlement with the defendant.

<sup>75</sup> We discuss this issue in the Supplementary Issues Paper at [6.66]–[6.67].

- (c) There will be a process of individual assessment, such as by a settlement administrator.

11.129 We do not think the court needs to consider all the technical details of the process. However, the court should have information about which of these approaches will be taken. Along with the next sub-factor, this will impact on how many class members will ultimately receive a benefit from the settlement.

***Any steps a class member must take to benefit from the settlement***

11.130 We think the court should consider what an individual class member would need to do to receive a benefit from the settlement, including:

- (a) Whether the defendant will pay class members directly or whether a class member would need to submit an individual claim.
- (b) Where an individual claim is required, what kind of information a class member would need to provide.
- (c) The proposed time period for submitting an individual claim.

11.131 We acknowledge some details of the individual claims process may need to be worked out after the settlement is approved, but we think the court should have some general information as to the proposed process. We see this as relevant because it will affect how many class members actually receive a benefit from the settlement. A claims process that is complex for individual class members and has a short time frame for claiming may result in few class members submitting a claim. We also think close court scrutiny would be required where a complex claiming procedure is coupled with a proposal to return unclaimed funds to the defendant.

11.132 When considering this factor, the court could also compare the likely process that would be involved if the claim proceeded to trial. For example, a complex claiming procedure may not count against settlement approval if a similar procedure would be necessary to establish an entitlement to damages because of the nature of the claim.

***The proposed method of dealing with any unclaimed settlement amounts***

11.133 We think the court should consider how the settlement proposes to deal with any unclaimed settlement funds. Options include:<sup>76</sup>

- (a) Returning the money to the defendant.
- (b) Distributing the money pro rata amongst class members who filed claims.
- (c) Giving the money to a charity whose activities are related to the claim.

11.134 We do not recommend 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. If only a small proportion of class members claim compensation, it may be appropriate for the court to consider whether any additional steps are desirable before unclaimed funds are distributed, such as further notice to class members. This could be done using the power we propose for the court to make any orders it considers appropriate for the administration and implementation of the settlement, which we discuss later in this chapter.

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<sup>76</sup> See Supplementary Issues Paper at [6.75]–[6.78].

### Legal fees and litigation funding commission

- 11.135 When the court is considering whether a settlement is fair, reasonable and in the interests of the class, we think it is relevant to consider the net amount class members will receive. Therefore, we think the court should consider any legal fees or litigation funding commission that will be deducted from the relief payable to class members. 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. As discussed in the Issues Paper, our conception of access to justice is broader than simply access to the courts.<sup>77</sup> We do not think a very small net payment to class members can automatically be equated with access to justice on the basis that ‘something is better than nothing’.
- 11.136 We do not see it as the court’s role to approve or vary legal fees as part of settlement approval. The situation is different in jurisdictions where class action lawyers act on a contingency fee basis and may be entitled to a percentage of the settlement sum. In Aotearoa New Zealand, lawyers have an obligation to only charge a fee that is fair and reasonable for the services provided.<sup>78</sup> Rather we think the court’s role should be to consider whether a settlement, which includes a particular payment of legal fees, is fair and reasonable.
- 11.137 In Chapter 9 we recommend the court should be able to vary a litigation funding commission at settlement when it has granted certain cost sharing orders. It is necessary for the court to have this power where a cost sharing order allows the litigation funder to receive a funding commission from class members who have not signed a funding agreement with it.
- 11.138 We also recommend in Chapter 17 that a litigation funding agreement in a class action is only enforceable by a funder if it is approved by the court. As part of this, we recommend the court consider whether the funding commission is fair and reasonable in light of various factors. These factors include the estimated total amount of relief claimed, the number of people likely to be entitled to a share of any relief, and the estimated costs, complexity and duration of the case. In addition, we suggest the court should consider how the estimated returns to the funder will accommodate variation in those factors, such as variation between the estimated and actual costs of the litigation. In other words, the court may approve a range of funding commissions that will apply in different scenarios.
- 11.139 At settlement approval, we anticipate the court would consider whether the funding commission is appropriate given the rate or range it initially approved. If the court considers the proposed deductions are not in line with what it originally approved, the court could determine that the settlement is not fair, reasonable and in the interests of the class, and decline to approve it.

### Potential risks, costs and benefits of continuing with the proceeding

- 11.140 When the court is considering whether to approve a proposed settlement, we think it is relevant to compare the outcome for class members with the range of possible outcomes if the litigation were to continue. This will include:

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<sup>77</sup> See Chapter 5 of the Issues Paper.

<sup>78</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

- (a) Comparing the amount that class members can receive in the settlement with the range of amounts they could be awarded if their claim was successful.
  - (b) Considering the risks of proceeding to trial (or appeal) and the likelihood that class members will be unsuccessful in obtaining relief.
  - (c) How long it might take to resolve the proceedings through litigation and whether this could cause any particular disadvantage (such as where class members are elderly or unwell and there is a risk they will be unable to give evidence).
  - (d) The costs of continuing with the litigation and the impact for class members in terms of the funding commission that would be deducted from any relief.
- 11.141 We do not think the court should conduct a preliminary merits assessment of the case or predetermine any points. Rather, the court's consideration should be primarily based on information filed by the parties, such as an assessment by an independent lawyer engaged by the parties. As noted earlier in this chapter, it is likely that some of this information will need to be provided on a confidential basis to avoid prejudicing the parties. If the court declines to approve the settlement and the matter goes to hearing, it is likely to be appropriate for a different judge to hear the matter. However, this is ultimately a matter of judicial resourcing and we do not make any recommendations on this matter. We also think this situation will rarely arise. In Australia, there are relatively few reported examples of a court declining to approve a settlement.<sup>79</sup> Where settlement approval is declined, the court will identify the area(s) of concern, which may lead to the parties reconsidering the settlement to address the issues of concern and resubmitting an application for settlement approval.<sup>80</sup>

### Views of class members

- 11.142 Earlier in this chapter we recommend class members should have the ability to object to a settlement. We think the court should take any views of class members into account when considering a settlement. This does not mean the views of a small group of objectors will inevitably derail the entire settlement. In fact, the experience of other jurisdictions indicates it is rare for a class member objection to result in the court declining to approve a settlement.<sup>81</sup> Ultimately it will depend on the nature and validity of the objection and the number of class members who object.
- 11.143 The court could also take into consideration the lack of any objections, although in some cases this might simply reflect barriers to objecting rather than support for the settlement. It will also be relevant to consider any class member expressions of support for the settlement.<sup>82</sup>

### Any steps taken to manage potential conflicts of interest

- 11.144 As noted above, we have amended this factor so it does not require the court to consider the process by which the settlement was reached. It now focuses on any steps taken to

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<sup>79</sup> Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (3rd ed, Thomson Reuters, Sydney, 2022) at [19.840].

<sup>80</sup> For example, see *Courtney v Medtel Pty Ltd (No 6)* [2004] FCA 1598, (2002) 122 FCR 168 and *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1877.

<sup>81</sup> See Supplementary Issues Paper at [6.35].

<sup>82</sup> Earlier in this chapter we suggest the representative plaintiff could be responsible for collating expressions of support and conveying them to the court.

manage potential conflicts of interest. We think this factor is much more specific and will not require the parties to provide information on the entire settlement process.

- 11.145 It will be up to parties as to the information they provide to support this factor. The type of information will depend on the nature of any potential conflicts of interest and how they were managed. Steps taken by the parties could include obtaining an independent valuation of the settlement or independent legal advice.

### *Court's powers when approving a settlement*

- 11.146 We think the court should either approve or decline to approve the proposed settlement. It should not be able to rewrite the terms of a settlement agreement. If the court has concerns about a proposed settlement that prevents it from approving the agreement, it can record those concerns in its decision declining to approve the settlement. The parties can then decide whether to renegotiate the agreement to address those concerns and resubmit an application for settlement approval. We do not think the court should be able to vary the litigation funding commission that will apply to a settlement, except when there is a cost sharing order in place.<sup>83</sup>
- 11.147 If the court decides to approve a settlement, it will need to make a formal order. In Australia, the court usually specifically approves the documents that make up the settlement (such as the deed of settlement, settlement scheme or settlement agreement).<sup>84</sup> Australian courts also frequently make orders identifying the parties who will be bound by the settlement and stating that the applicant has the authority to bind class members to the settlement.<sup>85</sup>
- 11.148 We think it is desirable to have clarity on which class members are bound by a settlement. For example, the settlement may only apply to class members who have claims against a particular defendant or who are part of a sub-class. We recommend the Class Actions Act specify that if the court approves a settlement, it must describe which class members are bound by the settlement.<sup>86</sup> The Act should also 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.<sup>87</sup>
- 11.149 The court may need to make other orders with respect to settlement approval, such as:
- (a) An order appointing a settlement administrator (which we discuss later in this chapter).
  - (b) Further confidentiality orders.
- 11.150 We envisage the representative plaintiff will file an application for leave to discontinue the class action when filing the settlement outcome report. The court will then need to make an order granting leave to discontinue the class action. We discuss discontinuance at the end of this chapter.

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<sup>83</sup> We discuss cost sharing orders in Chapter 9.

<sup>84</sup> Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (3rd ed, Thomson Reuters, Sydney, 2022) at [19.790].

<sup>85</sup> Damian Grave, Ken Adams and Jason Betts *Class Actions in Australia* (3rd ed, Thomson Reuters, Sydney, 2022) at [19.790].

<sup>86</sup> Draft legislation, cl 15(1)(c).

<sup>87</sup> Draft legislation, cl 15(2).



## FINALISING THE CLASS FOR SETTLEMENT

11.151 In this section we discuss:

- (a) Converting an opt-out class action to opt-in for the purposes of settlement.
- (b) Whether class members should have an ability to opt out of a settlement.
- (c) Whether other potential class members should be able to opt in for settlement.
- (d) Certification for the purposes of settlement.

### Converting a class action to opt-in for settlement

11.152 In the Supplementary Issues Paper, we noted that in an opt-out class action, the identity of many class members and the circumstances of their claims will likely be unknown. This could 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. We noted that in Australia, parties have managed this issue by seeking a class closure order from the court.<sup>88</sup>

11.153 We proposed a 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.<sup>89</sup> This 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 class members and a sufficient opportunity to opt in. A class member who did not opt in at settlement would not be eligible to receive the proceeds of settlement, but we did not think they should be bound by the terms of the settlement either.

11.154 We asked submitters whether the court should have a power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement.

### Results of consultation

11.155 We received 12 submissions on this issue.<sup>90</sup>

11.156 Eight submitters agreed a representative plaintiff should be able to seek an order to convert an opt-out class action to opt-in for the purposes of settlement.<sup>91</sup> Several submitters indicated giving the parties certainty around class size could help to facilitate settlement.

11.157 Some submitters commented on when such an order might be appropriate. Bell Gully said an order should not be available as of right and it should be assessed on a case-by-case basis. It said either the parties could agree to it, or the court could make an order on the application of either party if it determined it was in the interests of justice. Simpson

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<sup>88</sup> Supplementary Issues Paper at [6.101]–[6.102].

<sup>89</sup> Supplementary Issues Paper at [6.105]–[6.106].

<sup>90</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>91</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson and Tom Weston QC. In addition Shine Lawyers supported a “soft class closure” order, that would operate for a specified period. It said class members who did not register or opt out should still enjoy the benefit of a ceased limitation period (until the settlement was approved) and they should continue to be class members if the matter does not settle within the specified period.



Grierson said the power should be subject to the views of the parties and the court should consider the individual circumstances of the case.

- 11.158 Several submitters discussed what should happen if the court granted an order to convert a class action to opt-in for the purposes of settlement and some class members did not opt in. Chapman Tripp commented that a key factor driving settlement from a defendant's perspective would be avoiding further litigation and the proposed power would be of limited benefit if class members who did not opt in would not be bound. Tom Weston QC thought class members who did not opt in at settlement should still be bound by the outcome and said a defendant should have the benefit of certainty. However, Shine Lawyers said class members should not be bound by the settlement if they did not register to participate.
- 11.159 Shine Lawyers said that, if the settlement is not reached, the class should be opened again. Simpson Grierson thought the parties should be consulted on whether the case should go back to opt-out.
- 11.160 Gilbert Walker expressed some reservations about a power to convert an opt-out class action to opt-in for the purposes of settlement. It said that, if this power were routinely exercised, it would undermine the rationale for allowing opt-out class actions in the first place. The better solution would be for such cases to be commenced as opt-in. It said if the court was empowered to make an order to convert an opt-out class action to opt-in, it was hard to see why only the plaintiff could apply for such an order.

### *Our view*

- 11.161 We have concluded a class actions regime should not include a power to convert an opt-out class action to an opt-in class action for the purposes of facilitating settlement. We are not convinced that the benefits of having such a power will outweigh the disadvantages.
- 11.162 By certifying a class action on an opt-out basis, the court has concluded that opt-out is an appropriate means of determining class membership in the circumstances of the case. Converting a case to opt-in for settlement is likely to result in a much smaller group of class members benefitting from the class action, which means the benefits of certifying the case as an opt-out class action cannot be fully realised. If it is clear at the outset that it will be practically difficult or impossible to settle a class action on an opt-out basis, it may be desirable for the proceeding to be brought as an opt-in class action. Class closure orders may be more appropriate in Australia, where the class actions regimes do not strictly provide for opt-in class actions.<sup>92</sup>
- 11.163 Complex issues may arise if an opt-out class action can convert to opt-in for settlement. If a settlement is not reached and the case proceeds to hearing, there is a question as to whether the case should remain as opt-in (which means a smaller class benefitting from the judgment) or revert back to opt-out (which could cause confusion and complexity). Another issue is the impact on limitation periods of converting an opt-out class action to opt-in for settlement, particularly if there is the possibility of a case reverting back to opt-out.

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<sup>92</sup> Class closure orders and closed class descriptions have been developed as ways of getting around this issue. See Issues Paper at [12.50a] and Supplementary Issues Paper at [6.102]–[6.104].

- 11.164 We think a power to convert a case to opt-in for settlement may be of limited benefit to defendants because the settlement would only bind those who have opted in. We remain of the view it would be unfair if class members who did not respond to the opt-in notice were bound by the settlement but could not receive any benefits from it. We think a defendant may have greater finality from an opt-out settlement, which binds all class members. While this still carries the risk that a class member will be bound by the settlement without receiving any benefits (because they fail to take the necessary steps, such as filing a claim with a settlement administrator), we envisage the settlement claims period would be longer than any opt-in period. Later in this chapter we also recommend the court should be able to order additional notice to class members if settlement take-up rates are low.
- 11.165 There may be other ways of obtaining sufficient information about the class to enable a settlement to be reached. If the parties agree to a mediation or negotiation process, it is also possible the representative plaintiff will volunteer to provide the defendant with information about class member claims to facilitate settlement. Information could also be obtained through an order for class member discovery, which we discussed in Chapter 8.

### Opting out of settlement

- 11.166 In the Supplementary Issues Paper, we proposed class members should be given an opportunity to opt out of the class action at settlement so they can decide whether they prefer to settle their claim or preserve the ability to bring their own proceedings. We said a settlement may occur a long time after the initial opportunity to opt into or out of the class action, and matters may have changed considerably since then. We suggested the opt-out date should be after the settlement is approved.<sup>93</sup>
- 11.167 We asked submitters whether class members should be able to opt out of a class action settlement once approved.

### Results of consultation

- 11.168 We received 13 submissions on this question.<sup>94</sup>
- 11.169 None of these submitters supported a right for class members to opt out at settlement.<sup>95</sup> Twelve submitters disagreed with allowing class members to opt out of a settlement, with some indicating they were strongly opposed to our proposal.<sup>96</sup> Gilbert Walker said that, in some cases, it may be reasonable for a class member to opt out of an approved settlement, but this should not be available as of right. We discuss the key concerns raised by submitters below.

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<sup>93</sup> Supplementary Issues Paper at [6.110]–[6.115].

<sup>94</sup> Bell Gully, Chapman Tripp, Gilbert Walker, GCA Lawyers, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Nicole Smith. (We note that while we received separate submissions from Maurice Blackburn and Maurice Blackburn/Claims Funding Australia, they make the same points on this question. For simplicity, where we discuss reasons provided by submitters, we have referred to Maurice Blackburn/Claims Funding Australia).

<sup>95</sup> Although we note that two other submitters implicitly agreed with the right to opt-out in their submissions on the notice of approved settlement.

<sup>96</sup> Bell Gully, Chapman Tripp, GCA Lawyers, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Nicole Smith.

- 11.170 Several submitters said allowing class members to opt out of a settlement would undermine the efficiencies gained through certifying a proceeding as a class action. It could also increase the burden on the court because of interlocutory disputes (arising from an in-principle settlement being affected by a decreased class size) or because it means a class action is not settled and must go to hearing.
- 11.171 Some submitters said protecting the interests of class members did not require a second opportunity to opt out and pointed to other measures that exist:
- (a) The original opt-out process, which is designed to allow class members to make an informed and voluntary decision about whether to participate in a class action.
  - (b) The court's role in ensuring the settlement agreement is fair, reasonable and in the interests of the class.
  - (c) Class members can object to a settlement and seek leave to appeal.
- 11.172 Submitters also noted the unfairness that could result if class members could opt out at settlement. Comments made by submitters included:
- (a) It would allow class members to 'free ride'.
  - (b) It would give class members undue protection against the risks of litigation at the expense of the defendant.
  - (c) It would prejudice the interests of all parties and undermine the certainty and finality of settlements.
  - (d) Class members who take advantage of a collective process should be bound by it.
  - (e) By the time a settlement is reached, the parties will have spent significant time, effort and expense on the basis of the known parameters of the class.
  - (f) Class members are not able to opt out after a judgment.
  - (g) Where a settlement is only with some defendants, an opportunity to opt out could create chaos and unfairness.
- 11.173 Some submitters said the risk of class members opting out would cause difficulties in negotiating settlements:
- (a) It would create considerable uncertainty about the class size while the parties are negotiating settlement, which may impede, discourage or delay settlements.
  - (b) It might drive down aggregate monetary relief because of the difficulty in meaningfully assessing aggregate loss during negotiations.
  - (c) Settlement should be negotiated based on the dispute being fully and finally resolved for class members.
  - (d) It is likely to result in conditional settlements, based on the number of opt-outs, which may have significant costs consequences for the parties and the court.
- 11.174 Submitters also pointed to litigation funding difficulties that would arise if class members could opt out of a settlement:
- (a) It may allow class members to avoid contributing to the costs of the proceeding.
  - (b) It could lead to inconsistencies with a class member's contractual obligations under a litigation funding agreement.
  - (c) It would undermine the certainty that an effective litigation funding market requires.
  - (d) The funder needs to know who will be bound by a settlement at the outset.

- (e) It could undermine commercial calculations that founded the decision to support the class action and impact the viability of the claim for funders.
- 11.175 Several submitters addressed what should happen if a class actions regime did allow class members to opt out of a settlement. Gilbert Walker said it should require the leave of the court so that any prejudice to other parties could be taken into account. It also said it should trigger a right for the defendant to reconsider whether they wish to proceed with the settlement. Bell Gully said the amount of a settlement ought to be adjusted down proportionately. Chapman Tripp said an ability to opt out should only be available in exceptional circumstances, such as in an opt-out class action where the class member can demonstrate they were not aware of the class action. It should not be available in opt-in class actions.
- 11.176 Some participants at our consultation workshops also expressed concern about class members being able to opt out of a settlement. It was suggested this could create a “free rider problem” and that it may be preferable to allow class members a narrow right of appeal instead.

### Recommendation

**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.

- 11.177 We have reflected on the feedback we received on this issue and do not recommend a class actions regime provide a general right for class members to opt out of a settlement. We agree this could cause significant uncertainty and prevent class actions from being settled. Because legal fees and litigation funding commissions are usually recovered as a percentage of a class member’s settlement or damages award, it could allow class members to benefit from the work carried out on their behalf without having to contribute to the costs.<sup>97</sup> The risk of class members opting out of a settlement might deter litigation funding of class actions. While it could be in the interests of individual class members to allow a right to opt out, we accept this is outweighed by the potential impacts for the class as a whole, the parties and the ability to obtain litigation funding.
- 11.178 We also acknowledge the other safeguards that are provided for class members in the class actions regime we recommend. The initial opt-in or opt-out notice can advise class members that they will be bound by a settlement or judgment if they are part of the class action. The representative plaintiff will need to consider whether the proposed settlement is in what they believe to be the best interests of the class when agreeing to it. Class members can object to a proposed settlement. The court will also consider whether a settlement is fair, reasonable and in the interests of the class.

<sup>97</sup> It may be more straightforward for the class member to bring or settle their own individual claim because of the development of the claims through the class action. In some cases, a settlement has been reached after the court’s decision on common issues.

11.179 While we do not recommend a right for all class members to opt out of a settlement, we think the Class Actions Act should specify a court may order a class member can opt out where this is permitted by the terms of the settlement agreement.<sup>98</sup> In Australia, it appears open to the parties to negotiate an opportunity for class members to opt out.<sup>99</sup> In Ontario, there is a case where the parties agreed to give class members an opportunity to opt out of the settlement as more than eight years had passed since the proceedings began.<sup>100</sup> There may be circumstances where the parties think it would be desirable to provide a right to opt out, such as:

- (a) Where there is a small group of class members who are very opposed to the settlement. Allowing them to opt out might increase the chances of the settlement being approved or avoid the risk of class members having an ongoing sense of grievance about being bound to the settlement.
- (b) Where the settlement is reached on a per individual basis rather than global sum basis, so it is not necessary to determine an aggregate amount when negotiating the settlement.

11.180 We also think the Class Actions Act should specify the court may order specific class members should be given an opportunity to opt out, where the interests of justice require it.<sup>101</sup> We envisage this would be limited to cases where real unfairness could arise if a particular class member was required to be bound by a settlement. An example might be an opt-out class action where a class member can show they did not receive notice of the class action and would suffer some particular prejudice if they could not opt out, or a class member may have lacked sufficient capacity to make the decision to opt out and will be prejudiced by having to settle their claim. In one Australian case, the court granted a limited second opt-out right to 680 class members who had formally objected to the settlement on fairness grounds. The case related to unlawful debt collection by a government agency, which many objectors said had profoundly negative and damaging effects on them.<sup>102</sup>

11.181 In addition, where a settlement is reached prior to the initial opt-out notice, the potential class members will effectively be given an opportunity to opt out of the settlement. We discuss settlement prior to certification later in this chapter.

### Allowing other potential class members to opt in at settlement

11.182 In the Supplementary Issues Paper, we suggested other potential class members could be given an opportunity to opt in at settlement, but we did not think this should be required. We did not consider there was any unfairness in excluding someone from a settlement who had decided not to be part of the class action at an earlier stage. However, there could be cases where a defendant would want a settlement to bind the

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<sup>98</sup> Draft legislation, cl 15(1)(a)(i).

<sup>99</sup> See *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”.

<sup>100</sup> *Robertson v ProQuest Information and Learning LLC* 2011 ONSC 2629 at [25]. The parties also agreed the defendant could unilaterally terminate the settlement if more than 300 class members opted out.

<sup>101</sup> Draft legislation, cl 15(1)(a)(ii).

<sup>102</sup> *Prygodicz v Commonwealth of Australia* [2021] FCA 634 at [255] and [260].

widest group possible and so would seek to provide an additional opportunity for potential class members to opt into a class action at settlement.<sup>103</sup>

- 11.183 We asked submitters whether other potential class members should have an opportunity to opt in at settlement.

### *Results of consultation*

- 11.184 We received 11 submissions on this question.<sup>104</sup>

- 11.185 Three submitters agreed with allowing additional class members to opt in at settlement.<sup>105</sup> Bell Gully said this may be desirable in some cases so the settlement can bind the widest group possible and minimise the risk of further litigation on the issue. Similarly, Chapman Tripp said this could create efficiencies by helping to avoid further litigation. It said the process for opting in would need to be efficient, particularly if settlement is attempted mid-way through trial.

- 11.186 Johnson & Johnson and Simpson Grierson said there should only be an additional opt-in opportunity if the defendant consents.

- 11.187 Four submitters disagreed with allowing an opportunity for other class members to opt into a settlement.<sup>106</sup> Reasons for this included:

- (a) It will undermine the finality and certainty of a settlement.
- (b) There will be uncertainty as to who will be bound by the settlement.
- (c) It will undermine the ability to negotiate meaningful and binding settlements.
- (d) An increase in the class size might cause the settlement to fall over or significantly diminish the returns of other class members.
- (e) It will deter individuals from joining the class action at the beginning, since they could wait and see if there is a settlement.
- (f) It will undermine the certainty an effective litigation funding market requires.

- 11.188 Gilbert Walker said such a power is probably unnecessary since a defendant can always choose to extend the settlement to other potential class members if they wish.

### *Recommendation*

#### **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.

<sup>103</sup> Supplementary Issues Paper at [6.117].

<sup>104</sup> Bell Gully, Chapman Tripp, GCA Lawyers, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson and Nicole Smith.

<sup>105</sup> Bell Gully, Chapman Tripp and Insurance Council.

<sup>106</sup> GCA Lawyers, Maurice Blackburn, Maurice Blackburn/Claims Funding Australia and Omni Bridgeway.

- 11.189 We do not recommend a general right for other potential class members to opt in at settlement. Potential class members will have been given an opportunity to participate in the class action through the initial opt-in or opt-out process. If a class member has chosen not to opt into the class action, or has opted out, we do not think they should have a right to reverse their initial decision. The potential for the class size to expand once the settlement has been approved could inhibit settlement.
- 11.190 However, there may be circumstances where the parties wish to provide an opportunity for additional persons to opt in, so the settlement can bind the widest group possible and provide finality to the parties. We think the Class Actions Act should enable a potential class member to opt into a settlement where this is permitted by the settlement agreement.<sup>107</sup>
- 11.191 We also recommend the Class Actions Act specify the court may order a potential class member to be given an opportunity to opt into a settlement where the interests of justice require it.<sup>108</sup> We think it would be relatively rare for this situation to arise. One example might be where the person did not understand the opt-in or opt-out form, mistakenly thought they were part of the class action and turned down an individual settlement offer on this basis.
- 11.192 Where a settlement is reached prior to the initial opt-in notice, potential class members will effectively be given an opportunity to opt into the settlement. We discuss settlement prior to certification in the next section.

### Process for settlements reached prior to certification

- 11.193 In some cases, the parties will agree to settle a proceeding before it is certified as a class action. In the Supplementary Issues Paper, we proposed the court should still be required to approve settlements in such cases.<sup>109</sup> We said there would need to be a process for certifying or approving the class for settlement, so it is clear who the settlement is binding on.<sup>110</sup>
- 11.194 We proposed the court should decide whether to certify the class for the purposes of settlement. The court could apply the usual certification test with any necessary modifications. For example, the court would not need to consider whether the likely time and cost of a class action would be proportionate to the remedies sought. A hearing may be required to determine whether a class action can be certified for the purposes of settlement, although we envisaged this would be shorter than a normal certification hearing as a defendant would likely consent to certification for this purpose.<sup>111</sup>
- 11.195 We asked submitters whether, in cases where settlement is reached prior to certification, the court should consider whether to certify the proceeding for the purposes of settlement.

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<sup>107</sup> Draft legislation, cl 15(1)(b)(i).

<sup>108</sup> Draft legislation, cl 15(1)(b)(ii).

<sup>109</sup> Supplementary Issues Paper at [6.7]–[6.8].

<sup>110</sup> Supplementary Issues Paper at [6.118].

<sup>111</sup> Supplementary Issues Paper at [6.122].

## Results of consultation

- 11.196 We received eight submissions on this question.<sup>112</sup>
- 11.197 Five submitters agreed the court should consider whether to certify a proceeding for the purposes of settlement.<sup>113</sup> Bell Gully noted this would help to ensure the class and claims subject to the settlement are adequately defined. Simpson Grierson suggested we adopt the Canadian approach where certification is assessed against less rigorous criteria. Chapman Tripp said the opt-in date should be prior to the settlement approval hearing and class members should not then be able to opt out after approval.
- 11.198 Two submitters disagreed with the court certifying a proceeding for the purposes of settlement. Omni Bridgeway said this would be superfluous and unnecessarily costly. Similarly, Maurice Blackburn/Claims Funding Australia said it would result in significant and avoidable additional costs for the parties in preparing for a hearing on both certification and settlement. It would also be inconsistent with the objective of obtaining the just, speedy and inexpensive determination of proceedings. In addition, it would be practically difficult for the court to consider some of the certification criteria while also resolving the dispute, such as considering whether the statement of claim discloses a reasonably arguable cause of action.
- 11.199 Nicole Smith was unsure whether the court should be involved, commenting that as a class has not been formed, a settlement would not prevent others from bringing a claim.

## Recommendation

### 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.

- 11.200 In ordinary litigation, a group of plaintiffs and a defendant are free to agree to a settlement at an early stage of litigation. A class action is unusual because the parties seek to bind class members to the settlement. When a class action proceeding has been commenced but not yet certified, the class has not been formed and the scope of the class is unclear. For a settlement to be binding on class members, the court needs to consider whether a class can be certified and the scope of that class. There also needs to be an opt-in or opt-out process to allow class membership to be determined.

<sup>112</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson and Nicole Smith.

<sup>113</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson and Simpson Grierson.



- 11.201 If settlement of a class action proceeding is reached prior to certification the proposed representative plaintiff will need to file an application for approval of the settlement.<sup>114</sup> In Chapter 17 we also recommend that, if settlement occurs prior to certification, the representative plaintiff should seek court approval of any litigation funding agreement at the same time as it applies for settlement approval.
- 11.202 Before considering the application for settlement approval, we recommend the court should consider whether to certify the class action for the purposes of settlement. The court should apply the certification test, with any necessary modifications. For example, it is unlikely to be relevant to consider whether a class action proceeding is an appropriate procedure for the efficient resolution of class member claims. Whether the statement of claim discloses a reasonably arguable cause of action is also likely to be less relevant, although it could prevent the court from certifying and approving the settlement of a claim that is so meritless that it is an abuse of the court's processes. We envisage a hearing may not be necessary, given the defendant will have consented to certification for the purposes of settlement.
- 11.203 If the court considers the proceeding meets the requirements of the certification test (with any necessary modifications), it will need to certify the proceeding and appoint a representative plaintiff for the purposes of settlement. We anticipate the court would approve a single notice to class members which would advise of the proposed settlement and provide an opportunity to opt in or opt out. The court could then proceed to consider the application for approval of the settlement.

## SETTLEMENT ADMINISTRATION AND IMPLEMENTATION

- 11.204 Once a settlement is approved by the court, the terms and conditions of the settlement will need to be implemented, including paying any sums to class members. In this section we discuss:
- (a) Court oversight of settlement.
  - (b) Appointment of a settlement administrator.
  - (c) Requirements for reporting on the outcome of the settlement process.

### Court oversight of settlement

- 11.205 In the Supplementary Issues Paper, we proposed the court should supervise the administration and implementation of the settlement. This would allow the court to ensure class member interests are protected and respond to any issues that arise.<sup>115</sup> We envisaged the court's supervisory role would vary depending on the case.<sup>116</sup>
- 11.206 We also said the court should have the power to make any orders it considers appropriate with respect to the administration and implementation of a settlement. For example, if only a small proportion of class members claimed compensation under the

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<sup>114</sup> Earlier in this chapter, we recommended that a settlement reached prior to certification requires court approval in order to be binding.

<sup>115</sup> Supplementary Issues Paper at [6.128].

<sup>116</sup> Supplementary Issues Paper at [6.130].

settlement, the court could order further steps to be taken such as more extensive notice or extending the claims period.<sup>117</sup>

- 11.207 We asked submitters whether the court should supervise the administration and implementation of a class action settlement.

### *Results of consultation*

- 11.208 We received 11 submissions on this issue.<sup>118</sup>

- 11.209 Eight submitters agreed the court should supervise the administration and implementation of settlement.<sup>119</sup> The Insurance Council said this is essential to ensure the ongoing protection of class member interests.

- 11.210 Shine Lawyers noted many issues arise during settlement administration that may not have been provided for under the settlement scheme (such as unexpected costs or delays). To ensure the court's continued supervision, it suggested the class action should not be dismissed until the settlement scheme has been administered.

- 11.211 Three submitters thought court supervision of administration and implementation should not be required in all cases. Bell Gully said court supervision will be appropriate in some cases, such as where there are highly individualised loss assessments. In other cases, ongoing supervision may be unnecessary and inefficient. When the court decides whether to approve a settlement, it should also decide its ongoing supervisory role (if any). Chapman Tripp said requiring the court to supervise administration and implementation of a settlement could be a significant drain on court resources. It said that, if the parties require assistance from the court, they should be able to seek further orders as needed. Omni Bridgeway said the court should not be actively involved in monitoring the administration of a settlement, but it should be able to hear and resolve any disputes that arise in relation to administration.

- 11.212 Maurice Blackburn/Claims Funding Australia commented on our proposed power for the court to make "any other orders it considers appropriate for the administration and implementation of the settlement". They contrasted this with the Australian provisions allowing the court to make "such orders as are just" with respect to distribution. They suggested the term "just" is preferable as it allows for consideration of the broader interests of justice, while "appropriate" invokes a more pragmatic analysis.

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<sup>117</sup> Supplementary Issues Paper at [6.129].

<sup>118</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Rhonson Salim, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>119</sup> Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Rhonson Salim, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

## Recommendation

**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.

11.213 We recommend the Class Actions Act specify that the court retains jurisdiction to oversee the administration and implementation of a class action settlement, as part of its ongoing role to protect the interests of class members.<sup>120</sup> The court's role in overseeing settlement administration and implementation will differ according to the case. In some cases, the court's role might be limited to ensuring a settlement outcome report is filed.<sup>121</sup> In other cases, the court may need to take steps such as requiring further notice to class members or requiring further steps to be taken before unclaimed funds are distributed. In the Supplementary Issues Paper, we suggested the court should be required to "supervise" administration and implementation. However, on reflection, we consider it is preferable to refer to the court retaining jurisdiction to oversee the administration and implementation of a settlement. In some cases, administration and implementation will be straightforward and the court will not need to supervise the process.

11.214 To allow the court to carry out this oversight role, we consider the Class Actions Act should specify the court may make any orders it considers appropriate for the administration and implementation of the settlement.<sup>122</sup> We see this power as serving a slightly different function to the Australian power to "make such orders as are just" with respect to distribution.<sup>123</sup> While the Australian provision enables the court to approve a settlement distribution scheme, we think it is preferable for the court to approve key aspects of distribution as part of its power to approve a settlement. Our proposed power to make orders for the administration and implementation of the settlement will involve more technical matters and so we think the standard of "appropriate" is suitable.

11.215 Earlier in this chapter, we suggested a court would not make an order discontinuing a class action until settlement implementation has been completed. This is to ensure the court retains jurisdiction throughout this process.

## Appointment of a settlement administrator

11.216 In the Supplementary Issues Paper, we suggested that, in some cases, it would be appropriate to appoint an administrator to carry out the process of assessing individual claims and arranging payment to class members. This would not always be necessary, such as where the defendant can pay class members directly without a claim being

<sup>120</sup> Draft legislation, cl 16(1).

<sup>121</sup> We discuss settlement outcome reports later in this chapter.

<sup>122</sup> Draft legislation, cl 16(3).

<sup>123</sup> Federal Court of Australia Act 1976 (Cth), s 33V(2).

required. We said settlement administration needs to be carried out in a way that is accurate, efficient and cost-effective.<sup>124</sup>

- 11.217 We proposed a power for the court to appoint a settlement administrator but did not think this should be mandatory. We suggested the role could be performed by a range of people, including a barrister, accountant or corporate trustee. In some cases, the court might consider it appropriate for the plaintiff's law firm to fulfil the role. We envisaged the parties would propose an administrator and the court would consider whether that person is suitable for the role.
- 11.218 We asked submitters whether the court should have a power to appoint a settlement administrator and who would be appropriate to fulfil that role.

### *Results of consultation*

- 11.219 We received nine submissions on this issue, with all submitters agreeing the court should have a power to appoint a settlement administrator in appropriate cases.<sup>125</sup>
- 11.220 Suggestions on who would be appropriate to fulfil the role included:
- (a) Someone who is independent of the parties.<sup>126</sup>
  - (b) An independent person who is not a lawyer.<sup>127</sup>
  - (c) An entity with technical or subject matter expertise.<sup>128</sup>
  - (d) An accounting firm or claims consultant, where the process involves calculation and reviewing forms or supporting documents.<sup>129</sup>
  - (e) A barrister or arbitrator, where it is necessary to triage or assess claims.<sup>130</sup>
  - (f) The law firm engaged by the representative plaintiff.<sup>131</sup> Shine Lawyers said this will have knowledge of the litigation, may be the most efficient, and can provide consistency to class members.
- 11.221 Some submitters commented that it would depend on the nature of the settlement and the circumstances as to who would be appropriate for the role and suggested the court should have discretion. Simpson Grierson suggested the parties could agree on an administrator or alternatively submit candidates to the court for consideration.
- 11.222 Chapman Tripp and Omni Bridgeway said the appointment of any administrator could be considered at the same time as the application for approval of a settlement.

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<sup>124</sup> Supplementary Issues Paper at [6.131]–[6.132].

<sup>125</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>126</sup> Bell Gully, Chapman Tripp, Omni Bridgeway and Shine Lawyers (it said a third-party administrator may be appropriate where the role merely involves providing a payment to class members).

<sup>127</sup> Johnson & Johnson. In addition, the Insurance Council commented it should not be necessary for an administrator to have a legal qualification.

<sup>128</sup> Maurice Blackburn/Claims Funding Australia.

<sup>129</sup> Nicole Smith.

<sup>130</sup> Nicole Smith.

<sup>131</sup> Omni Bridgeway, Maurice Blackburn/Claims Funding Australia and Shine Lawyers. However, Bell Gully said the representative plaintiff's law firm should not fulfil the role.

## Recommendation

**R95**

The Class Actions Act should specify that the court may appoint a person as an administrator to implement the settlement.

11.223 We recommend the Class Actions Act should specify that the court may appoint a person as an administrator to implement the settlement.<sup>132</sup> The court should have discretion as to whether to appoint an administrator and who should fulfil the role. We think a range of people could fulfil the role and the appropriate person will depend on the circumstances of the case. In some cases, the administrator may need sufficient expertise to assess and categorise individual claims. In other cases, the role might be limited to receiving forms and arranging payment. Ideally the parties would agree on an administrator and the court would decide whether to approve the appointment. We envisage a settlement administrator would generally be appointed in cases where the parties have proposed this, with the settlement agreement providing how the costs of this would be met. We do not think the court should have to meet the costs of a settlement administrator.

## Settlement outcome reports

11.224 In the Supplementary Issues Paper, we said 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 would improve the transparency, monitoring and evaluation of settlements and enable the court to develop its expertise regarding the effectiveness of settlement distribution procedures.<sup>133</sup>

11.225 We proposed the court should be provided with a settlement outcome report within 60 days of the settlement implementation process being completed. This could be filed by the settlement administrator or by the parties if the court had not appointed an administrator. We outlined a list of information that could be provided in the report.

11.226 We suggested it would be desirable for settlement outcome reports to be made available to class members as well as the wider public. This would help to foster transparency and provide valuable public policy information on the extent to which class actions enable substantive access to justice and allow potential issues for reform to be identified. While we recognised that settlements are usually confidential in ordinary civil litigation, there are differences in class actions that make it appropriate to have settlement outcomes made publicly available.

11.227 We asked submitters whether there should be an obligation to provide a settlement outcome report to the court and whether this should be made publicly available.

<sup>132</sup> Draft legislation, cl 16(2).

<sup>133</sup> Supplementary Issues Paper at [6.136]–[6.141].

## Results of consultation

- 11.228 We received 11 submissions on this question.<sup>134</sup> There were 10 submitters who agreed there should be an obligation to provide a settlement outcome report to the court.<sup>135</sup> Bell Gully said this is consistent with the court's supervisory role. Nicole Smith said it will be particularly important if there are leftover funds to be distributed by the court. Chapman Tripp said it did not oppose settlement outcome reports being provided to the court but cautioned against a report in one case being used for settlement approval in another case, as settlements are fact-specific.
- 11.229 Maurice Blackburn/Claims Funding Australia raised several questions about how the process would work, including the level of detail required in a report, the effect on the litigation and settlement if a reporting question is not sufficiently answered, and whether the 60-day deadline could be extended.
- 11.230 Several submitters supported reports being publicly available, with some saying this should be subject to any confidentiality orders imposed by the court.<sup>136</sup> Bell Gully acknowledged there may be circumstances where it is beneficial to make the report public but said it should be determined on a case-by-case basis and there should not be a presumption in favour of reports being publicly available. Maurice Blackburn/Claims Funding Australia said reports should be available by making a request to the court registry.
- 11.231 Gilbert Walker thought public reporting should only be at a general statistical level and said default publication of settlement amounts could have a chilling effect on settlements.
- 11.232 Simpson Grierson did not think settlement outcome reports should be made public. It said the ability to resolve a claim on a commercially confidential basis is often a driver in reaching a settlement and defendants may be less willing to settle if settlement terms are made public. The Insurance Council said the settlement amount and amounts paid to lawyers should remain confidential. It said the risk of a class member disclosing this information is not the same as a publicly distributed report setting out detailed settlement figures. However, in the interests of transparency, the percentages deducted by the funder and lawyer could be disclosed, along with the percentage received by class members.

## Recommendations

### 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).

<sup>134</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>135</sup> Bell Gully, Nikki Chamberlain, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson and Nicole Smith.

<sup>136</sup> Nikki Chamberlain (subject to any confidentiality orders), Johnson & Johnson, Omni Bridgeway and Shine Lawyers (subject to any confidentiality orders).

**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.

11.233 In the Issues Paper, we noted there is limited evidence on the extent to which class members achieve compensation or other forms of substantive justice through participating in a class action.<sup>137</sup> We think it will be practically difficult to assess whether a class actions regime is meeting the objective of improving access to justice without having information on the outcome of settlements. We therefore recommend the Class Actions Act require the settlement administrator or the parties (as appropriate) to file a settlement outcome report within 60 days of the settlement implementation process being completed, or at a later time if allowed by the court.<sup>138</sup>

11.234 We recommend the Rules Committee should consider developing a High Court Rule on the contents of the settlement outcome report. We think there should be a degree of flexibility, as some information may not be available to a settlement administrator. For example, the rule could require the report to provide the best information available on:

- (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).

<sup>137</sup> Issues Paper at [5.24]–[5.25].

<sup>138</sup> Draft legislation, cl 16(4).

- (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 lawyers.
  - (j) The amount of unclaimed funds and how this was distributed.
- 11.235 We think settlement outcome reports should be made available to class members and to the wider public. We recommend the Ministry of Justice should make settlement outcome reports available on the class actions webpage of the Courts of New Zealand website, subject to any confidentiality orders made by the court. While we recognise that settlements are often confidential in ordinary civil litigation, there are differences in class actions that make it appropriate to have information on settlement outcomes made publicly available:
- (a) The settlement process is less private and confidential. Class action settlements must be approved by the court, unlike ordinary civil litigation. In addition, a potentially large number of class members will have information about the settlement terms.
  - (b) There is a 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. Settlement outcome reports might also identify issues requiring law reform.
  - (c) It is important to provide procedural access to justice for class members.<sup>139</sup> Transparency about settlement outcomes will help to achieve that.
  - (d) A class action settlement may include deductions in legal fees, litigation funding commission and other costs in circumstances where class members did not expressly sign up to a legal retainer or funding agreement. Transparency may help to facilitate a competitive litigation funding market. There is also a broader public interest in knowing the extent to which litigation funding achieves its access to justice objective.
- 11.236 We anticipate the court could make confidentiality orders with respect to a settlement outcome report, where it considers this is appropriate. Even where confidentiality is necessary in a particular case, it may not be necessary to make the entire report confidential. For example, the total settlement figure could be confidential but information about class member payments could be made available in bands. To the extent possible, we think settlement outcome reports should be made publicly available.

## SETTLEMENT OF INDIVIDUAL CLAIMS

- 11.237 In this section we discuss the following issues relating to individual settlements:
- (a) Defendant communications with individual class members about settlements.
  - (b) When individual settlements could effectively dispose of the class action.
  - (c) When the representative plaintiff may settle their individual claim.

### Defendant communications about settlement

- 11.238 The defendant may want to contact class members directly about settling their individual claims. In the Supplementary Issues Paper, we proposed that after certification, any

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<sup>139</sup> We discuss this aspect of access to justice in the Issues Paper at [5.22].



individual settlement communications to class members from a defendant should be reviewed by the court. We said there is a risk that the defendant may seek to unfairly settle a claim quickly and cheaply with uninformed class members during the opt-in/opt-out period. If the opt-in/opt-out notice required court approval, we thought it was fair for the court's supervisory power to attach to communications of a similar nature between the defendant and the class. We anticipated the court's role would be to check the communication properly characterises the class action and is not otherwise unfair or misleading.<sup>140</sup>

- 11.239 We asked submitters whether the court should review defendant communications with class members about individual settlements after certification.

### *Results of consultation*

- 11.240 We received 11 submissions on this issue.<sup>141</sup>

- 11.241 Three submitters agreed the court should be required to review defendant communications about individual settlements.<sup>142</sup> Nicole Smith said defendants should not be able to “pick off and settle” what they consider to be the stronger or higher value claims. Maurice Blackburn/Claims Funding Australia said court oversight and supervision is needed because of the unique nature of class actions, and the potential prejudice to individual class members and the class as a whole if individual settlements are not reviewed.

- 11.242 Five submitters did not think the court should review defendant communications about individual settlements.<sup>143</sup> Bell Gully said this was unnecessary and would restrict the rights defendants would have in any other proceeding. Gilbert Walker said requiring court review of every communication with actual or potential class members is unnecessary and could be unduly burdensome. It said class members should be as free as any other litigant to take an earlier offer of compromise if they wish to do so. If the court is to have a role in reviewing defendant communications, it thought this should be limited to ensuring they are not misleading and said the court should not decide for class members that they should not receive or accept an offer. Simpson Grierson said that, if the lawyer was regarded as lawyer for the class, it was unnecessary for the court to review any settlement communications between the defendant and individual class members, but it thought the court would still need to approve any final resolution.

- 11.243 Some submitters thought a preferable option is to require a defendant to disclose any individual settlement offer to the representative plaintiff's solicitor, who could then advise on the offer or seek court intervention if necessary.<sup>144</sup> Johnson & Johnson and Shine

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<sup>140</sup> Supplementary Issues Paper at [3.66]–[3.70].

<sup>141</sup> Bell Gully, Chapman Tripp, Gilbert Walker, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Vince Morabito, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

<sup>142</sup> Chapman Tripp, Maurice Blackburn/Claims Funding Australia and Nicole Smith. Shine Lawyers supported court supervision and/or a communications protocol. In addition, Vince Morabito referred us to his article on judicial supervision of individual settlements with class members: Vince Morabito “Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States” (2003) 38 Tex Int'l LJ 663 at 723–727.

<sup>143</sup> Bell Gully, Gilbert Walker, Johnson & Johnson, Simpson Grierson and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>144</sup> Gilbert Walker and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

Lawyers suggested the court could establish a protocol for defendant communications with class members.<sup>145</sup> The Insurance Council thought the issue should be considered by the court at certification but cautioned against court review of communications becoming an onerous or time-consuming process.

### Recommendation

**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.

- 11.244 It is unlikely that a class member could individually settle their claim with the defendant once they have decided to opt into the class action, or they have not opted out by required date. This is because their claims will be determined as part of the class action and an individual settlement could not lead to a full and final settlement of the individual class member's claim.<sup>146</sup>
- 11.245 Therefore, it will generally be necessary for any individual settlements with a class member to be concluded during the opt-in/opt-out period, while they are deciding whether to participate in the class action. Class members should be free to settle their individual claim during this period if they wish. The issue is how a defendant may communicate with individual class members about settlement. In Chapter 7, we recommend that after certification, a defendant's lawyer must direct class member communications to the lawyer for the class. This is because the lawyer is representing the class as a whole and the no-contact rule applies.<sup>147</sup> This rule does not apply to the defendant itself.
- 11.246 While we originally proposed the court should have to approve communications about settlement between the defendant and individual class members, we now think this approach may be unworkable. The defendant may have different approaches to settlement for different groups of class members, which could require the court to review multiple settlement communications. This could be inefficient and burdensome for the court. It may also be inappropriate for the court to be aware of the terms of a settlement the defendant is prepared to offer while the litigation is ongoing.
- 11.247 We do not see the court's role as approving individual settlements with potential class members. Rather, the court's role should be to ensure a defendant's communications will not mislead or confuse potential class members. We therefore think it is sufficient to recommend the Class Actions Act specify that any defendant communication with a potential class member about settlement of their individual claim must include a statement about the class action that has been approved by the court. The defendant could bring a single application to have this text approved. Ideally this would occur at the same time as

<sup>145</sup> Johnson & Johnson thought the process on communications with class members outlined in Part 11 of the *Class Actions Practice Note* (Federal Court of Australia, Practice Note GPN-CA, December 2019) was appropriate.

<sup>146</sup> Unless the court made an order allowing the class member an additional opportunity to opt out of the class action. In Chapter 8 we recommend such an order should only be granted where the interests of justice require it.

<sup>147</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.4.

the court approves the opt-in or opt-out notice, to ensure the two communications are aligned and will not confuse class members.<sup>148</sup>

### Where individual settlements could dispose of the proceeding

11.248 We have identified an additional issue relating to individual settlements. If the defendant enters into individual settlement agreements with a significant number of class members after certification, this could effectively dispose of the proceeding. It would be undesirable if individual settlements could be used to avoid the settlement approval provisions we recommend. In Australia, courts have suggested the settlement approval provision might apply where individual settlements are reached with all class members.<sup>149</sup>

### Recommendation

**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.

11.249 We recommend the Class Actions Act should specify that, once a class action is certified, the defendant must seek court approval when there is a realistic prospect that individual settlements will effectively dispose of the class action. This could occur where settlements are reached with virtually all class members, or where the number of settlements means there is a risk of the class action no longer meeting the certification test (and the defendant seeking decertification). In particular, if the post-settlement class size is very small, it could mean a class action is no longer an appropriate procedure for the efficient resolution of class member claims.

11.250 When approval is sought for a large number of individual settlements, we consider the court should apply the settlement approval test with any necessary modifications. For example, it is unlikely to be necessary to consider the proposed method of dealing with unclaimed funds.

11.251 We do not think it is necessary for a defendant to seek approval for individual settlements that are reached prior to certification, even if reached with the entire proposed class. At this point, there is no class action to dispose of, only a proposed class action.

11.252 While we have recommended that court approval should be required of a class action settlement reached pre-certification, this is necessary because individual class members are not parties to the agreement. Court approval is necessary to determine whether a settlement is in the interest of class members who have not agreed to the settlement but will be bound by it. The court also needs to determine certification for the purposes of

<sup>148</sup> We note that in *Ross v Southern Response*, the Court made decisions on the contents of the opt-out notice and defendant communications with class members at the same time: see *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453.

<sup>149</sup> See *King v AG Australia Holdings Ltd* [2002] FCA 872, (2002) 121 FCR 480 at [42]; *Courtney v Medtel Pty Ltd* [2002] FCA 957, (2002) 122 FCR 168 at [45]; *Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927 at [16].

settlement so it is clear who will be bound by the agreement. The same rationale does not apply to an individual settlement, which is agreed to by the potential class member and will only bind the parties to the agreement.

### Settling the representative plaintiff's claim

- 11.253 Another issue we have identified is whether the representative plaintiff should be allowed to settle their individual claim. In Australia, a representative plaintiff may settle their individual claim at any stage of the proceeding with the leave of the court.<sup>150</sup> The UK Competition Appeal Tribunal Rules allow a representative plaintiff to settle their individual claim in an opt-in class action, but not in an opt-out class action.<sup>151</sup>
- 11.254 We think it would be problematic for a representative plaintiff to settle their individual claim, as the proceeding will have been certified on the basis of a particular representative plaintiff being suitable and able to fairly and adequately represent the class. If the representative plaintiff seeks to withdraw from the role, there is a risk of the class action being decertified. This means a defendant may have an incentive to settle the representative plaintiff's individual claim, potentially on more favourable terms than it would be willing to settle with other class members. This can create a conflict of interest because the representative plaintiff is required to act in what they believe to be the best interests of the class.

### Recommendation

**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.

- 11.255 We recommend 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.<sup>152</sup> The court would need to consider whether there is another suitable person who can replace them as representative plaintiff. If the court grants the person leave to withdraw as representative plaintiff, we think the person would become an ordinary class member. They should then have the same ability to settle their individual claim as other class members. This means they can settle their individual claim and withdraw from the class action prior to the close of the opt-in/opt-out date. After this point, they can only opt out of the class action with the leave of the court, which we have said should be limited to circumstances where the interests of justice require it. We think it would be unfair if the representative plaintiff had a greater opportunity to settle their individual claim than other class members given their role is to act in what they believe to be the best interests of the class.

<sup>150</sup> Federal Court of Australia Act (Cth), s 33W(1).

<sup>151</sup> The Competition Appeal Tribunal Rules 2015 (UK), rr 86 and 94(1).

<sup>152</sup> In Chapter 6 we recommend the court should only allow a representative plaintiff to withdraw from the role with the leave of the court.

## COURT APPROVAL OF DISCONTINUANCE OF A CLASS ACTION

- 11.256 In the Supplementary Issues Paper, we proposed court approval should be required to discontinue both opt-in and opt-out class actions, as this will bring the proceedings to an end for class members. We thought there should be a separate provision requiring approval of a discontinuance because our proposed settlement provisions included detailed procedures that would not be applicable.<sup>153</sup>
- 11.257 We asked submitters whether the court should be required to approve the discontinuance of a class action.

### Results of consultation

- 11.258 We received ten submissions on this question, with all submitters agreeing court approval of discontinuance should be required.<sup>154</sup> Several submitters noted that a decision to discontinue a class action will affect all class members and that approval should be required as with settlement.
- 11.259 Maurice Blackburn/Claims Funding Australia discussed the test that should apply to discontinuance and noted Australian courts had taken two different approaches to this test. It suggested our proposed settlement test could apply to discontinuance, without the list of factors. It also noted the legal consequence of discontinuance is materially distinct to that of a settlement. Discontinuance is a unilateral act that does not bind the class members for the purpose of extinguishing rights but merely puts them back in their original position.

### Recommendations

#### 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.

- 11.260 We recommend the Class Actions Act should specify that a representative plaintiff must obtain court approval to discontinue a class action. This is because the discontinuance will bring the proceeding to an end for class members. In both Australia and Canada, court

<sup>153</sup> Supplementary Issues Paper at [6.10].

<sup>154</sup> Bell Gully, Chapman Tripp, Insurance Council, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Nicole Smith.

approval is required to discontinue a class action.<sup>155</sup> Leave is also required to discontinue a representative action in Aotearoa New Zealand, at least in opt-out proceedings.<sup>156</sup>

- 11.261 We have considered what the appropriate test for discontinuance should be. In Australia, one line of cases has considered whether the proposed discontinuance is fair and reasonable and in the interests of class members as a whole.<sup>157</sup> Other cases have considered whether the proposed discontinuance is unfair, unreasonable or adverse to the interests of class members.<sup>158</sup> The latter approach has been described as considering whether class members will be disadvantaged by a discontinuance, rather than whether it will be positively in their interests.<sup>159</sup> In Ontario, the court's key concern when considering an application to discontinue a class action is whether the interests of class members will be prejudiced or whether any prejudice is mitigated. A discontinuance does not have to be beneficial or in the best interests of class members.<sup>160</sup>
- 11.262 The effect of a unilateral discontinuance of a class action is different to an agreed settlement of a class action. As summarised in one Australian case, when a class action is unilaterally discontinued:<sup>161</sup>
- (a) Class members will be free to commence a new proceeding against the same defendant if they wish.
  - (b) There is no agreement compromising the proceeding and so no merger of class members' rights.
  - (c) If there has not been a judicial determination, there will be no *res judicata* or issue estoppel.
- 11.263 The legal consequences of a settlement will be more significant for class members than discontinuance, as it will be binding on class members and will bar them from bringing their own proceedings against the defendant on the same cause of action.<sup>162</sup>
- 11.264 The practical implications of the court declining to approve the application may also differ. Where the parties are seeking to have a settlement agreement approved, the alternative will usually involve the parties continuing with the litigation and proceeding to a hearing. Where the representative plaintiff applies to discontinue the class action, it may be practically unable to continue with the litigation, perhaps because it no longer has sufficient resources. Therefore, the alternative may be for the proceedings to be abandoned.
- 11.265 Because of these differences, we do not think the settlement test we recommend should apply to a discontinuance. The representative plaintiff should not have to demonstrate that discontinuing the class action will be positively in the interests of class members. We

<sup>155</sup> See Federal Court of Australia Act 1976 (Cth), s 33V(1) and Class Proceedings Act SO 1992 c 6 (Ontario), s 29(1).

<sup>156</sup> *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [83].

<sup>157</sup> *Mercedes Holdings Pty v Waters (No 1)* [2010] FCA 124, (2010) 77 ACSR 265 at [10]. See also *Wotton v Queensland* [2009] FCA 534, (2009) 109 ALD 534 at [37]–[40].

<sup>158</sup> *Laine v Thiess Ptd Ltd* [2016] VSC 689 at [34]; *Babsco Ptd Ltd v Pitcher Partners* [2020] FCA 1610, (2020) 148 ACSR 551 at [3], [29]; *Markovic v Unified Security Group (Australia) Pty Ltd* [2021] VSC 840 at [11].

<sup>159</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497 at [55].

<sup>160</sup> See *Johnson v North American Palladium Ltd* 2021 ONSC 3346 at [15].

<sup>161</sup> See *Babsco Ptd Ltd v Pitcher Partners* [2020] FCA 1610, (2020) 148 ACSR 551 at [22]. This is referred to in *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497 at [54].

<sup>162</sup> See *Babsco Ptd Ltd v Pitcher Partners* [2020] FCA 1610, (2020) 148 ACSR 551 at [23].

think this would be too high a threshold. In many cases it will be in class members' interests for the class action to continue, but this may not align with realities such as an inability to continue funding the litigation. Instead, we think the absence of disadvantage to class members is the relevant consideration, in line with the Ontario approach and some of the Australian authorities.<sup>163</sup> We recommend the court consider whether discontinuing a class action would prejudice the interests of class members. If a discontinuance would prejudice the interests of class members, the court could make orders to protect the interests of class members. For example, if the discontinuance is due to lack of funding, the court might grant a stay of proceedings to see if alternative funding could be arranged. Alternatively, it could order further notice to class members to provide them with information on the consequences of the class action being discontinued and the options open to them.

- 11.266 We consider the discontinuance test should apply when a class action is being discontinued without any agreement that would have the effect of extinguishing class member claims.
- 11.267 We recommend the Class Actions Act should specify that the settlement approval provisions apply where there is an agreement between the representative plaintiff and one or more defendants that has the effect of extinguishing some or all class member claims. A settlement of a class action will not necessarily extinguish all class member claims. In a case with multiple defendants, a settlement may be reached with only some class members. A settlement could also be reached with a sub-class.
- 11.268 A settlement agreement will generally have a term requiring the class action to be discontinued. We do not consider the court would need to separately apply the discontinuance test given it has already determined the settlement is fair, reasonable and in the interests of the class.<sup>164</sup>

## DRAFT SETTLEMENT PROVISIONS

- 11.269 Below we set out draft legislative provisions that could give effect to our recommendations on settlement.

### 12 Settlement of class action

- (1) The settlement of a class action proceeding is not binding unless approved by a court.
- (2) An application for approval of a settlement must be made by the representative plaintiff or proposed representative plaintiff if the application is made prior to certification.

<sup>163</sup> We prefer the approach followed in authorities such as *Laine v Thiess Ptd Ltd* [2016] VSC 689 to the approach in *Mercedes Holdings Pty v Waters (No 1)* (2010) [2010] FCA 124, 77 ACSR 265.

<sup>164</sup> In *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 3497 at [46] and [61], the court distinguished between a "unilateral discontinuance" and a "settling discontinuance".

### 13 Settlement application before certification of proceeding

- (1) This section applies if an application for approval of a settlement is made before the certification of a class action proceeding.
- (2) Before considering that application, the court must consider whether the proceeding meets the requirements of **section 4** (with any necessary modifications), and if the court considers the application does so, for the purposes of settlement it must—
  - (a) certify the proceeding as a class action proceeding; and
  - (b) appoint 1 or more representative plaintiffs.

### 14 Approval of settlement

The court must approve the settlement if it is satisfied that the settlement is fair, reasonable, and in the interests of the class, and when making that assessment the court must consider—

- (a) the terms and conditions of the proposed settlement, including—
  - (i) the type of relief that will be provided to class members, and if this includes monetary relief, the total amount of that monetary relief; and
  - (ii) how the benefits of the settlement will be allocated as between class members; and
  - (iii) whether class members are treated equitably in relation to each other; and
  - (iv) the proposed method of determining the entitlement of individual class members; and
  - (v) any steps a class member must take to benefit from the settlement; and
  - (vi) the proposed method of dealing with any unclaimed settlement amounts; and
- (b) any legal fees and funding commission 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) any steps taken to manage potential conflicts of interest; and
- (f) any other factors it considers relevant.



## 15 Steps following approval of settlement

- (1) If the court approves a settlement under **section 14**, it—
  - (a) may order that a class member may opt out of the settlement, but only if—
    - (i) opting out is permitted by the terms of the settlement agreement; or
    - (ii) the court considers that the interests of justice require that 1 or more class members be given the opportunity to opt out of the settlement; and
  - (b) may order that a person who was eligible to become a class member but did not do so (an **eligible person**) may opt in to the settlement, but only if—
    - (i) opting in is permitted by the terms of the settlement agreement; or
    - (ii) the court considers that the interests of justice require that 1 or more eligible persons be given the opportunity to opt in to the settlement; and
  - (c) must describe which class members will be bound by the settlement.
- (2) A settlement is binding on the parties to the settlement and all class members described by the court under **subsection (1)(c)** on and from the date of the court order approving the settlement.

## 16 Administration and implementation of settlement

- (1) The court retains the jurisdiction to oversee the administration and implementation of a settlement it approves under **section 14**.
- (2) The court may appoint a person as an administrator to implement the settlement.
- (3) The court may make any other order it considers appropriate for the administration and implementation of the settlement.
- (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 implementation of the settlement within 60 days of the implementation process being completed or at a later time if allowed by the court.

## 17 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 assess whether a settlement is fair, reasonable, and in the interests of the class.
  - (2) The court may order that 1 or more of the parties pay part or all of the costs of the counsel or expert.
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## CHAPTER 12

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# Adverse costs in class actions

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## INTRODUCTION

12.1 In this chapter, we discuss:

- (a) Whether the adverse costs rule should apply in class actions.
- (b) Costs liability for certification.
- (c) Calculating costs in class actions.
- (d) Class member liability for costs.

## THE ADVERSE COSTS RULE

12.2 A general principle of civil litigation in Aotearoa New Zealand is that the unsuccessful party must pay costs to the successful party in a proceeding or interlocutory proceeding, which we refer to as adverse costs.<sup>1</sup> In the Issues Paper we discussed whether this rule should also apply to class actions.

12.3 We noted that other jurisdictions have taken different approaches to this issue:<sup>2</sup>

- (a) Australia applies an adverse costs rule in civil litigation, including in relation to its class actions regimes.
- (b) A ‘no costs’ rule applies to class actions in the United States, meaning the successful party is generally not entitled to claim costs from the unsuccessful party.
- (c) The Canadian jurisdictions have taken different approaches, with several provinces (including Ontario) retaining an adverse costs rule for class actions and other provinces (including British Columbia) adopting a no costs rule.
- (d) While the United Kingdom (UK) Competition Appeal Tribunal Rules do not specify that the unsuccessful party must pay adverse costs, the Tribunal has taken the approach that this should be its starting point.

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<sup>1</sup> High Court Rules 2016, r 14.2(1)(a).

<sup>2</sup> Issues Paper at [13.5]–[13.8].

- 12.4 In overseas class actions regimes where adverse costs are payable, it is the representative plaintiff who is liable for any costs award rather than class members.<sup>3</sup> Similarly, in cases under rule 4.24 of the High Court Rules 2016 (HCR), the courts have said it is the representative plaintiff who has costs liability and individual group members are generally not exposed to the risk of an adverse costs order.<sup>4</sup>
- 12.5 An adverse costs rule can have the benefits of compensating successful litigants for some of their costs, encouraging parties to settle, discouraging frivolous or vexatious claims and discouraging inappropriate litigation behaviour.<sup>5</sup> However, having to bear the risk of adverse costs creates a significant financial disincentive to taking on the role of representative plaintiff and may deter class actions. It might also affect litigation decisions, such as a plaintiff deciding not to pursue certain interlocutory applications or abandoning an appeal in exchange for the defendant not pursuing costs. While in other jurisdictions a representative plaintiff generally obtains an indemnity for adverse costs (such as from a litigation funder, law firm, after-the-event insurer or public fund), this comes at a cost to the class in the form of an increased fee or share of damages being paid to the indemnifier.
- 12.6 In the Issues Paper, we said if the adverse costs rule applies to class actions, the representative plaintiff may be required to provide security for those costs. We also noted the issue of whether a class member could be required to contribute to security for costs.<sup>6</sup>
- 12.7 The Issues Paper identified several alternatives to, or variations on, the adverse costs rule for class actions:<sup>7</sup>
- (a) A no costs rule, where the successful party is generally not entitled to claim costs from the unsuccessful party. This could be subject to limited exceptions.
  - (b) A no costs rule for certain stages of the proceeding, such as certification.
  - (c) A one-way costs shifting rule, where the defendant but not the plaintiff is liable for adverse costs if they are unsuccessful.
  - (d) A different costs scale for class actions, or a power for the court to set a maximum costs level.
  - (e) Specifying considerations that a court may take into account when determining costs in a class action.
- 12.8 We also noted that a public class action fund could provide an indemnity for adverse costs to representative plaintiffs.<sup>8</sup> We discuss this option in Chapter 18.

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<sup>3</sup> Issues Paper at [13.10].

<sup>4</sup> Issues Paper at [13.9].

<sup>5</sup> Issues Paper at [13.13]–[13.14].

<sup>6</sup> Issues Paper at [13.35]–[13.36]. Security for costs in Te Kōti Matua | High Court is governed by the High Court Rules 2016, r 5.45. Security may be awarded where it is just, and either the plaintiff is not resident or incorporated in Aotearoa New Zealand, or there is reason to believe they would be unable to pay the defendant's costs if unsuccessful. A security for costs order gives the defendant some protection against the risk a plaintiff will not meet an adverse costs order. We discuss security for costs in funded proceedings in Chapter 15.

<sup>7</sup> Issues Paper at [13.19]–[13.30].

<sup>8</sup> Issues Paper at [13.31]–[13.34].

- 12.9 We asked submitters how the risk of adverse costs had impacted on representative actions. We also asked if the adverse costs rules should be retained for class actions or whether reform is desirable.

## Results of Consultation

### *Adverse costs in representative actions*

- 12.10 Nine submissions discussed how the risk of adverse costs has impacted on representative actions.<sup>9</sup> Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said the risk of adverse costs may have deterred meritless representative actions from being pursued. Tom Weston QC said adverse costs have created a fair balance between plaintiffs and defendants. Bell Gully and Simpson Grierson did not think the risk of adverse costs has impacted on cases to date, because most have been backed by litigation funders that have provided a costs indemnity.<sup>10</sup>
- 12.11 LPF Group and Omni Bridgeway considered the adverse costs rule had negative effects for representative actions by making it difficult to bring cases.<sup>11</sup> Nevertheless, Omni Bridgeway supported retaining the adverse costs rule for class actions as it deterred frivolous or meritless cases.
- 12.12 The results of our survey of group members in representative actions indicates that the lack of group member liability for adverse costs is seen as a benefit of this form of litigation over individual proceedings.<sup>12</sup> However, Meredith Connell referred to prospective group members declining to opt into a representative action because of concern about potential costs exposure, even where the representative plaintiff had obtained an adverse costs indemnity.

### *Adverse costs in class actions*

- 12.13 Thirteen submitters favoured retaining the adverse costs rule for all stages of class actions.<sup>13</sup> Reasons given by submitters included:
- (a) Adverse costs discourage frivolous, vexatious and speculative claims. They also encourage plaintiffs to assess the merits of their claim before proceeding.
  - (b) Adverse costs discourage inappropriate litigation behaviour.

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<sup>9</sup> Bell Gully, Tony Ellis, Insurance Council, LPF Group, Meredith Connell, Omni Bridgeway, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>10</sup> Although Simpson Grierson commented that there may be a small number of marginal cases where the risk of adverse costs dissuades a class from bringing an action.

<sup>11</sup> In addition, Tony Ellis referred to litigants not bringing ordinary litigation because of the risk of adverse costs. He also referred to the difficulty in continuing with a case when there was a settlement offer on the table, because rejecting a Calderbank offer could lead to increased costs.

<sup>12</sup> We asked participants who would not have brought their own individual proceeding what the reasons were for that, with respondents able to select multiple options. The most popular response was 'too expensive' (with 334 people selecting this option) and the second most popular response was 'risk of having to pay defendant's legal costs' (192 people selected this option). A total of 409 people answered our survey.

<sup>13</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Carter Holt Harvey, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Insurance Counsel, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

- (c) There is no principled basis to treat class actions differently from any other kind of civil proceeding.
  - (d) The risk of adverse costs can encourage parties to settle.
  - (e) Awarding adverse costs enables successful litigants to be compensated for some of their costs.
  - (f) Adverse costs ensure the parties are treated equally and fairly, particularly compared to a one-way costs rule.
  - (g) A defendant has no choice about whether they are part of litigation and is not necessarily more able to pay costs than a plaintiff.
- 12.14 Some of the submitters who supported adverse costs also thought some reforms to costs rules were desirable, to reflect the special nature of class actions. Several submitters supported a new scale of costs for class actions, to reflect their size and the increased time it takes to complete each step.<sup>14</sup> Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland) and Maurice Blackburn/Claims Funding Australia supported having factors the court could consider when deciding whether to award adverse costs. In addition, the Insurance Council considered that an exception to adverse costs could apply for public law class actions that involve non-monetary claims. Carter Holt Harvey suggested that in funded class actions, the funder should be directly liable for costs on a full indemnity for reasonable costs basis. In addition, Bell Gully supported the court being able to make a costs order against a litigation funder.
- 12.15 Several submitters identified ways of mitigating the impact of adverse costs on a representative plaintiff, including:
- (a) The ability to access litigation funding or after-the-event insurance.<sup>15</sup>
  - (b) Requiring litigation funding agreements to contain a complete costs indemnity for the representative plaintiff.<sup>16</sup>
  - (c) A ‘group costs order’ as in Victoria, where a lawyer acting on a contingency fee basis is liable for adverse costs.<sup>17</sup>
  - (d) A public class action fund that could indemnify representative plaintiffs.<sup>18</sup>
- 12.16 There were several submissions addressing security for costs.<sup>19</sup> Nikki Chamberlain said class members should not be liable for security for costs as they have no obligation to pay adverse costs and no control over the proceeding. Other submitters referred to the importance of security for costs for protecting defendants. Submitters also provided feedback on security for costs in funded proceedings in response to a separate question, which we discuss in Chapter 15.
- 12.17 Associate Professor Barry Allan (Te Whare Wānanga o Otāgo | University of Otago) preferred having no costs for certification, but adverse costs applying after this. Nicole Smith supported having no adverse costs at the initial stage of the proceedings (until

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<sup>14</sup> Bell Gully, Nikki Chamberlain, Chapman Tripp and Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand.

<sup>15</sup> Association of Litigation Funders of Australia.

<sup>16</sup> Bell Gully.

<sup>17</sup> Maurice Blackburn/Claims Funding Australia.

<sup>18</sup> Nikki Chamberlain, Tony Ellis and Maurice Blackburn/Claims Funding Australia.

<sup>19</sup> Bell Gully, Nikki Chamberlain, Simpson Grierson and Tom Weston QC.

court review of arrangements). Three submitters supported a no costs regime, including because adverse costs could deter vulnerable groups from bringing class actions.<sup>20</sup>

12.18 Although the Supplementary Issues Paper did not ask any specific questions relating to adverse costs in class actions, several submitters made suggestions on costs, including:

- (a) Having a separate costs regime or provision for increases to existing scale costs for class actions.<sup>21</sup>
- (b) Capping costs in class actions.<sup>22</sup>
- (c) Requiring the plaintiff to acknowledge they are aware of and understand their costs obligations before the substantive proceeding commences.<sup>23</sup>
- (d) An express legislative power for a court to make a public interest costs order, which could involve no costs, lower costs or a cap on costs payable by unsuccessful representative plaintiffs.<sup>24</sup>
- (e) Costs in concurrent class actions being addressed.<sup>25</sup>

12.19 Issues relating to costs were also raised by several consultation workshop participants, including:

- (a) Suggesting there should be a cap on the costs that could be claimed.
- (b) Commenting that personal costs liability is a disincentive to taking on the role of representative plaintiff.
- (c) Proposing that a class actions regime should specify that class members are generally not liable for costs (although other participants thought this was unnecessary).

## Recommendation

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

12.20 We consider the adverse costs rule should apply to class actions. We acknowledge the risk of adverse costs may be a barrier to litigants wanting to commence a class action. However, we are not convinced that removing an adverse costs rule is likely to make it feasible to bring a wider range of class action cases in Aotearoa New Zealand. This is because potential claimants would still need to have a means of paying for legal fees and disbursements. We think this, rather than the risk of adverse costs, is likely to be the more significant barrier to bringing a class action.<sup>26</sup> In many cases, claimants will need to have

<sup>20</sup> Jennifer Braithwaite, Jasminka Kalajdzic and NZ Shareholders' Association.

<sup>21</sup> Chapman Tripp.

<sup>22</sup> Consumer NZ.

<sup>23</sup> Institute of Directors.

<sup>24</sup> Vince Morabito.

<sup>25</sup> Woodsford Litigation Funding.

<sup>26</sup> As noted above, our survey of group members in representative actions indicated that the cost of bringing litigation was the primary reason why individuals would not have brought their own individual proceeding, with the risk of adverse costs second.

litigation funding for a class action to proceed and there is an established practice of litigation funders providing an indemnity for adverse costs.

- 12.21 Some jurisdictions with class actions regimes allow lawyers to charge fees on a contingency basis, where the lawyer will be paid a percentage of any damages award or settlement and will not be paid if the claim is unsuccessful. In Canada and the United States, contingency fees are the predominant method of funding class actions.<sup>27</sup> Where class actions are funded by contingency fees, removing an adverse costs rule could make a greater impact on improving access to justice. We expect the impact would be much more limited in Aotearoa New Zealand because contingency fees are not permitted.<sup>28</sup> There may be cases where a lawyer is prepared to act on a pro bono or conditional fee basis and so removing the risk of adverse costs would enable a case to proceed. However, given the high costs of running a class action, we do not expect it will be common for lawyers to provide legal representation on this basis.
- 12.22 There are also benefits to applying an adverse costs rule to class actions, including enabling successful litigants to be compensated for some of their costs, ensuring that plaintiffs and defendants are treated equally, deterring meritless cases, facilitating settlements and discouraging improper litigation behaviour. The adverse costs principle is well established in Aotearoa New Zealand and there was little support from submitters for moving to a no costs rule or a one-way costs shifting rule.
- 12.23 We have considered whether a class actions regime should specify considerations that should be taken into account when costs decisions are made, such as access to justice. We prefer to allow courts the flexibility to take into account any matter they consider relevant in the context of a particular case. We note the High Court Rules allow a judge to make an order for no costs, or reduced costs, where the proceedings concern a matter of public importance.<sup>29</sup>

### *Mitigating the impact on a representative plaintiff*

- 12.24 Because the representative plaintiff is a party to the class action (and class members are not), they will be liable for any adverse costs award made in favour of the defendant. We have considered the impact of the adverse costs rule on the representative plaintiff and how to mitigate this. The costs consequences for the representative plaintiff in a class action are unique by comparison to other civil litigation.<sup>30</sup> As explained by the Victorian Law Reform Commission, “[t]he financial risks that the representative plaintiff takes on are disproportionate not only to the risks borne by other class members, but also to the value of their own claim”.<sup>31</sup> Having to bear the risk of adverse costs creates a significant disincentive to taking on the role of representative plaintiff.<sup>32</sup>
- 12.25 This report makes several recommendations that are designed to respond to this concern. Our proposed certification test requires the court to consider whether the

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<sup>27</sup> See Issues Paper at [2.22].

<sup>28</sup> Lawyers and Conveyancers Act 2006, ss 333–335.

<sup>29</sup> High Court Rules 2016, r 14.7(e).

<sup>30</sup> Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 84.

<sup>31</sup> Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.8].

<sup>32</sup> Issues Paper at [13.11].

proposed representative plaintiff is aware of the duty and responsibilities of the role, including their potential liability for adverse costs. In Chapter 3, we recommend the representative plaintiff must receive independent legal advice on the duty and responsibilities of the role.

- 12.26 Where a class action is funded, we expect that a litigation funder would provide an indemnity to the representative plaintiff for adverse costs. In Chapter 17, in the context of court approval of funding agreements, we recommend the court should consider the extent of any adverse costs indemnity provided to a representative plaintiff as part of its review of whether a litigation funding agreement is fair and reasonable. In Chapter 15, we recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule to create a rebuttable presumption in funded class actions that the representative plaintiff will provide security for costs (although in reality it is likely to be the funder that meets this cost). We also recommend the Rules Committee consider developing a rule to 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. This will help to protect the representative plaintiff as well as the defendant.
- 12.27 We also propose a class action fund in Chapter 18. Where available, the fund would enable a representative plaintiff to receive an indemnity for adverse costs, as well as funding for legal costs.

## COSTS LIABILITY FOR CERTIFICATION

- 12.28 In Chapter 6, we recommend the Class Actions Act should require certification before a case can proceed as a class action. Because of the unique and mandatory nature of the certification stage, we have considered whether the normal adverse costs rules should apply to certification or whether a different approach is appropriate, such as costs lying where they fall or costs in the cause.
- 12.29 We discussed the issue of costs for certification briefly in the Issues Paper.<sup>33</sup>

### Costs lie where they fall approach

- 12.30 We have considered whether costs should lie where they fall for certification, which is the approach recommended by the Law Commission of Ontario.<sup>34</sup> This approach would recognise that certification is very different to a normal interlocutory application, because it is a threshold requirement for a class action which is required by the legislation. We do not favour this as a blanket rule because we think the benefits of an adverse costs rule, such as deterring meritless litigation, are particularly important at certification. Having an adverse costs rule for certification will encourage a plaintiff (and their lawyer) to carefully consider the merits of a case before proceeding. It will also encourage a defendant to consider how it responds to an application for certification, including whether to oppose it. We do not consider removing an adverse costs rule for certification would have a significant impact on access to justice, because a plaintiff will still need to have a means

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<sup>33</sup> Issues Paper at [13.22]–[13.23].

<sup>34</sup> Law Commission of Ontario *Class Actions: Objectives, Experiences and Reforms – Final Report* (July 2019) at 88.



of funding the litigation and be able to pay any adverse costs ordered at other stages of the proceeding.

- 12.31 Where a defendant does not oppose certification, we think costs should normally lie where they fall. This is consistent with the High Court Rules, which provide for costs to be payable on *opposed* interlocutory applications.<sup>35</sup> We also note that in Ontario, a court may exercise its discretion to order no costs, or costs in the cause, where the defendant consents to certification or does not oppose.<sup>36</sup>
- 12.32 Even where a defendant does not oppose certification, the court will still need to be satisfied that the certification test is met and consider matters such as whether there is a suitable representative plaintiff who would fairly and adequately represent the class. The plaintiff will therefore incur costs in having a class action certified. However, we would expect the costs to be lower where an application is unopposed. In some cases, the court may be able to determine an unopposed certification application on the papers.

### Costs in the cause approach

- 12.33 Where an application for certification is opposed, we think it will usually be appropriate for an award of costs to be made. In cases where a certification application is successful, a question arises as to whether costs should be payable immediately or deferred for later.<sup>37</sup>
- 12.34 The court could follow the usual approach to costs in opposed interlocutory applications, where costs are fixed and payable after the application has been determined (unless there are “special reasons to the contrary”).<sup>38</sup> This approach reflects the fact that the merits of a particular interlocutory application and the merits of the substantive proceedings are different matters.<sup>39</sup> The court can subsequently reverse, discharge or vary an order for costs on an interlocutory application if it considers the original order should not have been made.<sup>40</sup> If this approach is applied, a plaintiff would be entitled to adverse costs following a court’s decision to grant certification.
- 12.35 We have considered whether a different approach would be appropriate for certification. A benefit of having costs in interlocutory applications immediately follow the event is that it may discourage unnecessary applications and make parties face the consequences of applications that were unnecessarily made or opposed. This policy rationale does not apply in the same way to certification, which we recommend should be a mandatory stage of the class actions regime.<sup>41</sup> It may not be desirable to discourage defendants from

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<sup>35</sup> High Court Rules 2016, r 14.8.

<sup>36</sup> See *Locking v McCowan* 2016 ONSC 7854 at [7], *Quinte v Eastwood Mall Inc* 2014 ONSC 1661 at [5], and *Frank v Farlie, Turner & Co* 2013 ONSC 4364 at [29]–[32]. As we discuss below, costs in the cause means the party who is ultimately unsuccessful in the substantive proceeding is liable to pay costs for certification.

<sup>37</sup> Where the court declines to certify a proposed class action and there is no appeal, we envisage costs would be fixed and payable following the court’s decision.

<sup>38</sup> High Court Rules 2016, r 14.8(1).

<sup>39</sup> *Chapman v Badon Ltd* [2010] NZCA 613, 20 PRNZ 83 at [12].

<sup>40</sup> High Court Rules 2016, r 14.8(2).

<sup>41</sup> This point has been made in relation to the Canadian regime: *2038724 Ontario Ltd v Quizno’s Canada Restaurant Corp* [2008] 96 OR (3d) 252 (ONSC) at [22].

contesting certification, as the court's task in deciding on certification may benefit from hearing from both parties.<sup>42</sup>

- 12.36 The costs of certification could be made 'costs in the cause'. This would mean the party who is ultimately unsuccessful in the substantive proceeding is liable to pay costs for certification.<sup>43</sup> There are numerous examples of courts in Aotearoa New Zealand making orders that costs on particular applications are to be costs in the cause.<sup>44</sup>
- 12.37 This was the approach taken by Te Kōti Matua | High Court in *Strathboss Kiwifruit v Attorney-General*, which was a representative action under HCR 4.24. The Court commented that if the defendant was subsequently successful in defending the litigation, it might legitimately complain that it should not have faced adverse costs for responding to preliminary steps that were only required because the plaintiffs chose to bring their case as a funded representative action. It therefore deferred the costs entitlement on the preliminary applications and made them costs in the cause.<sup>45</sup> In another representative action, *Ross v Southern Response*, the costs of giving notice to group members were held to be costs in the cause.<sup>46</sup>
- 12.38 An argument in favour of costs in the cause is that if a defendant is successful at the substantive hearing, it may be unfair that they have paid the plaintiff's costs for bringing their case in this way. It also recognises the differences between certification and other forms of interlocutory application, as discussed above.
- 12.39 Factors against taking a costs in the cause approach to certification include:
- (a) An application for certification would be a requirement of the Class Actions Act, rather than an application the plaintiff chooses to bring.
  - (b) A plaintiff who is ultimately successful may have to wait several years to claim their entitlement to costs for certification. This means they are unable to use this money for the costs of running the litigation.
  - (c) It may incentivise a defendant to challenge every point rather than consenting to certification or conceding that some aspects of the certification test are met.
  - (d) Just because a plaintiff is ultimately unsuccessful in the litigation, that does not mean the case should never have been certified.<sup>47</sup> A class action may still have been an efficient way of resolving a legal issue that applies to a large number of claimants and may have even been of benefit to the defendant compared to defending many individual claims.

<sup>42</sup> *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 2482, 23 PRNZ 64 at [19], [21] and [23].

<sup>43</sup> "Costs in the cause" means that the costs of an interlocutory proceeding is to be awarded according to the final award of costs in the case. If the plaintiff is ultimately successful in the case, they will get interlocutory costs as part of the costs awarded against the defendant and vice versa: see *JT Stratford & Son Ltd v Lindley and Others (No 2)* [1969] 3 All ER 1122 (CA) at 1123.

<sup>44</sup> Situations where costs in the cause have been ordered include where a party has successfully appealed a summary judgment, where an injunction has been successfully obtained, and where both parties have partially succeeded.

<sup>45</sup> *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 2482, (2015) 23 PRNZ 64 [*Strathboss - costs*] at [24]–[25].

<sup>46</sup> *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 [*Ross - notification application*] at [193].

<sup>47</sup> In *Labourers' Pension Fund of Central and Eastern Canada* 2015 ONSC 6354 at [137], the Court observed there was not a general practice of making costs in the cause in contested certification applications because certification was a procedural step that was independent from the ultimate merits of the litigation. The outcome of the common issues trial did not mean that the proceeding should not have been certified.

- 12.40 We consider the court should have a high degree of discretion as to costs awards in class actions, as with other civil litigation. This will allow courts to respond to the needs and circumstances of a particular case.
- 12.41 We do not favour a general rule in favour of certification costs being costs in the cause. Such a rule may be unfair to plaintiffs, lead to defendants opposing every aspect of certification as a matter of course and unnecessarily fetter the court's discretion with respect to costs. However, we do not rule out the possibility that a 'costs in the cause' order may be appropriate in some cases. An example might be where the certification hearing largely focused on whether there was a reasonably arguable cause of action.

### Costs where there are concurrent class actions

- 12.42 In Chapter 5, we recommend that the court should consider the applications for certification of concurrent class actions together. We think the court should have discretion as to how costs are allocated, to reflect the outcome of the hearing. We anticipate the court might take the following approach to costs:
- (a) Where the court finds that a particular class action does not meet the test for certification, the unsuccessful applicant may face an order to pay costs to the defendant.
  - (b) Where the court finds that two concurrent class actions meet the test for certification but only one should be certified, the defendant may face an order to pay costs to the successful representative plaintiff. Costs could lie where they fall with respect to the unsuccessful representative plaintiff's application for certification.
  - (c) Where the court finds that two concurrent class actions meet the test for certification and both should be certified, the defendant may face an order to pay costs to both representative plaintiffs.

## CALCULATING COSTS IN 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.

- 12.43 When an adverse costs order is made in a class action, the court will need to determine the allowable amounts. We consider that the usual daily recovery rates and time allocations should apply to class actions, as many steps in a class action will be similar to other types of civil litigation.<sup>48</sup> We think it is unnecessary to have a separate scale of costs for class actions. While class actions will often be complex, the costs rules provide for categorisation of proceedings.<sup>49</sup> We see no need for a special category just for class actions and think these cases will often be similar in complexity to other category 3 proceedings. Although class action hearings may take longer than other hearings, the schedule will allow for this because the costs allocation for appearing at a hearing is based

<sup>48</sup> See High Court Rules 2016, sch 2 (appropriate daily recovery rates) and sch 3 (time allocations).

<sup>49</sup> High Court Rules 2016, r 14.3.

on hearing duration. The High Court also has flexibility to deal with situations where scale costs do not cover a particular step.<sup>50</sup>

- 12.44 We think it would, however, be desirable to add a time allocation for certification to the list in Schedule 3 of the High Court Rules. We consider preparing for certification is likely to be more involved than a usual interlocutory hearing, so a specific allocation is desirable. We do not think it is necessary to have a specific time allocation for a settlement approval hearing. We envisage that costs will normally lie where they fall for settlement approval, given that both the plaintiff and defendant will be supporting the application.
- 12.45 We considered the suggestion that there should be a maximum level of costs payable in class actions but concluded that would be unfair to the successful party. A party does not always have complete control over legal costs, as some will arise from responding to issues raised by the other party. We also think the system of having time allocations for steps in civil litigation provides some predictability as to the costs that can be ordered and discourages parties from unnecessarily incurring costs.

### CLASS MEMBER LIABILITY FOR COSTS

- 12.46 A usual feature of a class action is that the representative plaintiff is liable for any adverse costs award in favour of the defendant since they are a party to the litigation. Class members, who are not parties, are not generally liable for adverse costs.
- 12.47 Courts in Aotearoa New Zealand have held that group members in representative actions are not exposed to the risk of an adverse costs award.<sup>51</sup> This is despite the court having jurisdiction to make non-party costs awards.<sup>52</sup> Nonetheless, some submitters said that potential group members may be reluctant to join a representative action because of a concern that they may be liable for costs.<sup>53</sup> We therefore think it would be desirable for the class actions regime to provide clarity on class member liability for costs.
- 12.48 In Australia, class actions legislation provides that the court may not award costs against a class member except in the case of issues determined on a sub-group or individual basis.<sup>54</sup> The Ontario legislation specifies that class members, other than the representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.<sup>55</sup> The purpose of the provision is to insulate class members from the costs of stages in a class action where they do not participate as a matter of

<sup>50</sup> See for example *Strathboss Kiwifruit Ltd v Attorney-General* [2019] NZHC 62 at [38]–[39], where the Court considered it was appropriate to award costs for the provision of particulars. Although there was normally no allowance for this, the particulars ordered were extensive and necessary (in part) because the case was a representative action.

<sup>51</sup> *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431, (2019) 25 PRNZ 33 at [108]; *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) at [211]; *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 May 2010 at [43]; *Hedley v Kiwi Co-operative Dairies Ltd* (2000) 15 PRNZ 210 at [32].

<sup>52</sup> *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 26 May 2010 at [36]–[43].

<sup>53</sup> We note that in Australia, research has shown “numerous instances” of class members adding comments on their opt-out forms which indicated a mistaken belief that the class action could expose them to liability for costs: Vince Morabito and Naomi Hatcher “Security for Costs in Unfunded Federal Class Actions: Back to the Future” (2018) 92 ALJ 105 at 114.

<sup>54</sup> For example, see Federal Court of Australia Act 1976 (Cth), s 43(1A). See also Issues Paper at [13.10].

<sup>55</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 31(2). There are similar provisions in other Canadian regimes: see Issues Paper at [13.10].

course.<sup>56</sup> The court can also award costs where it grants leave to a class member to participate in a proceeding.<sup>57</sup> The UK Competition Appeal Tribunal Rules provide that costs may not be awarded to or against class members, except with respect to issues determined on an individual basis, applications made by a class member or issues determined on a sub-group basis (in the latter case, only the sub-group plaintiff is liable for costs).<sup>58</sup>

## Recommendation

### 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.

12.49 We think it would be desirable for the High Court Rules to expressly provide that a class member cannot be liable for costs except in three circumstances.

12.50 First, where the court determines an issue that relates only to the claims of an individual class member. This might be an issue relating to causation or loss, such as whether a misrepresentation induced the class member to enter into a contract.<sup>59</sup> We imagine it would be relatively unusual for a court to determine such issues on an individual basis, given how time-consuming this would be in a large class action.<sup>60</sup> Individual issues such as whether a particular person's claim is limitation-barred might also need to be determined.<sup>61</sup>

12.51 Second, where the class member is a sub-class representative plaintiff and the court is determining an issue on a sub-class basis. In this situation, the class member is taking on the role of the representative plaintiff for the purposes of the sub-class issue and it is appropriate for them to have costs liability. In Chapter 8, we expressed the view that a

<sup>56</sup> See *Bancroft-Snell v Visa Canada Corporation* 2020 ONCA 549 at [7] and *Trillium Motor World Ltd v General Motors of Canada Ltd* 2017 ONCA 545 at [61].

<sup>57</sup> This relies on the court's jurisdiction under Class Proceedings Act SO 1992 c 6 (Ontario), s 14, which enables the court to grant a class member leave to participate on whatever terms it considers appropriate, including as to costs. See *Bancroft-Snell v Visa Canada Corporation* 2020 ONCA 549 at [7] and [10] and *Silver v Imax Corporation* 2012 ONSC 4064 at [12].

<sup>58</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 98.

<sup>59</sup> See Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [169].

<sup>60</sup> In Chapter 8, we recommend the court should have a power to give directions with respect to the determination of individual issues.

<sup>61</sup> Our recommendations on limitation in Chapter 4 will not assist a class member where the limitation period expired prior to the class action proceeding being commenced.

sub-class representative plaintiff should have to meet the requirement of being a suitable person who will fairly and adequately represent the sub-class. A relevant factor will be whether they understand the duty and responsibilities of the role, including as to costs.<sup>62</sup>

- 12.52 The third situation is where a class member has brought an interlocutory application, is the respondent to an application or is otherwise granted leave to participate in the proceeding. One example is where a class member is dissatisfied with the way the class action is being run and seeks an order from the court, such as an order to replace the representative plaintiff. Another example is where the court grants leave to a class member to object at a settlement hearing. We do not wish to suggest an objecting class member should face adverse costs as a matter of course, but there may be circumstances where this is appropriate, such as where the objection was meritless or vexatious.
- 12.53 In these situations, the class member will have conduct of the application or issue rather than the representative plaintiff, so we think it is reasonable for them to assume costs liability. We think the lawyer for the class (or any other lawyer acting for the class member) should advise the class member of the possibility that adverse costs will be ordered against them.
- 12.54 As well as clarifying the position in the High Court Rules, we consider the notice to class members should clearly explain to class members the circumstances in which they can have costs liability.<sup>63</sup>

### **Class member liability for security for costs**

- 12.55 In the Issues Paper we noted that courts in Australia have taken different approaches to whether a class member can be required to contribute to security for costs. We noted the Victorian Law Reform Commission recommended amending the Victorian class actions regime to specify that the court may not order a class member to provide security for costs.<sup>64</sup>
- 12.56 We anticipate that many class actions will be supported by a litigation funder. In Chapter 15, we recommend the Rules Committee consider developing a new High Court Rule to create a rebuttable presumption that funded representative plaintiffs will provide security for costs in funded class actions. We also recommend the Rules Committee consider developing a rule empowering the court to order costs, including security for costs, directly against a litigation funder. If, as we recommend in Chapter 18, a class action fund is established, the terms of funding could include payment of any security for costs required. Therefore, the issue of whether class members should contribute to security for costs will generally only arise in unfunded cases. This will include cases that are always intended to be brought on an unfunded basis, as well as cases where a litigation funder withdraws partway through the proceeding and prior to paying security for costs.
- 12.57 For a class member to feel confident about joining a class action, they need to have some certainty about the potential costs implications. We think it would undermine our recommendation that a costs order cannot be made against a class member (except in specific circumstances) if a class member faces the risk of a security for costs order.

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<sup>62</sup> We discuss sub-classes in Chapter 8.

<sup>63</sup> We discuss the contents of the opt-in or opt-out notice in Chapter 8.

<sup>64</sup> Issues Paper at [13.36].

- 12.58 We consider a security for costs order should only be available against a class member in circumstances where they may have liability for adverse costs (and where the test for security for costs is met). This means security for costs should not be ordered against class members with respect to determination of the common issues. In some circumstances it might be appropriate to order security for costs against a class member who is acting as sub-class representative plaintiff or where a class member's individual issues are being determined.
- 12.59 This does not prevent class members from voluntarily agreeing to contribute to security for costs. In an opt-in case, there may be an agreement between class members and the representative plaintiff as to how the costs of the proceeding will be met, which could include all class members contributing to security for costs. Or in a situation where a litigation funder withdraws from a case and there is a security for costs order that must be met, class members might agree to contribute to this security to ensure the case can proceed.
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## CHAPTER 13

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# Abolishing maintenance and champerty

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## INTRODUCTION

13.1 In this chapter, we discuss:

- (a) The advantages and disadvantages of litigation funding.
- (b) Our conclusion that litigation funding is desirable for Aotearoa New Zealand in principle.
- (c) Uncertainty in the law about whether litigation funding is permitted.
- (d) Our recommendation that the torts of maintenance and champerty be abolished.

## DESIRABILITY OF LITIGATION FUNDING IN PRINCIPLE

13.2 In the Issues Paper, we identified potential advantages of litigation funding, including:<sup>1</sup>

- (a) Improving access to justice for plaintiffs by alleviating the costs of litigation and “levelling the playing field” in litigation against well-resourced defendants.
- (b) Reducing the financial risks of litigation for plaintiffs, particularly the risk of an adverse costs order if the litigation is unsuccessful.
- (c) Allowing plaintiffs to stay focused on activities other than litigation, for example allowing commercial plaintiffs to stay focused on their core business.
- (d) Expanding financing options in respect of litigation.
- (e) The availability of a funder’s litigation expertise and experience.
- (f) Providing defendants with confidence that their costs will be met by the funder if they are successful.

13.3 We also discussed potential disadvantages of litigation funding, including:

- (a) The risk that the court system may become burdened with an increase in litigation, for example additional representative or class actions.
- (b) The risk of encouraging meritless litigation.

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<sup>1</sup> For detailed discussion, see Issues Paper at Chapter 17.



- (c) Impacts on the availability and affordability of directors and officers liability insurance (D&O insurance).
- 13.4 We expressed the preliminary view that litigation funding is desirable in principle, provided concerns about it (for example, funder control, conflicts of interest, funder profits and capital adequacy) can be adequately managed. We expressed the view that the advantages of litigation funding, particularly its potential to improve access to justice, outweigh its potential disadvantages.

## UNCERTAINTY ABOUT WHETHER LITIGATION FUNDING IS PERMITTED

- 13.5 In the Issues Paper, we discussed the uncertainty in the law about whether litigation funding is permitted.<sup>2</sup> In the absence of specific regulation of litigation funding, the courts in Aotearoa New Zealand have adopted a cautiously permissive approach to litigation funding.<sup>3</sup> However, uncertainty remains about whether and when litigation funding arrangements are contrary to the policy behind the torts of maintenance and champerty, which have historically prohibited litigation funding and remain part of our law.<sup>4</sup>
- 13.6 Maintenance is where a person, without lawful justification, assists a party to a civil action to bring or defend the action and this causes damage to the other party. Champerty is a form of maintenance where financial assistance is provided in return for a share of any recovery. The policy behind the torts is to protect the defendant from malicious litigation.<sup>5</sup> To some extent, the policy is also to protect the integrity of the courts and those whose litigation is being maintained.<sup>6</sup>
- 13.7 Breach of the torts can give rise to a claim for damages by the defendant against the funder of the litigation. Where a breach is established, the funding agreement itself, being contrary to public policy, may also be unenforceable.
- 13.8 To our knowledge, there are no examples in Aotearoa New Zealand of a successful claim based on the torts, nor are there any examples of a litigation funding agreement being unenforceable as contrary to public policy. The courts have preferred to address any issues by relying on their wide powers to stay or dismiss proceedings that are frivolous, vexatious or an abuse of process.<sup>7</sup>
- 13.9 Today, there is a tension between litigation funding and the policy underpinning the torts of maintenance and champerty. Litigation funding has an increasingly important role to play in improving access to justice.<sup>8</sup> The courts in Aotearoa New Zealand have suggested that access to justice considerations may necessitate a relaxation of the torts, at least in

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<sup>2</sup> Issues Paper at Chapter 16.

<sup>3</sup> *PricewaterhouseCoopers v Walker* [2016] NZCA 338 at [14].

<sup>4</sup> We discuss maintenance and champerty in the Issues Paper in Chapters 15, 16 and 18.

<sup>5</sup> Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Final Report, 2020) at 14; *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121] per Elias CJ.

<sup>6</sup> See *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [121] per Elias CJ.

<sup>7</sup> See Issues Paper at [15.6]–[15.12].

<sup>8</sup> See Issues Paper at [16.7]–[16.11] and Chapter 1. See also *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [177], and *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28] and [77].

the context of representative and class actions.<sup>9</sup> However, in her dissenting judgment in *PricewaterhouseCoopers v Walker* (*PwC v Walker*), Elias CJ cautioned that litigation funding still carries a risk of oppression and considered “it is a matter of some controversy” whether and when litigation funding arrangements may offend against the torts and the policy underpinning them.<sup>10</sup>

- 13.10 To the extent that litigation funding is permitted, the absence of any specific regulation means the parameters within which litigation funders should operate are also unclear. As we discuss in Chapter 14, these uncertainties are problematic because they may impact on the availability and affordability of litigation funding in Aotearoa New Zealand. In turn, this may diminish the ability of potential plaintiffs to access justice. The funder risks losing its investment (and the possibility of a return on its investment) if a funding agreement is unenforceable, proceedings are stayed on abuse of process grounds or damages are payable for breach of the torts of maintenance and champerty (particularly if this occurs after the funded proceeding has been brought to a successful conclusion). Uncertainty about acceptable litigation funding arrangements may also increase the risk of challenges to funding arrangements, adding cost and delay to the resolution of claims. More broadly, these uncertainties raise rule of law concerns in the sense that predictability and transparency of laws that apply or may apply to litigation funding are currently lacking.

## CONSULTATION QUESTIONS

- 13.11 In the Issues Paper, we asked submitters which of the potential advantages and disadvantages of permitting litigation funding are most important and why. We also asked submitters if they consider litigation funding is desirable for Aotearoa New Zealand in principle.
- 13.12 With respect to the torts of maintenance and champerty, we asked to what extent these impact on the availability and pricing of litigation funding in Aotearoa New Zealand. We also asked if the courts should be left to clarify and develop the law in relation to maintenance and champerty or if the law should be reformed. If reform is required, we asked submitters which option for clarifying the law they prefer and why.
- 13.13 We discussed four options to address the tension between litigation funding and the policy underpinning the torts of maintenance and champerty, and to clarify the permissibility of litigation funding.<sup>11</sup> We set out these options below.

### Retain the torts and leave the courts to clarify and develop the law

- 13.14 This may be an appropriate option if the policy underpinning maintenance and champerty remains sound and the torts do not cause sufficient inconvenience to necessitate reform. This approach can be seen to some extent in Canada and Queensland, Australia.<sup>12</sup>

<sup>9</sup> *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [16]–[17]; *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28]. See also Issues Paper at [16.9]–[16.10].

<sup>10</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [111] per Elias CJ.

<sup>11</sup> For detailed discussion, see Issues Paper at Chapter 18.

<sup>12</sup> See Issues Paper at [18.2]–[18.9].

## Retain the torts subject to a statutory exception for litigation funding

- 13.15 There is already a statutory exception to maintenance and champerty in section 334 of the Lawyers and Conveyancers Act 2006, which permits lawyers to enter into conditional fee arrangements. In 2009, Te Komiti mā ngā Tikanga Kooti | Rules Committee developed a Class Actions Bill, which would have created an exception to the torts of maintenance and champerty for litigation funding of class actions. However, the Bill was never progressed.

## Abolish the torts

- 13.16 Another way to clarify the permissibility of litigation funding would be to abolish the torts of maintenance and champerty altogether. There have been no successful claims founded on maintenance and champerty in Aotearoa New Zealand.<sup>13</sup> This might suggest that little would be lost by abolishing the torts. On the other hand, the torts may function as a deterrent against funding malicious proceedings.<sup>14</sup> The torts may have a wider impact that goes beyond litigation funding and abolishing them may have unforeseen consequences.<sup>15</sup>
- 13.17 Te Aka Matua o te Ture | Law Commission considered whether the torts should be abolished in its 2001 Report *Subsidising Litigation*. Although nearly all submitters urged abolition, at the time the Commission favoured retaining the torts.<sup>16</sup> In 2009, the Rules Committee also considered whether the torts should be abolished in the context of its work on the draft Class Actions Bill. However, it did not reach a consensus and considered the issue may be beyond the scope of its work.<sup>17</sup>

## Abolish the torts subject to a preservation provision

- 13.18 A variation on the above option would be to abolish the torts but retain the courts' ability to find a funding agreement unenforceable on grounds of public policy or illegality. For example, through legislation preserving "any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal" or words to similar effect (a preservation provision).
- 13.19 The torts of maintenance and champerty have been abolished in a number of comparable jurisdictions such as England and Wales, Singapore and the Australian states of Victoria, New South Wales, South Australia, Australian Capital Territory and Tasmania.<sup>18</sup> However, most of these jurisdictions have enacted a preservation provision.<sup>19</sup> In the Law Commission's 2001 Report, it rejected the option of abolishing the torts subject to a

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<sup>13</sup> See Issues Paper at [18.22]–[18.25].

<sup>14</sup> Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

<sup>15</sup> See Issues Paper at [18.22]–[18.25].

<sup>16</sup> See Issues Paper at [18.19].

<sup>17</sup> See Issues Paper at [18.14].

<sup>18</sup> See Issues Paper at [18.17].

<sup>19</sup> The Law Reform Commission of Western Australia has also recommended the torts should be abolished, subject to a preservation provision: *Maintenance and Champerty in Western Australia* (Project 110: Final Report, 2020) at 2, Recommendation 1.

preservation provision.<sup>20</sup> The Commission considered no great simplification of the law would be achieved by following the United Kingdom and Australian precedents.

## RESULTS OF CONSULTATION

### Advantages of litigation funding

13.20 Thirty-one submitters answered the Issues Paper question on the potential advantages and disadvantages of permitting litigation funding.<sup>21</sup> Of these, 24 identified advantages,<sup>22</sup> 15 identified disadvantages<sup>23</sup> and 10 identified both advantages and disadvantages.<sup>24</sup>

### Improving access to justice

13.21 Access to justice was often considered to be an advantage or the most important advantage of litigation funding, with 23 submitters discussing this benefit.<sup>25</sup> Several submitters identified groups whose access to justice has been or may be improved by litigation funding, such as homeowners following the Christchurch earthquakes, consumers with low-value claims, retail investors, and community-led groups. Some submitters said that, while profit may be the primary motivation for litigation funders, access to justice can nevertheless result from their activity.<sup>26</sup> Some noted that many class actions would not be feasible without litigation funding.<sup>27</sup>

13.22 Other access to justice benefits identified by submitters were that litigation funding can “level the playing field” (by overcoming the potential for a defendant to win litigation by

<sup>20</sup> Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 10–11. See also Issues Paper at [18.37].

<sup>21</sup> Submitters who answered Question 37 of the Issues Paper were: Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC, Bell Gully, Buddle Findlay, BusinessNZ, Chapman Tripp, Claims Resolution Service, Consumer NZ, DLA Piper, Michael Duffy, Tony Ellis, Gilbert Walker, Institute of Directors, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, IBA Antitrust Committee, Johnson & Johnson, Murray Lazelle, LPF Group, Marsh, Maurice Blackburn/Claims Funding Australia, Hikina Whakatutuki | Ministry of Business, Innovation and Employment (MBIE), Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), NZ Shareholders' Association, NZX, Omni Bridgeway, Simpson Grierson, Christopher St Johanser, Tempest, Vicki Waye and Tom Weston QC. Some submitters on the Issues Paper commented on the advantages and disadvantages of permitting litigation funding in their responses to other questions in the Issues Paper, however they are not recorded in this list. In addition, a number of submitters on the Supplementary Issues Paper also commented on the potential advantages and disadvantages of litigation funding, including David Bigio QC, GCA Lawyers, Andrew Harnos, Zane Kennedy, LPF Group, MinterEllisonRuddWatts, Ross Asset Management Investors Group and Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission).

<sup>22</sup> Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC, Bell Gully, BusinessNZ, Chapman Tripp, Claims Resolution Service, Consumer NZ, DLA Piper, Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, MBIE, NZLS, NZ Shareholders' Association, Omni Bridgeway, Simpson Grierson, Christopher St Johanser, Tempest and Vicki Waye.

<sup>23</sup> Barry Allan, Andrew Barker QC, Bell Gully, Buddle Findlay, Michael Duffy, Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Murray Lazelle, Marsh, NZX, Simpson Grierson and Tempest.

<sup>24</sup> Barry Allan, Andrew Barker QC, Bell Gully, Gilbert Walker, Institute of Directors, Johnson & Johnson, Insurance Council, IBA Antitrust Committee, Simpson Grierson and Tempest.

<sup>25</sup> Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC, Bell Gully, BusinessNZ, Chapman Tripp, Claims Resolution Service, Consumer NZ, DLA Piper, Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, NZ Shareholders' Association, Omni Bridgeway, Simpson Grierson, Christopher St Johanser, Tempest and Vicki Waye.

<sup>26</sup> Andrew Barker QC, Chapman Tripp, Consumer NZ (implied) and Gilbert Walker.

<sup>27</sup> For example, Barry Allan, IBA Antitrust Committee and Vicki Waye. Some submitters on the Supplementary Issues Paper also made this point.

outspending the plaintiff)<sup>28</sup> and reduce the risks of litigation for plaintiffs (particularly the risk of an adverse costs order).<sup>29</sup>

13.23 However, some submitters challenged the assumption that litigation funding improves access to justice or highlighted access to justice limitations:<sup>30</sup>

- (a) Andrew Barker QC noted that, in the context of settlements, the exact terms are usually confidential even if the broad nature of the settlement is explained. The amount received by litigants, in comparison to how much is received by the funder and lawyers is rarely divulged. In his view, the reality is that the courts are providing a significant business opportunity for funders, and court oversight of funding agreements is necessary to protect funded plaintiffs.
- (b) Several submitters said funders only improve access to justice in cases that meet their investment criteria.<sup>31</sup> Dr Tony Ellis commented that funders are unlikely to fund public law cases given the low monetary awards, and Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said funders are unlikely to fund public interest cases.
- (c) Tom Weston QC said access to justice is a slogan that deserves close scrutiny. Such considerations provide only limited support for class actions and litigation funding, and the more difficult question is whether funded litigation is socially or economically useful. Similarly, the Insurance Council questioned whether litigation funding promotes “worthwhile claims”, for example claims where the aggregate amount is profitable for a funder but the individual harm is negligible.

### *Funder expertise and evaluation of the merits of claims*

13.24 Bell Gully and the International Bar Association (IBA) Antitrust Committee said the funder’s expertise and experience in litigation can be an advantage of litigation funding. For instance, the funder can provide valuable assistance with organising and managing the claim. The IBA Antitrust Committee said this can be especially beneficial in class actions as the representative plaintiff may not have a sophisticated understanding of the law and the funder can play an important role in facilitating the best outcome for the class.

13.25 Several submitters commented on whether litigation funding encourages, or discourages, meritless claims. DLA Piper suggested that, because litigation funders evaluate the merits of a claim and only fund claims that they consider have good prospects of success, their involvement provides independent corroboration of the merits of the case. Four other submitters doubted that litigation funding encourages meritless claims as this would be detrimental to a funder’s commercial interests, business model and reputation.<sup>32</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted that fears about meritless claims are likely to be exaggerated as the funder will often do greater due diligence and be less personally involved in the litigation than the plaintiffs themselves.

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<sup>28</sup> Association of Litigation Funders of Australia, LPF Group and Omni Bridgeway.

<sup>29</sup> Association of Litigation Funders of Australia, Bell Gully, DLA Piper, IBA Antitrust Committee and NZLS.

<sup>30</sup> Andrew Barker QC, Tony Ellis, Insurance Council, IBA Antitrust Committee, Vicki Waye and Tom Weston QC.

<sup>31</sup> Insurance Council, IBA Antitrust Committee and Vicki Waye.

<sup>32</sup> Chapman Tripp, Consumer NZ, Maurice Blackburn/Claims Funding Australia and NZLS.

### *Other potential advantages*

- 13.26 DLA Piper commented on advantages of litigation funding for corporate plaintiffs. It said litigation funding removes litigation costs from a company's balance sheet. This enables plaintiffs to stay focused on activities other than litigation and rewards investors for taking on litigation risk. However, Chapman Tripp said it is not aware of litigation funding being used to assist corporate plaintiffs in this way. It considered this is unlikely to be a significant driver of litigation funding in Aotearoa New Zealand in future.
- 13.27 LPF Group said litigation funding can deter unlawful conduct. Without it, many meritorious cases could not be pursued, and defendants would not be held to account. In relation to corporate and shareholder claims, litigation funding serves to lift the standards of professional conduct of those in governance and advisory roles and increases confidence across all areas of the business and investment community and society.
- 13.28 Chapman Tripp submitted that litigation funding can contribute to development of the law, as funded litigants may be more willing to test novel legal principles.
- 13.29 Hīkina Whakatutuki | Ministry of Business, Innovation and Employment said class actions and litigation funding may help to improve the effectiveness of regulatory regimes by incentivising consumers, creditors and other private parties to exercise their rights.

### **Disadvantages of litigation funding**

#### *The risk of an increase in meritless claims*

- 13.30 Eleven submitters discussed whether litigation funding may encourage some meritless claims<sup>33</sup> or drive settlements of meritless litigation.<sup>34</sup> Most considered this risk to be low or manageable.<sup>35</sup> However, three submitters thought litigation funding may drive settlements of meritless litigation.<sup>36</sup> For example, the Institute of Directors said defendants in Australia have been compelled to settle claims they consider meritless and defensible because of the involvement of litigation funders. As the insurer funding the defence has significant control in the proceedings, it can drive settlements on financial grounds, preventing organisations and directors from being able to clear their names. The Insurance Council likewise suggested that a funder may fund a claim on the assumption a well-resourced defendant will pay a premium to end the proceedings and avoid the higher irrecoverable cost of succeeding at trial. It said this has been the case with some litigation stemming from the Christchurch earthquakes.
- 13.31 The IBA Antitrust Committee said the reality is likely to be somewhere in the middle and will depend on the culture of a particular jurisdiction. Meritless claims are likely to be less attractive in jurisdictions where adverse costs orders are common. However, it said the

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<sup>33</sup> Barry Allan, Chapman Tripp, Consumer NZ, Institute of Directors, Maurice Blackburn/Claims Funding Australia, NZLS, Simpson Grierson and Tempest.

<sup>34</sup> Buddle Findlay, Institute of Directors, Insurance Council, IBA Antitrust Committee and Simpson Grierson.

<sup>35</sup> Chapman Tripp, Consumer NZ, Maurice Blackburn/Claims Funding Australia, NZLS and Simpson Grierson. Barry Allan said the present market in Aotearoa New Zealand does not suggest any need for concern, but cautioned that less scrupulous funders may emerge as the market matures. Tempest said vexatious and frivolous claims will be bolstered if funders are "allowed to speculate in litigation".

<sup>36</sup> Buddle Findlay, Institute of Directors and Insurance Council. Simpson Grierson considered this a risk in the "absence of further regulation of litigation funders".

high rate of class action settlements in Australia suggests defendants have little appetite to defend class actions, including potentially meritless claims.

### *Impact on directors and officers liability insurance*

- 13.32 Submitters were divided on the extent to which litigation funding is affecting the insurance market. Four submitters said it has reduced or may reduce the availability and affordability of D&O insurance,<sup>37</sup> and other forms of insurance such as professional indemnity insurance<sup>38</sup> or public and product liability cover.<sup>39</sup>
- 13.33 The Insurance Council said entities perceived to be particularly exposed to regulator or shareholder action can find it increasingly difficult and expensive to buy D&O insurance. It also said a rise in litigation funding is a risk for D&O insurance and general liability insurers, as it could incentivise legal action due to large-scale catastrophe events and large-scale customer remediation by insureds as a result of regulator action. The D&O insurance policy is effectively the cause of claims because the litigation funder can chase the policy where the action derives from a failure by officers.
- 13.34 The Institute of Directors and Marsh emphasised the tougher insurance market conditions in Australia and Aotearoa New Zealand in recent years. According to Marsh, these include increased renewal premiums and retention levels,<sup>40</sup> stricter terms and a decrease in coverage.<sup>41</sup> The Institute of Directors said the volatile and restrictive insurance market has caused some local and overseas insurers to cease providing D&O insurance, particularly to dual-listed companies.
- 13.35 Three submitters commented on factors contributing to the hardening insurance market.<sup>42</sup> The Institute of Directors said class actions and litigation funding have contributed, alongside the expanding role and responsibilities of boards, policy-makers targeting directors for personal liability when reforming regimes, more active and well-resourced regulators, and COVID-19. Marsh acknowledged it is difficult to separate out the direct impact of class actions and litigation funding from other factors contributing to changes in the D&O insurance market but said various sources have discussed a correlation.<sup>43</sup>
- 13.36 By contrast, three submitters were sceptical about the negative impact of litigation funding on D&O insurance.<sup>44</sup> They indicated there is no robust evidence to support the claims that litigation funding is causing higher D&O insurance premiums, and said other factors are also impacting on the market.<sup>45</sup> Professor Vicki Waye (University of South Australia) said the contribution of funded class actions to the hardening D&O insurance

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<sup>37</sup> Insurance Council, Institute of Directors, Marsh and NZX.

<sup>38</sup> Marsh.

<sup>39</sup> Insurance Council.

<sup>40</sup> In particular, Marsh said the average rate per million increase for D&O insurance for ASX250 clients in 2020 was 182 per cent above 2019, and the average retention increased for the same period by 211 per cent.

<sup>41</sup> In particular, Marsh said it has become increasingly difficult to purchase companies securities cover.

<sup>42</sup> Institute of Directors, Insurance Council and Marsh.

<sup>43</sup> For example, its own submission to the Australian Law Reform Commission's inquiry into Class Action Proceedings and Third-Party Litigation Funders.

<sup>44</sup> Maurice Blackburn/Claims Funding Australia, NZ Shareholders' Association and Vicki Waye.

<sup>45</sup> NZ Shareholders' Association and Vicki Waye.



market is negligible among these other factors, and suggested the concern is a red herring. Maurice Blackburn/Claims Funding Australia said it is too simplistic to assert that litigation funding is *the* cause of an increase in D&O insurance premiums. It said that elides the underlying issue – that it is the corporate misconduct of companies and their directors that results in proceedings being issued (and not the mere availability of litigation funding).

### *Other potential disadvantages*

- 13.37 Seven submitters said excessive funder profits are a potential disadvantage of litigation funding, as this comes at the expense of those who have genuinely suffered loss.<sup>46</sup> Four submitters commented specifically on this risk in class actions or representative actions.<sup>47</sup> The Insurance Council said the courts are reluctant to intervene to address funder profits.
- 13.38 Four submitters identified (or alluded to) the potential for conflicts of interest as a disadvantage of litigation funding.<sup>48</sup> The IBA Antitrust Committee said this is the “most significant disadvantage”, and the risk (arising from funder control and relationships between the funder and the lawyer) is structural and unavoidable without adequate regulation and oversight.
- 13.39 Four submitters commented on the potential for litigation funding to increase the courts’ workload, but this did not appear to be a significant concern.<sup>49</sup> The IBA Antitrust Committee said funding has a predictable but notable effect on the functioning of the court system as a whole, leading to slower case processing and larger backlogs. It also said that, despite a mature litigation funding market, the Australian Federal Court is continuing to meet its efficiency targets, which suggests any impact on the courts’ workload can be mitigated. Chapman Tripp acknowledged that an increase in litigation funding will add to the courts’ workload but considered this can be mitigated by the introduction of a statutory class actions regime that will minimise inefficient procedural applications. Maurice Blackburn/Claims Funding Australia said it may be simplistic to characterise an increase in filed proceedings as a “disadvantage” of litigation funding, as funding is intended to facilitate access to justice.
- 13.40 Dr Michael Duffy (Monash University) noted the risk of a funder becoming insolvent or leaving the funded plaintiff exposed to an adverse costs order. He said this may be an issue where the funder has insufficient assets within the jurisdiction to meet an adverse costs order or where smaller funders do not have the financial ability to see a case through to its conclusion.
- 13.41 Michael Duffy also said litigation funding may lead to the securitisation of legal claims and the emergence of a secondary market. While this could have some benefits for businesses (such as debt factoring and trading in book debts), trading in actionable civil claims may raise potential problems and ethical issues such as the financial relationships between claim assignees and the witnesses needed to establish their claims.

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<sup>46</sup> Bell Gully, Michael Duffy, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson and Murray Lazelle.

<sup>47</sup> Bell Gully, IBA Antitrust Committee, Johnson & Johnson and Murray Lazelle.

<sup>48</sup> Andrew Barker QC, Bell Gully, Michael Duffy and the IBA Antitrust Committee.

<sup>49</sup> Chapman Tripp, Michael Duffy, IBA Antitrust Committee and Maurice Blackburn/Claims Funding Australia.



## Desirability of litigation funding for Aotearoa New Zealand

- 13.42 We received 24 submissions on the desirability of litigation funding.<sup>50</sup> Of those, 21 submitters thought litigation funding is desirable in principle.<sup>51</sup> Some said it is necessary given the access to justice issues in Aotearoa New Zealand,<sup>52</sup> particularly in the context of a statutory class actions regime.<sup>53</sup> Some indicated that the access to justice advantages of litigation funding outweigh any potential disadvantages.<sup>54</sup> NZLS said litigation funding is both desirable in principle and an established fact. Although there are valid concerns, many of these are best understood as arising not as a matter of principle but as a matter of proper regulation. Several others said their support for litigation funding is contingent on the concerns with litigation funding being properly managed.<sup>55</sup>
- 13.43 Three submitters were sceptical about the desirability of litigation funding in principle while also appearing to acknowledge it is here to stay.<sup>56</sup> They emphasised access to justice limitations of litigation funding, potential dangers and need for robust regulation.

## Survey of group members

- 13.44 In the anonymous survey of group members who have participated in representative actions in Aotearoa New Zealand, we asked participants how likely it is they would have brought their own individual proceedings if they were not part of the representative action. We received 409 responses to this question, with the overwhelming majority indicating it is not at all likely they would have brought their own proceedings.<sup>57</sup>
- 13.45 We also asked participants to provide reasons for their responses.<sup>58</sup> The main reason given was that it would have been too expensive.<sup>59</sup> Other common reasons were the risk of having to pay the defendant's costs if the litigation is unsuccessful,<sup>60</sup> wanting to avoid the stress of bringing individual proceedings,<sup>61</sup> uncertainty about the process for bringing

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<sup>50</sup> Andrew Barker QC, Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Consumer NZ, DLA Piper, Gilbert Walker, Insurance Council, IBA Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, NZ Shareholders' Association, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.

<sup>51</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Chapman Tripp, Claims Resolution Service, Consumer NZ, DLA Piper, Gilbert Walker, Insurance Council, IBA Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, NZ Shareholders' Association, NZX, Omni Bridgeway, Simpson Grierson, Nicole Smith, Vicki Waye and Woodsford Litigation Funding.

<sup>52</sup> Claims Resolution Service, Gilbert Walker, LPF Group and NZLS.

<sup>53</sup> Barry Allan, Association of Litigation Funders of Australia, BusinessNZ, Nicole Smith and Vicki Waye. Tom Weston QC said there is little benefit in establishing a class actions regime without also addressing litigation funding, but this does not necessarily make funding "desirable".

<sup>54</sup> Chapman Tripp, Consumer NZ, DLA Piper, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Simpson Grierson.

<sup>55</sup> Bell Gully, Chapman Tripp, Insurance Council, NZ Shareholders' Association and NZX.

<sup>56</sup> Andrew Barker QC, Carter Holt Harvey and Tom Weston QC.

<sup>57</sup> Participants could give an answer ranging from 1 (not at all likely) to 5 (extremely likely). The numerical breakdown of responses was: 330 participants answered 1 (not at all likely), 55 answered 2, 11 answered 3, one answered 4 and 11 answered 5 (extremely likely). For information on the survey see Chapter 1.

<sup>58</sup> Participants could select one or more of 10 reasons, including "other" (in which they could type their own answer).

<sup>59</sup> 334 responses.

<sup>60</sup> 192 responses.

<sup>61</sup> 188 responses.

individual proceedings,<sup>62</sup> the time involved in bringing individual proceedings,<sup>63</sup> not wanting to pursue the defendant on their own,<sup>64</sup> the value of their claim not being worth pursuing individually<sup>65</sup> and being unaware they had a claim.<sup>66</sup>

13.46 The survey also asked participants about their experience of litigation funding:

- (a) **Was your case funded by a litigation funder?** There were 409 responses to this question. Of those, 231 participants (56.5 per cent) said yes, 22 (5.4 per cent) said no, and 156 (38.1 per cent) were unsure.
- (b) **If so, how have you found the experience of having your case funded by a litigation funder?** There were 227 responses to this question. Most participants indicated that their experience had been positive.<sup>67</sup>
- (c) **If so, are you satisfied that the funding commission charged by the litigation funder supporting your case is fair and reasonable?** There were 228 responses to this question. Most submitters were neutral or positive about the funding commission charged.<sup>68</sup> It is likely that some participants were commenting on representative actions that had not yet been resolved, and they may therefore have had an incomplete picture of how much the funder would receive from any sum recovered.
- (d) **What has been the most positive aspect of being funded by a litigation funder?** There were 201 responses.<sup>69</sup> Key themes were: the absence of upfront costs or financial risks,<sup>70</sup> that litigation funding makes litigation possible,<sup>71</sup> that the funder provides expertise and significant resources,<sup>72</sup> and reassurance the case has merit.<sup>73</sup>
- (e) **What has been the most negative aspect of being funded by a litigation funder?** We received 175 responses to this question.<sup>74</sup> Key themes were that the funder's commission significantly diminishes class members' returns,<sup>75</sup> and that there was a lack of communication, transparency and control regarding the litigation or the funding.<sup>76</sup> Approximately 76 participants (43.4 per cent) indicated they had not had any negative experiences.

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<sup>62</sup> 181 responses.

<sup>63</sup> 165 responses.

<sup>64</sup> 141 responses.

<sup>65</sup> 105 responses.

<sup>66</sup> 82 responses.

<sup>67</sup> Participants could give an answer ranging from 1 (very negative) to 5 (very positive). The numerical breakdown of responses was: 82 participants answered 5 (very positive), 71 answered 4, 65 answered 3, five answered 2 and four answered 1 (very negative).

<sup>68</sup> Participants could give an answer ranging from 1 (very unsatisfied) to 5 (very satisfied). 32 participants answered 5 (very satisfied), 75 answered 4, 102 answered 3, 15 answered 2 and four answered 1 (very unsatisfied).

<sup>69</sup> This question required a free-text response.

<sup>70</sup> 98 responses.

<sup>71</sup> 44 responses.

<sup>72</sup> 29 responses.

<sup>73</sup> 13 responses.

<sup>74</sup> This question required a 'free text' response.

<sup>75</sup> 45 responses.

<sup>76</sup> 19 responses.

## Concerns about maintenance and champerty

- 13.47 We received 10 submissions on the extent to which the torts of maintenance and champerty are impacting on the availability and pricing of litigation funding.<sup>77</sup>
- 13.48 Five submitters said the torts are a source of uncertainty and risk for litigation funders, and this may have access to justice consequences by impacting on the availability and affordability of litigation funding.<sup>78</sup> Omni Bridgeway said the failure to abolish the torts in the state of Queensland has led to confusion about the status of litigation funding arrangements and costly satellite litigation. Maurice Blackburn/Claims Funding Australia said the torts impose an unnecessary burden on the courts when dealing with questions of whether or how the torts should be applied. Maurice Blackburn/Claims Funding Australia also indicated, as did LPF Group, that the torts create an imbalance between plaintiffs and defendants, which unfairly benefits defendants.
- 13.49 Four submitters thought the torts have little impact on litigation funding.<sup>79</sup> BusinessNZ considered that, while the torts have not impacted the availability and pricing of litigation funding, the concerns underpinning the torts remain relevant.

## Options for reforming maintenance and champerty

- 13.50 We received 18 submissions on whether the courts should be left to clarify and develop the law in relation to maintenance and champerty, or whether the law should be reformed.<sup>80</sup> Of these, 16 submitters indicated the law should be, or may need to be, reformed.<sup>81</sup> We also received 14 submissions commenting on options for reform.<sup>82</sup>

### *Retain the torts in their current form and leave the courts to clarify and develop the law*

- 13.51 BusinessNZ and Carter Holt Harvey thought the torts should be retained in their current form, leaving the courts to clarify and develop the law. They said the potential for abuse remains in any system and the torts reasonably address that potential.

### *Retain the torts subject to a statutory exception for litigation funding*

- 13.52 Three submitters favoured retaining the torts subject to a statutory exception for litigation funding.<sup>83</sup> Bell Gully submitted the torts should be left intact, pointing to *Cain v*

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<sup>77</sup> Bell Gully, BusinessNZ, DLA Piper, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Nicole Smith and Vicki Waye.

<sup>78</sup> DLA Piper, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Nicole Smith.

<sup>79</sup> Bell Gully, Insurance Council, Simpson Grierson and Vicki Waye.

<sup>80</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, DLA Piper, Michael Duffy, Tony Ellis, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>81</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, Chapman Tripp, Claims Resolution Service, DLA Piper, Michael Duffy, Tony Ellis, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson, Nicole Smith and Tom Weston QC.

<sup>82</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Chapman Tripp, Claims Resolution Service, DLA Piper, Tony Ellis, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson and Vicki Waye.

<sup>83</sup> Bell Gully, BusinessNZ and Insurance Council.

*Mettrick*.<sup>84</sup> In that case, Te Kōti Matua | High Court held that a clause in the litigation funding agreement between the plaintiff liquidators and the funder amounted to an assignment of a bare cause of action, as it essentially enabled the funder to pursue litigation against the wishes of the plaintiff. The Court ordered a stay of proceedings on the basis that the funding agreement, contrary to law, gave the funder control of the litigation that went beyond what was reasonable to protect its investment.<sup>85</sup> Bell Gully said the case shows that a sensible balance can exist between accepting litigation funding in principle, but subject to the court's scrutiny to protect the interests of claimants.

- 13.53 The Insurance Council also favoured this option, saying a cautious approach is desirable in the absence of a full understanding of the wider impact of abolishing the torts. When drafting a statutory exception to the torts, it said it will be important to ensure nothing affects the court's power to prohibit or control a proceeding that constitutes an abuse of process.

### **Abolish the torts**

- 13.54 Five submitters supported abolishing the torts,<sup>86</sup> for example to clearly permit and encourage the use of litigation funding in class actions,<sup>87</sup> and to reduce the risks of litigation funding for both claimants and funders.<sup>88</sup> Two of these submitters considered a preservation provision is unnecessary. Omni Bridgeway said the adoption of such provisions in Australia and the United Kingdom happened long before litigation funding became widely available and acceptable, and since then public policy has “decisively shifted” in favour of permitting litigation funding. DLA Piper said a preservation provision is unnecessary, as the courts already have the jurisdiction to determine if a funding agreement is an abuse of process.

### **Abolish the torts subject to a preservation provision**

- 13.55 Three submitters supported abolishing the torts, subject to a provision to preserve the courts' ability to find a funding agreement unenforceable on grounds of public policy or illegality.<sup>89</sup> Simpson Grierson said this would provide greater clarity for all participants in funded proceedings, whilst ensuring the court retains discretion in extreme cases.
- 13.56 Chapman Tripp said the impacts of abolishing the torts appear to be limited. It noted there has been no successful claim founded on maintenance and champerty in Aotearoa New Zealand, and said it is not aware of businesses pursuing litigation against business rivals “hiding behind nominal litigants” (one of the Law Commission's concerns about abolishing the torts in its 2001 Report).<sup>90</sup> If such a situation does arise, it said a preservation provision would allow the court to render any funding agreement motivated by such collateral purpose unenforceable on public policy grounds. The court would also retain its ability to stay the proceeding for abuse of process. Chapman Tripp considered it unnecessary to

<sup>84</sup> *Cain v Mettrick* [2020] NZHC 2125.

<sup>85</sup> *Cain v Mettrick* [2020] NZHC 2125 at [72]. For discussion of this case, see Issues Paper at [15.37].

<sup>86</sup> Association of Litigation Funders of Australia, DLA Piper, Tony Ellis, LPF Group and Omni Bridgeway.

<sup>87</sup> Association of Litigation Funders of Australia.

<sup>88</sup> DLA Piper.

<sup>89</sup> Chapman Tripp, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>90</sup> Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 10.

be prescriptive about when a funding agreement will be contrary to public policy and said the courts will be assisted with this assessment by Australian and English case law.

- 13.57 Maurice Blackburn/Claims Funding Australia similarly said there is no need to retain the torts given the court's existing power to deal with any abuse of process and its discretion to award costs. It expressed concern about case-by-case development of exceptions if the torts are retained and said no issues have arisen in Australian states that have abolished the torts. A preservation provision would conform with the approach taken in many Australian states and enable courts in Aotearoa New Zealand to draw upon the body of case law developed in Australia about the permissibility of funding arrangements.

### *Other suggestions*

- 13.58 Associate Professor Barry Allan (Te Whare Wānanga o Otāgo | University of Otago) suggested a class actions statute could provide guidance on when a funding agreement will not be illegal or contrary to public policy. For example, if the funding agreement is necessary to provide substantively meaningful access to justice and is fair and reasonable as between the funder and class members. A class actions statute could articulate factors for the court to consider when conducting this assessment. He said there should also be an ability to render a funding agreement unenforceable outside the class actions context. However, the funded party should have the onus of challenging the funding agreement, just as it would if the agreement had been obtained by duress.

## RECOMMENDATION

**R107**

The torts of maintenance and champerty should be abolished.

### *Litigation funding is desirable in principle*

- 13.59 We confirm the preliminary view we expressed in the Issues Paper that litigation funding is desirable for Aotearoa New Zealand in principle. We think the law should clarify that litigation funding is permitted by abolishing the torts of maintenance and champerty. However, the concerns that litigation funding gives rise to regarding funder control, conflicts of interest, funder profits and funder capital adequacy should be subject to appropriate regulation. We set out our recommendations for managing these concerns in Chapters 14-17.
- 13.60 Overall, the submissions confirmed our view that the access to justice advantages of litigation funding outweigh the potential disadvantages. As we explained earlier in this report there are significant access to justice issues facing Aotearoa New Zealand.<sup>91</sup> While litigation funding is not a “silver bullet” for these issues it does have a role to play in improving access to justice.<sup>92</sup> Litigation funders are primarily motivated by profit, but by assuming the upfront costs and financial risks of litigation they can facilitate access to the court system and enable plaintiffs to seek redress. Litigation funding can allow plaintiffs to bring claims they could not have brought (due to financial constraints) or would not

<sup>91</sup> See Chapter 2.

<sup>92</sup> See Issues Paper at Chapter 5 and [17.4].

have brought (due to uncertainty about the process, or the time or stress that would be involved in doing so). It can also help to “level the playing field” in litigation against well-resourced defendants.<sup>93</sup>

- 13.61 Earlier in this report, we recommend the creation of a statutory regime for class actions. In our view, that regime would have limited practical utility without litigation funding. In many cases, class actions would be unable to proceed without litigation funding as the financial costs and risks the representative plaintiff would assume are too high.<sup>94</sup>
- 13.62 We are not persuaded that litigation funding will have a significant impact on the availability and affordability of D&O insurance or other kinds of insurance in Aotearoa New Zealand. We recognise there has been a hardening of the insurance market in recent years, which has seen premiums increase and the availability and coverage of insurance decrease in Aotearoa New Zealand and particularly in Australia. However, a number of factors may be contributing to these changes. As we noted in the Issues Paper, although litigation funding may also affect the market, it is not easy to separate out the effects of funding from the effects of these other factors.<sup>95</sup> In our view, the potential impact of litigation funding on the insurance market is not a compelling reason against litigation funding, as long as meritless litigation is prevented. In the absence of meritless cases, any impact litigation funding has on the insurance market can only come from meritorious cases that are presently being hindered by current barriers to access to justice.<sup>96</sup>
- 13.63 We think the risk of litigation funding leading to an increase in meritless cases is minimal. Litigation funders have little or no incentive to fund meritless cases as this is unlikely to be profitable. It is in their commercial interests to undertake careful due diligence to ensure they fund meritorious claims. Unlike some other jurisdictions (such as the United States), a plaintiff in Aotearoa New Zealand can be ordered to pay adverse costs to the defendant if the litigation is unsuccessful, which will also deter funders from pursuing meritless claims.
- 13.64 Other potential disadvantages of litigation funding such as funder control, conflicts of interest, funder profits, and funder capital adequacy are addressed in our recommendations in Chapters 15–17.
- 13.65 We are not persuaded that any increase in the courts’ workload is a disadvantage of litigation funding. We acknowledge that litigation funding may result in an increase in litigation, particularly class actions that would often be unable to proceed without it, and that funded class actions may be resource-intensive for the courts to manage. However, it is difficult to avoid this impact given that litigation funding and class actions are intended to increase access to the court system. We note that funded class actions are likely to make up a very small proportion of civil litigation overall and that a well-designed procedural regime for class actions and litigation funding should minimise the impacts on the court system. Nevertheless, it will be important to understand the impact of class actions on the court system so that delays for other litigants can be avoided. In Chapter 2, we suggest Te Tāhū o te Ture | Ministry of Justice should collect data on the numbers

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<sup>93</sup> See further Issues Paper at [17.6] and [17.8].

<sup>94</sup> See Issues Paper at [17.11]–[17.14]. We discuss adverse costs in Chapter 12.

<sup>95</sup> Issues Paper at [17.43]–[17.48].

<sup>96</sup> See also Chapter 2.

of class actions filed and the judicial resources needed for each. This will allow analysis of the impact of class actions on the court system.

- 13.66 In the Issues Paper, we discussed the risk of a secondary market in litigation funding developing.<sup>97</sup> We said securitisation of funding agreements, where the funder packages their investments for sale either directly or indirectly in a secondary market, may pose a concern. For example, the funder might sell its interest to a hedge fund. Litigation in this context constitutes a further step away from the courts' function of vindicating wrongs and accordingly may undermine public perceptions of the legitimacy of the courts. There appears to be a growing secondary market in the United States and, more recently, in the United Kingdom.<sup>98</sup> However, we are not aware of any secondary market in litigation funding in Aotearoa New Zealand, and only one submitter raised this as a potential concern. We therefore have not considered the issue. If concerns arise in future, we suggest they be considered at that time.

### The torts of maintenance and champerty should be abolished

- 13.67 We recommend the torts of maintenance and champerty should be abolished. By constraining what support can be provided to claimants, they act as an impediment to access to justice. We think the historical policy rationales for the torts, to protect members of society from malicious litigation and to assure the integrity of the courts, can be addressed in other ways. For example, through appropriate and transparent regulation of litigation funding. Already, numerous exceptions to the prohibition on maintaining legal actions have emerged, including in relation to the provision of financial support by relatives, friends or trade unions, subrogation under insurance policies, and the assignment of causes of action that are ancillary to property interests.<sup>99</sup>
- 13.68 Overseas, access to justice considerations have led some jurisdictions to abolish the torts.<sup>100</sup> Similarly, the courts in Aotearoa New Zealand have recognised that the cost of litigation is beyond the means of most New Zealanders and litigation funders may have an increasingly important role to play in ensuring access to justice.<sup>101</sup> In *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council*, the High Court said access to justice and the desirability of promoting settlement of litigation were reasons for reconsidering the policy behind the torts of maintenance and champerty.<sup>102</sup> Similarly, in *Saunders v Houghton*, Te Kōti Pira | Court of Appeal suggested access to justice considerations may necessitate a relaxation of the torts:<sup>103</sup>

...the interests of justice can require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance. Access to justice is a fundamental

<sup>97</sup> See Issues Paper at [21.12]

<sup>98</sup> See Issues Paper at [21.12].

<sup>99</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [115]. See also: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [253]; Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Discussion Paper, 2019) at 8.

<sup>100</sup> For examples of jurisdictions that have abolished the torts, see Issues Paper at [18.17].

<sup>101</sup> For example, *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [177]. See also *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28] and [77].

<sup>102</sup> *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [17], [36], [43] and [45]–[46]. See Issues Paper at [15.8]–[15.9].

<sup>103</sup> *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28].

principle of the rule of law. It can require flexibility to meet the harsh reality of the current cost to the injured party of litigation, which is often more than a would-be plaintiff can sensibly be expected to bear. The result would be a failure of justice: a plaintiff with merits can be excluded from relief against the defendant who has committed a legal wrong.

13.69 In relation to litigation funding, the High Court in *Houghton v Saunders* said:<sup>104</sup>

... there has been a dramatic change in attitude, with some jurisdictions abolishing the tort of champerty altogether and courts generally adopting a much more liberal and relaxed approach, to the point where many authorities appear actively to support litigation funding as a matter of public policy.

13.70 The continued existence of the torts creates uncertainty about whether and to what extent litigation funding is permitted in Aotearoa New Zealand. This uncertainty may impact on the availability and affordability of litigation funding, and ultimately on the ability of some plaintiffs to access justice. As the Law Reform Commission of Western Australia (LRCWA) concluded in its 2020 Report *Maintenance and Champerty in Western Australia*, rather than protecting citizens from injustice, the torts now risk creating injustice themselves.<sup>105</sup>

13.71 None of the submissions we received on maintenance and champerty persuaded us that anything would be lost if the torts were abolished. One submitter said *Cain v Metrick* may indicate that the torts still have value. Although one of the defendants in that case argued that the funding terms were contrary to the policies underpinning maintenance and champerty, the High Court did not determine the proceeding on that basis.<sup>106</sup> Instead, it granted a stay of proceedings on the basis that the funding agreement was an impermissible assignment of a bare cause of action.<sup>107</sup>

13.72 We acknowledge the Law Commission's view in its 2001 Report that the torts may act as a deterrent.<sup>108</sup> However, the authors of *Todd on Torts* state that the "[w]idening justifications for supporting actions, and the lack of decisions in New Zealand imposing liability, suggest that little would be lost by [abolishing the torts]".<sup>109</sup> We agree.

13.73 In Chapter 17, we recommend court oversight of litigation funding agreements in the context of class actions to protect the interests of class members and uphold the integrity of the courts. We also note the courts will retain the ability to manage the policy concerns of the torts through their existing general powers to stay or dismiss any proceedings that are frivolous, vexatious or otherwise an abuse of process, or that disclose no reasonably arguable cause of action. While abolishing the torts will clarify that litigation funding is not itself an abuse of process, it will not limit the court's ability to stay proceedings where the particular terms of the funding arrangement amount to an abuse of process or an

<sup>104</sup> *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [176].

<sup>105</sup> Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Final Report, 2020) at 14.

<sup>106</sup> *Cain v Metrick* [2020] NZHC 2125 at [41]–[43]. The litigation was being funded by Winton Capital Ltd through PLF Services Ltd. Winton Capital specialised in managing and acquiring distressed assets and property developments. It had not previously been involved in litigation funding of this kind but had looked into such opportunities. It was approached by the liquidators to fund the proceedings and saw this as an opportunity to make a return on its investment. The High Court considered Winton had no problematic motives.

<sup>107</sup> *Cain v Metrick* [2020] NZHC 2125 at [65] and [85].

<sup>108</sup> Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

<sup>109</sup> Stephen Todd "Abuse of Legal Process" in Stephen Todd (ed) *Todd on Torts* (8<sup>th</sup> ed, Thomson Reuters, Wellington, 2019) at [18.4.04].



assignment of a bare cause of action, or the claim is meritless (in the sense that it discloses no reasonably arguable cause of action), and to award costs accordingly. We think this is a more principled and effective control than relying on defendants to sue under the torts. To the extent that the prospect of being sued in tort for maintenance and champerty may have a deterrent effect on funding malicious litigation, we think the prospect of a claim being struck out (with an associated costs award) is likely to provide a similar effect.

- 13.74 Te Kōti Mana Nui | Supreme Court in *Waterhouse v Contractors Bonding* considered the circumstances in which a litigation funding agreement may amount to an abuse of process justifying a stay of proceedings.<sup>110</sup> It set out broad categories of conduct that may attract the intervention of the court on traditional grounds to include proceedings that:<sup>111</sup>
- (a) Deceive the court, are fictitious or a mere sham.
  - (b) Use the process of the court in an unfair or dishonest way, for some ulterior or improper purpose or in an improper way.
  - (c) Are manifestly groundless, without foundation or serve no useful purpose.
  - (d) Are vexatious or oppressive.
- 13.75 In addition, the Supreme Court found that a litigation funding arrangement can be challenged as an abuse of process if it effectively assigns a bare cause of action in circumstances where that is impermissible.<sup>112</sup> In making this assessment, the Court said regard should be had to the arrangement as a whole, including the level of control and profit share of the funder, as well as the role of the lawyers acting.<sup>113</sup>
- 13.76 There was strong support from submitters for reforming maintenance and champerty. Although submitters differed on how the law should be reformed, most favoured abolishing the torts (either with or without a preservation provision).
- 13.77 On balance, we think it is unnecessary to preserve any rule of law under which a litigation funding agreement is to be treated as contrary to public policy or otherwise illegal. We do not think a preservation provision has any bearing on the court's ability to stay proceedings if a funding agreement amounts to an abuse of process. As the Supreme Court observed in *Waterhouse v Contractors Bonding*, the rule against assignments of bare causes of action "had its origin in the torts of maintenance and champerty but now seems to have an independent existence of its own".<sup>114</sup> We note the LRCWA recently recommended abolishing the torts subject to a preservation provision,<sup>115</sup> and was partly

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<sup>110</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

<sup>111</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [31], citing *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [27] and IH Jacob "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23 at 43.

<sup>112</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

<sup>113</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57]. There will not be an abuse of process where the effective assignment under a funding agreement is in favour of a party with a genuine commercial interest: *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [77]. See also *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 (CA) at 645, and *Samy Trustee Ltd v Pauanui Dream Estate Ltd* [2020] NZHC 2118 at [25].

<sup>114</sup> *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

<sup>115</sup> Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Final Report, 2020) at 2, Recommendation 1.

influenced by a desire to ensure consistency in the law between Australian jurisdictions.<sup>116</sup> However, this factor has less relevance for Aotearoa New Zealand.

- 13.78 We acknowledge that in reaching this conclusion we are, to some extent, speculating on unknowns. It is impossible to know or quantify the deterrent effect of the torts, the extent to which the torts are impacting on the availability and affordability of litigation funding, or the long-term consequences of abolishing the torts. In recommending abolition of the torts, our intention is not to weaken the courts' powers to deal with any litigation funding issues that undermine the courts' integrity. Rather, our recommendation reflects our view that the court has inherent jurisdiction to address these policy concerns, for example, the ability to stay or strike-out proceedings that are an abuse of its process. The rule against bare assignment is a further illustration of this. Our recommendations discussed in Chapters 14–17 dealing with the regulation of litigation funding are directed to clarifying and reinforcing the courts' powers in this context.
- 13.79 Our recommendation also reflects our view that the torts create uncertainty about the permissibility of litigation funding, and that a preservation provision – while a more cautious approach – would retain ambiguity in the law. While our recommendation to abolish the torts departs from the Law Commission's conclusion in its 2001 Report that the torts should be retained, we agree with its conclusion that no great simplification of the law would be achieved by following the approach of England and Wales and some Australian jurisdictions of abolishing the torts while preserving the courts' ability to find a funding agreement unenforceable on grounds of public policy or illegality.<sup>117</sup>
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<sup>116</sup> Law Reform Commission of Western Australia *Maintenance and Champerty in Western Australia* (Project 110: Final Report, 2020) at 18–19.

<sup>117</sup> Te Aka Matua o te Ture | Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 11.

**CHAPTER 14**

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# Models for regulation and oversight of litigation funding

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**INTRODUCTION**

14.1 In this chapter, we discuss:

- (a) The limited extent to which litigation funding is regulated in Aotearoa New Zealand, and the uncertainty about the extent to which litigation funding is permitted.
- (b) The need for further, specific regulation and oversight of litigation funding, particularly in the context of class actions.
- (c) Objectives and guiding principles for permitting and regulating litigation funding.
- (d) Possible forms of regulation and oversight, and our preference for court oversight.
- (e) Our recommendation in relation to the disclosure of litigation funding agreements.

**LITIGATION FUNDING IS NOT SPECIFICALLY REGULATED IN AOTEAROA NEW ZEALAND**

14.2 In contrast to some comparable jurisdictions, litigation funding in Aotearoa New Zealand is not specially regulated.<sup>1</sup> Instead, litigation funding is regulated to a limited extent by the following:

- (a) General mechanisms available to the court for managing litigation, which have been applied to address some issues arising in funded litigation. These include the courts' powers to stay or strike-out proceedings, and order security for costs.
- (b) Principles that have developed through the courts to address some of the issues arising in funded litigation, for example principles applicable to the disclosure of litigation funding arrangements.
- (c) General statutes that may apply to litigation funding, such as consumer protection legislation.

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<sup>1</sup> For further discussion, see Issues Paper at [15.13]–[15.62].

- (d) The torts of maintenance and champerty (discussed in Chapter 13).
- 14.3 The lack of any specific regulation of litigation funding, combined with the tension between litigation funding and the torts of maintenance and champerty, means there is some uncertainty about whether, and to what extent, litigation funding is permitted in Aotearoa New Zealand.
- 14.4 In the Issues Paper, we expressed the preliminary view that a regulatory response is warranted to address this uncertainty in the law, and to improve transparency and accountability of litigation funder operations in relation to funder control of litigation, conflicts of interest, funder profits and funder capital adequacy.
- 14.5 We acknowledged, however, that the need for regulation may depend on the nature of the funded proceeding or the nature of the funded plaintiff. For instance, we observed that recent reforms to regulate litigation funding in Australia have been directed at class actions. Australia's regulatory response arose out of concerns about inequities and risks of consumer harm in class actions, and the potential for poor justice outcomes. In Aotearoa New Zealand, the courts have also indicated that funded representative actions may justify greater supervision than other funded proceedings to ensure the protection of all parties (including group members who are not before the court but will have their rights determined by the proceedings).<sup>2</sup>

## CONSULTATION QUESTIONS

- 14.6 In the Issues Paper, we asked submitters which of the concerns with litigation funding, if any, warrant a regulatory response. We also discussed options for the form of any regulation and oversight of litigation funding, and asked submitters which option they prefer, and why. In particular, we discussed the following:<sup>3</sup>
- (a) **Industry-based self-regulation and oversight.** This would involve inviting funders operating in Aotearoa New Zealand to develop their own industry standards, and to form an industry association responsible for overseeing compliance with those standards. Membership of the industry association could be either voluntary or could be made a statutory requirement in order for a funder to enter into any funding agreement. The standards of the association could be binding on members, and the association could impose sanctions for non-compliance. The association could be funded by the litigation funding industry through member subscriptions. Industry self-regulation and oversight is the approach taken in England and Wales.<sup>4</sup>
  - (b) **Managed investment scheme and licensing requirements overseen by Te Mana Tatai Hokohoko | Financial Markets Authority (FMA).** The managed investment scheme and licensing requirements in the Financial Markets Conduct Act 2013 (FMC Act) could be imposed on funders, with compliance overseen by the FMA. Among other things, funders would be subject to governance and financial resource

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<sup>2</sup> See *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [63]; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86]; *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [78].

<sup>3</sup> For further discussion, see Issues Paper at [23.13]–[23.51].

<sup>4</sup> Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018). For further discussion, see Issues Paper at [23.17]–[23.18].

requirements. This would be similar to Australia's position in relation to funded class actions.<sup>5</sup>

- (c) **Tailored licensing requirements overseen by the FMA or another regulator.** A variation to the above option is that funders could be subject to modified or new licensing requirements and be monitored by the FMA (or another appropriate regulator). An advantage of this approach would be the tailoring of licensing to the issues raised by litigation funding. However, a disadvantage would be the added regulatory burden of administering a new licensing regime that is tailored to a relatively small number of funders operating in the Aotearoa New Zealand market.
- (d) **Tailored statutory rules overseen by a new oversight body.** A further option is the creation of a tailored statutory regime and a new statutory body to oversee compliance with that regime. The regime could clarify the parameters for acceptable litigation funding arrangements, set minimum terms for funding agreements and minimum standards of behaviour and resources for litigation funders, impose consequences for non-compliance and establish an oversight body.
- (e) **Court approval of litigation funding arrangements.** The courts could be required to approve funding arrangements in all or some funded proceedings, for example in funded class actions. Legislation could set out certain conditions that litigation funding arrangements and funders would need to satisfy in order for the court to approve the arrangement. There is precedent for court approval of class action funding agreements in Ontario.<sup>6</sup>
- (f) **A combination of these options.**

14.7 In broad terms, we said the issue with industry self-regulation is that it is voluntary, while the issue with statutory regulation concerns who would be the regulator to oversee the regime. In terms of managed investment scheme requirements, we noted that the FMC Act was not specifically designed with litigation funding in mind, and significant tailoring of the existing requirements would be required. Court approval would be limited to dealing with funding arrangements as and when funded litigation commences.

## RESULTS OF CONSULTATION

### The need for specific regulation and oversight

14.8 There was strong support from submitters for specific regulation and oversight of litigation funding.<sup>7</sup> At one end of the spectrum submitters considered robust regulation of litigation funding is required to manage the concerns,<sup>8</sup> with one commenting that “the case for regulation in some form is overwhelming”.<sup>9</sup> At the other end of the spectrum

<sup>5</sup> For discussion of Australia's approach to regulation of litigation funding, see Issues Paper at [23.29]–[23.32].

<sup>6</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 33.1. For further discussion of court approval of funding arrangements see Issues Paper at [23.47]–[23.51]. See also Chapter 17.

<sup>7</sup> Including from Andrew Barker QC, Bell Gully, Chapman Tripp, Te Tari Ture o te Karauna | Crown Law Office, Gilbert Walker, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, International Bar Association (IBA) Antitrust Committee, Michael Legg, Murray Lazelle, LPF Group, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), NZ Shareholders' Association, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

<sup>8</sup> For example, Andrew Barker QC, Carter Holt Harvey and Johnson & Johnson.

<sup>9</sup> Andrew Barker QC.

some submitters favoured a light touch approach to regulation.<sup>10</sup> Two submitters did not think that any government-led regulation of litigation funding is warranted,<sup>11</sup> with one funder suggesting the industry has demonstrated no need for regulation.<sup>12</sup>

- 14.9 Several submitters agreed with our preliminary view that the need for transparency and accountability in relation to concerns about funder control, conflicts of interest, funder profits and funder capital adequacy warrants a regulatory response.<sup>13</sup> Others emphasised particular concerns justifying regulation. For example, Omni Bridgeway said it supports appropriate regulation of litigation funding to address concerns about funder capital adequacy and to ensure funders operate competently, efficiently, honestly and fairly.<sup>14</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) said the main purpose of any regulatory regime should be to demystify what is on offer so that those who use litigation funding can make informed choices. It said the focus of regulation should be on facilitating the transparent and open provision of information, including about a funder's resources and the funding terms available.
- 14.10 Many submitters emphasised the greater need for regulation and oversight of litigation funding in class actions as compared to other funded proceedings. This was considered necessary to protect the interests of funded representative plaintiffs and class members,<sup>15</sup> reflect the burden of class actions on defendants,<sup>16</sup> provide greater certainty for litigation funders<sup>17</sup> and ensure an appropriate balance between the interests of the representative plaintiff, class members and defendant.<sup>18</sup>
- 14.11 Some submitters emphasised a particular need for regulation and oversight in opt-out class actions or indicated there is less need for regulation and oversight in opt-in class actions.<sup>19</sup> Te Tari Ture o te Karauna | Crown Law Office said that, in opt-in class actions where the representative plaintiff and class members actively sign up to a proceeding, including any litigation funding arrangement, it is at least arguable they do so on a "buyer beware" basis. LPF Group said contractual certainty in opt-in class actions will facilitate access to justice. It also said funders will be discouraged from supporting litigation if the court has the ability to reopen or vary funding terms agreed by the plaintiff prior to entering the agreement.
- 14.12 A number of submitters suggested the public policy considerations that apply to funded class actions, or other low-value dispute resolution for claimants, might not apply to the

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<sup>10</sup> For example, Association of Litigation Funders of Australia and DLA Piper.

<sup>11</sup> Tempest Litigation Funding and Woodsford Litigation Funding.

<sup>12</sup> Woodsford Litigation Funding.

<sup>13</sup> For example, Bell Gully, Insurance Council, Simpson Grierson and Tom Weston QC.

<sup>14</sup> Other examples include Gilbert Walker (which emphasised the need for regulation of funder profits), the IBA Antitrust Committee (which was especially concerned about funder profits and conflicts of interest) and LPF Group (which emphasised the need for regulation to address uncertainty about whether litigation funding is permitted, funder capital adequacy, funder presence in Aotearoa New Zealand, conditional fee arrangements, disclosure and security for costs).

<sup>15</sup> Barry Allan, Andrew Barker QC, Bell Gully (implied), Buddle Findlay (implied), Colin Carruthers QC, Chapman Tripp, Gilbert Walker, Michael Legg, LPF Group and Vicki Waye.

<sup>16</sup> Carter Holt Harvey and Johnson & Johnson.

<sup>17</sup> LPF Group.

<sup>18</sup> For example, NZX said the regulatory settings for litigation funding should be designed to ensure an appropriate balance between providing access to redress and the negative effects of vexatious actions.

<sup>19</sup> Barry Allan, Buddle Findlay, Crown Law Office, Michael Legg, LPF Group and Vicki Waye.

sophisticated commercial market or the use of litigation funding in individual cases.<sup>20</sup> For example, Professor Vicki Waye (University of South Australia) said there is no justification for regulation and oversight in individual commercial cases. If an individual wants to access litigation funding as opposed to some other form of finance, they should be free to do so and to negotiate their own terms. However, she suggested regulation and oversight may be justified if funding becomes available at a consumer level and if less sophisticated consumers do not understand the risks. Woodsford Litigation Funding noted that funders who are in the business of funding commercial high-value disputes already operate in a highly scrutinised environment (that is, before judges and arbitral tribunals). The parties involved are often sophisticated users of legal services and employ expert legal counsel who have their own professional obligations. It submitted that the public policy considerations that might apply to low-value dispute resolution for plaintiffs who may not have access to expert legal advice should not apply to the sophisticated commercial market.

### Form of regulation and oversight

- 14.13 We received 32 submissions on the form that any regulation and oversight of litigation funding in Aotearoa New Zealand should take.<sup>21</sup>
- 14.14 In the context of representative and class actions, there was strong support for some form of court oversight of the funding arrangement at the commencement of the proceeding and/or when approving a proposed settlement:<sup>22</sup>
- (a) Twelve submitters indicated support for court approval or oversight of the litigation funding arrangement at the commencement of the class action.<sup>23</sup> For example, to ensure compliance with any mandatory minimum terms or statutory requirements.
  - (b) Eleven submitters supported court oversight of the funding commission in the context of approving a class action settlement.<sup>24</sup>

<sup>20</sup> For example, Barry Allan, Andrew Barker QC, DLA Piper, Michael Legg, Vicki Waye and Woodsford Litigation Funding.

<sup>21</sup> Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC, Bell Gully, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Colin Carruthers QC, Nikki Chamberlain, Chapman Tripp, Claims Resolution Service, Crown Law Office, DLA Piper, Te Mana Tatai Hokohoko | Financial Markets Authority (FMA), Gilbert Walker, Institute of Directors, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, Hikina Whakatutuki | Ministry of Business, Innovation and Employment (MBIE), NZLS, NZ Shareholders' Association, NZX, Omni Bridgeway, Ross Asset Management Investors Group, Simpson Grierson, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.

<sup>22</sup> Barry Allan, Andrew Barker QC, Bell Gully, Buddle Findlay, Carter Holt Harvey, Colin Carruthers QC, Chapman Tripp, Insurance Council, IBA Antitrust Committee, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, NZ Shareholders' Association, NZX, Simpson Grierson, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding. The Association of Litigation Funders of Australia noted the existing power in Australia for the court to approve class action settlements and suggested that a statutory cap would be unnecessary if the court has this power. DLA Piper supports guidelines for funders, and said the court could take non-compliance into account when considering whether the funding agreement is an abuse of process.

<sup>23</sup> Barry Allan, Andrew Barker QC, Bell Gully, Buddle Findlay, Carter Holt Harvey, Colin Carruthers QC, Chapman Tripp, Insurance Council, IBA Antitrust Committee, NZLS, Simpson Grierson and Tom Weston QC. DLA Piper explicitly said that court approval of funding arrangements is not necessary (and it is sufficient to disclose the funder's identity, location and amenability to the jurisdiction of the court) but said the court should continue to have some oversight to the limited extent of ensuring funding arrangements do not amount to an abuse of process.

<sup>24</sup> Association of Litigation Funders of Australia, Andrew Barker QC, Bell Gully, Buddle Findlay, Colin Carruthers QC, Nikki Chamberlain, Insurance Council, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway and Woodsford Litigation Funding.

- (c) Six submitters supported court oversight of the litigation funding arrangement at both the commencement of the class action and when approving a settlement.<sup>25</sup>
- 14.15 In the Issues Paper, we did not ask submitters whether the court should have an express power to make common fund orders. However, some submitters nevertheless expressed support for court oversight of funding commissions in the context of exercising a power to make common fund orders.<sup>26</sup> In the Supplementary Issues Paper, we asked whether the court should have an express power to make common fund orders or other cost sharing orders,<sup>27</sup> and we received strong support from submitters for this option. We discuss those submissions and recommend an express power for the court to make cost sharing orders in Chapter 9.
- 14.16 Some submitters suggested ways the court could be assisted to oversee litigation funding arrangements. For example, through statutory criteria to assist the court in deciding whether to approve a funding agreement or settlement, mandatory minimum terms for funding agreements, or an express power for the court to appoint an expert to assist with its assessment of the reasonableness of a funding commission.
- 14.17 Alongside court oversight of litigation funding in representative and class actions, there was strong support for clarifying lawyers' professional obligations when acting in funded proceedings. We discuss these submissions in Chapter 16 and make recommendations on avoiding and managing conflicts of interest in funded proceedings. In Chapter 7, we make recommendations to clarify the relationship between the lawyer and the class.
- 14.18 There was some support for licensing requirements with oversight by the FMA or another appropriate regulator. Of those who supported licensing, most favoured tailored licensing requirements.<sup>28</sup> The managed investment scheme requirements in the FMC Act were generally seen as a poor fit for regulating litigation funders.<sup>29</sup> Notably, the FMA submitted that litigation funding should be regulated as a legal service, not a financial markets service. It did not support licensing requirements and FMA oversight, saying:
- (a) Licensing by the FMA is not an effective mechanism to address the concerns with litigation funding. The FMA's role is to promote the development of fair, efficient and transparent markets. Financial markets regulation in Aotearoa is based on a twin peaks model where the FMA is responsible for market conduct regulation and Te Pūtea Matua | Reserve Bank of New Zealand is the prudential regulator. It is outside the FMA's remit to address concerns about funder profits or conflicts of interest, or concerns about the integrity of the court system raised by funder control.

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<sup>25</sup> Andrew Barker QC, Bell Gully, Colin Carruthers QC, Nikki Chamberlain, Insurance Council and IBA Antitrust Committee.

<sup>26</sup> Bell Gully, LPF Group and Maurice Blackburn/Claims Funding Australia. Crown Law Office said some regulation may be warranted where funding pricing models are used as the starting point for orders that apply to class members who have not agreed to them.

<sup>27</sup> Supplementary Issues Paper at [4.68]–[4.85] and Q 27.

<sup>28</sup> Omni Bridgeway and Simpson Grierson support a tailored licensing regime, overseen by the FMA. NZX suggested an appropriate regulatory body should establish a licensing regime for funders of class actions. Bell Gully said it is not opposed to tailored licensing requirements. Vicki Waye said there may be merit in character requirements for funders, for example through a bespoke licensing requirement.

<sup>29</sup> Association of Litigation Funders of Australia, DLA Piper, FMA, IBA Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, Vicki Waye and Woodsford Litigation Funding. MBIE said more thought needs to be given to the appropriateness of the FMA as the potential regulator of litigation funders, given the primary issue at hand is access to justice. Further, it said the purpose of litigation funding is inconsistent with the purposes of the Financial Markets Conduct Act 2013, ss 3–4.



- (b) Further, licensing would not automatically mean that a funder has adequate financial resources to meet an adverse costs order, continue to fund the proceedings, or distribute funds to shareholders.
  - (c) It is not clear whether litigation funding arrangements come within the definition of a “managed investment scheme” in the FMC Act.<sup>30</sup> In order to be a managed investment scheme, the plaintiff would need to have rights to participate in, or receive, financial benefits. Financial benefit is defined as “capital, earnings, or other financial returns”.<sup>31</sup> When considering the arrangement between a litigation funder and a plaintiff, the FMA does not consider the features that relate to reducing financial risk, or compensation for loss received from the court, fit the definition of a financial benefit. If a funder raises contributions from investors this is likely to fit the definition of a debt security or managed investment scheme (depending on how it is structured) under the FMC Act and may accordingly raise issues that intersect with the FMA’s regulatory mandate. However, this is not the purpose for regulating litigation funding, as set out in the Issues Paper.
- 14.19 Only two submitters clearly favoured a requirement for funders to be licensed as providers of financial products under the existing requirements of the FMC Act.<sup>32</sup> While some other submitters could see similarities between litigation funding and other financial products, or were not opposed to licensing in principle, they were more tentative about the suitability of the managed investment scheme and licensing requirements.<sup>33</sup> Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said that, to the extent funders are sourcing funding from the public, these offerings should be regulated as any other investment product would be.
- 14.20 There was little support for industry self-regulation and oversight.<sup>34</sup> This was generally seen as an inadequate response to the concerns with litigation funding,<sup>35</sup> or impractical given the nascent market for litigation funding in Aotearoa New Zealand and the fact that most funders are presently based overseas.<sup>36</sup>

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<sup>30</sup> Financial Markets Conduct Act 2013, s 9.

<sup>31</sup> Financial Markets Conduct Act 2013, s 9.

<sup>32</sup> Johnson & Johnson said robust regulation of funders is required to meet the interests of all stakeholders, including defendants, and considered funders should be subject to a similar degree of prudential supervisions as other financial service providers. Carter Holt Harvey said there is no principled justification for excusing funders from complying with securities law, and said the definition of a managed investment scheme under Australia’s Corporations Act 2001 (Cth) does not differ materially from the definition in the Financial Markets Conduct Act 2013.

<sup>33</sup> For example, Gilbert Walker said that in some ways the relationship between a plaintiff and funder resembles that of an investor and issuer governed by the Financial Markets Conduct Act 2013 and other corporate legislation. However, it said it did not have developed thoughts on what form regulation should take. NZLS submitted that litigation funding is an unusual form of “financial product”, and supported prudential regulation by the Reserve Bank and operational oversight by the courts rather than oversight by the FMA. Bell Gully said it is not opposed to imposing managed investment requirements on funders in principle, but noted this has caused problems in Australia. Chapman Tripp supported the FMA having an oversight role (alongside the courts and Te Tāhū o te Ture | Ministry of Justice) but did not detail which matters should be overseen by the FMA, or whether funders should be brought within the scope of the Financial Markets Conduct Act 2013.

<sup>34</sup> BusinessNZ considers industry regulation would be preferable to statutory regulation. LPF Group supports industry regulation along the lines of the Association of Litigation Funders’ *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018).

<sup>35</sup> Carter Holt Harvey, Claims Resolution Service, Gilbert Walker and IBA Antitrust Committee.

<sup>36</sup> Chapman Tripp and Maurice Blackburn/Claims Funding Australia.

- 14.21 There also was very limited support for retaining the status quo. Joint Action Funding said the courts have developed the law in relation to litigation funding since *Houghton v Saunders* and this work should not be set back by a “one rule to fit all legislative solution”.
- 14.22 There was no support for creating a new statutory body to oversee any regulation of litigation funding. Only Chapman Tripp commented on this option and said it sees no need for a new oversight body at this stage.

## OUR APPROACH

- 14.23 The submissions on the Issues Paper affirmed our preliminary view that the lack of certainty in the law, and the need for better transparency and accountability in relation to the concerns with litigation funding, warrant a regulatory response.<sup>37</sup> In Chapter 13, we recommend the torts of maintenance and champerty should be abolished to clarify that litigation funding is permitted in Aotearoa New Zealand.
- 14.24 Below, we conclude that further regulation and oversight of litigation funding is also required to clarify uncertainty about the extent to which litigation funding is permissible and to address the concerns with litigation funding. We discuss objectives for permitting and regulating litigation funding, principles for guiding the design of any regulation and oversight, and the form that any regulation and oversight of litigation funding should take.

### Further regulation and oversight of litigation funding is needed

- 14.25 Like uncertainty about *whether* litigation funding is permitted (discussed in Chapter 13), uncertainty about *the extent* to which litigation funding is permitted may negatively impact on access to justice, by reducing the availability and affordability of litigation funding. It may also increase the risk of challenges to funding agreements, adding cost and delay to the resolution of claims. Furthermore, it may mean that plaintiffs are not adequately protected against the risks that can arise in funded proceedings, for example in relation to funder control of litigation, conflicts of interest, funder profits and funder capital adequacy (which together we describe as “the concerns with litigation funding”).

### Class actions

- 14.26 We think the need for further regulation and oversight of litigation funding is strongest in the class actions context. For the reasons below, we think class actions give rise to particular concerns about funder control of litigation and funder profits, as well as more general concerns about conflicts of interest and funder capital adequacy.
- 14.27 In a class action, the representative plaintiff may be unable to effectively negotiate fair and reasonable funding terms, as there will often be an imbalance of power between them and the funder. In most cases, the representative plaintiff will be dependent on litigation funding to bring their claim given the significant costs and financial risks of class actions. Costs may include lawyers’ fees for what may be complex and protracted litigation, as well as disbursements such as expert witness reports and court fees. Further, claims that attract litigation funding will often be against well-resourced defendants backed by their insurers. This means the representative plaintiff will usually be dependent on an adverse costs indemnity from the funder to avoid being exposed to financial risks

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<sup>37</sup> Issues Paper at [23.8].

that are disproportionate to the risks that other class members carry, and to the value of their own claim.<sup>38</sup>

- 14.28 Terms that give the funder control over the conduct of the litigation also give rise to a risk that the funder will prioritise its own interests over the interests of the representative plaintiff and the class. Funder control may diminish the representative plaintiff's ability to have input into how the litigation is conducted.
- 14.29 Further, unfair or unreasonable funding terms may diminish the compensation the representative plaintiff and class members receive if their claim is successful, diminishing the access to justice objective for permitting litigation funding (discussed later in this chapter). For example, terms that entitle the funder to an unreasonable share of any settlement or damages award or allow the funder to terminate the agreement without cause. The latter can put subtle forms of pressure on the representative plaintiff and influence the power dynamics in settlement discussions.
- 14.30 The representative plaintiff will often have little or no litigation experience or expertise, limiting their ability to effectively monitor their claim and protect their interests and class member interests during the proceedings.
- 14.31 The ability of class members to protect their interests is even more limited, because of their low-level of engagement with the claim.<sup>39</sup> They do not have the status of parties and may have very little contact with the lawyer for the representative plaintiff and the class. Class members will likely have no ability to influence the funding terms or commission. For example, it is often a condition of joining an opt-in class action that the class member signs a litigation funding agreement that has already been finalised before the opt-in period commences. Class members may also have very little input into how the litigation is conducted, yet they will be bound by a judgment. Alternatively, they will be bound by a settlement despite usually having no role in settlement negotiations. In opt-out class actions, class members may not even be aware of the proceeding until it has been resolved.
- 14.32 While the lawyer for the representative plaintiff has professional duties to promote and protect their client's interests, and may also owe duties to the class,<sup>40</sup> there is a risk that they will be incentivised to prioritise the funder's interests (because the funder is paying their bills) or their own interests (in order to cultivate or maintain an ongoing business relationship with the funder).
- 14.33 If the funder fails to maintain adequate capital, a successful defendant may be left with a significant loss if the funder and the representative plaintiff are unable to meet an adverse costs order. If the funder is based overseas, the defendant may be put to the additional expense, risk and inconvenience of litigating in a foreign jurisdiction to enforce any security provided. While concerns about funder capital adequacy could exist in any funded proceedings, class actions raise particular concerns because the class is likely to

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<sup>38</sup> In cases under HCR 4.24, the courts have said it is the representative plaintiff who has costs liability and individual group members are generally not exposed to the risk of an adverse costs order: Issues Paper at [13.9]. See also Chapter 12.

<sup>39</sup> In Chapter 18 we discuss recommendations to assist class members to make informed decisions about their participation in a class action.

<sup>40</sup> In Chapter 7, we recommend that the lawyer for the representative plaintiff should become the lawyer for the class upon certification and have a lawyer-client relationship with the class as a whole. We also recommend NZLS consider amending the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 to clarify the duties the lawyer owes to the class.

use litigation funding when it cannot otherwise afford to litigate. It could therefore be assumed the class will be unable to cover the defendant's costs if the litigation funder is unable to. As class actions tend to be significantly more expensive and protracted than ordinary proceedings, a defendant's loss is likely to be significant if the funder fails to fulfil an obligation to indemnify the representative plaintiff against an adverse costs order. While security for costs mitigates this concern, it is not a complete response as it is a matter for the court's discretion and may not reflect the actual costs incurred.

- 14.34 A representative plaintiff may also be left with a substantial and unexpected liability for legal fees and adverse costs if a funder fails to fulfil a commitment under the funding agreement to meet these expenses. We discuss this issue in Chapter 16.

### *Other funded proceedings*

- 14.35 In other funded proceedings, we do not consider litigation funding warrants regulation and oversight to the same extent as in class actions. In these cases, the risk of funder control of litigation and funder profits is less concerning, and the risk of conflicts of interest may also be reduced.
- 14.36 The nature of other claims that attract litigation funding means that the funded plaintiff is likely to be commercially sophisticated. Outside the context of representative actions, litigation funding in Aotearoa New Zealand is most often used in high-value commercial cases such as insolvency and insurance claims.<sup>41</sup> In such cases, the plaintiff may themselves have litigation experience or expertise, or access to their own lawyers or in-house legal team. They are able to promote and protect their interests when negotiating litigation funding agreements and are likely to be actively engaged in their claim and able to monitor and protect their interests during the proceedings.
- 14.37 Occasionally, litigation funding is used outside a commercial context, for example in high-value relationship property disputes.<sup>42</sup> In such cases, the individual plaintiff will have the status of a party to the litigation and will be able to have input into the negotiation of the funding agreement and the way the litigation is conducted. The funding agreement is unlikely to give the funder control over the conduct of the litigation, reducing the risk of lawyers facing conflicts between the interests of the funder and their client. The risk of lawyer-plaintiff conflicts may also be reduced if the plaintiff has a pre-existing relationship with the lawyer, or if the lawyer does not have the expectation of, or opportunity for, repeat work from the litigation funder. Our recommendations to mitigate lawyer-plaintiff conflicts of interest in Chapter 16 nevertheless apply to all funded proceedings and are not limited to class actions.
- 14.38 Whereas representative plaintiffs usually require full litigation funding (including for legal costs), an individual plaintiff may only require partial funding to mitigate their risk. For example, they may decide to finance legal fees but seek funding to satisfy an order for security for costs or to cover disbursements. This also reduces the risk of funder control of litigation and conflicts of interest.

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<sup>41</sup> For example, the recent *Mainzeal* litigation was a funded liquidator action against the former directors of Mainzeal, which collapsed in 2013 owing more than \$110 million to unpaid subcontractors and creditors. For discussion of this case, and further information about the use of litigation funding in insolvency and insurance claims in Aotearoa New Zealand, see Issues Paper at [14.28]–[14.32].

<sup>42</sup> For example, *Patel v Patel* [2014] NZHC 2410. In our conversations with some litigation funders, they confirmed that relationship property disputes sometimes attract litigation funding.

- 14.39 Finally, submitters had few, if any, concerns about litigation funding outside the class actions context. They indicated that an individual plaintiff does not require protection to the same extent as representative plaintiffs and class members, and that they should be free to contract with the funder on whatever terms are acceptable to them. This attitude was shared by members of our Expert Advisory Group and the judges we consulted. It is also reflected in the approaches to regulation of litigation funding in Australia and Ontario, which are largely confined to class actions.
- 14.40 However, concerns about funder capital adequacy may arise in any funded proceedings. Further, while the risk of conflicts of interest may be reduced in commercial cases, there remains some risk of lawyer-plaintiff conflicts in these cases. We consider these risks in Chapters 15 and 16.

### **Objectives for permitting and regulating litigation funding**

- 14.41 We think the objectives for permitting and regulating litigation funding should be improving access to justice, while assuring the integrity of the court system.

#### ***Litigation funding should improve access to justice***

- 14.42 Access to justice is a fundamental tenet of democracy. However, as previously noted in this review, the high costs associated with litigation are well beyond the means of most New Zealanders and significantly impede access to the courts.
- 14.43 In Chapter 13, we conclude that, although litigation funding is not a “silver bullet” for the access to justice problems facing Aotearoa New Zealand, it nevertheless has a role to play in improving access to justice. Litigation funding can allow plaintiffs to bring claims they could not have brought (due to financial constraints) or would not have brought (due to uncertainty about the process, or the time and stress that would be involved in doing so). It can also help to level the playing field for plaintiffs in litigation against well-resourced defendants. We concluded that litigation funding is desirable in principle and the law should clarify its permissibility in Aotearoa New Zealand.
- 14.44 Regulation and oversight of litigation funding should therefore support the use of litigation funding to improve access to justice. In the Issues Paper, we set out a holistic approach to access to justice that includes access to the courts, a fair and transparent process, meaningful participation rights and a substantively just result.<sup>43</sup> Access to justice must be considered from the perspective of both plaintiffs and defendants. This holistic approach enables us, in making recommendations for reform, to consider a wide range of factors.

#### ***Litigation funding should assure the integrity of the court system***

- 14.45 While litigation funding can have the effect of improving access to justice, litigation funders are motivated by profit. Excessive funder profits may corrode public perceptions of the court system.<sup>44</sup> If a funded plaintiff’s compensation is substantially diminished because of their reliance on litigation funding, perceptions about the quality of justice they achieved through the courts may also be diminished.

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<sup>43</sup> See Issues Paper at Chapter 5 and Chapter 2 of this report.

<sup>44</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at xiii and xv.

- 14.46 There is a further risk that the integrity of the court process will be affected by excessive funder profits and control of the litigation. The courts provide a forum where individuals can seek to enforce and defend their substantive rights. This core function may be diminished where, rather than adjudicating on rights, the court process serves the economic purposes of removed third parties.
- 14.47 Historically, the torts of maintenance and champerty prohibited litigation funding. The policy rationales for those torts were to protect members of society from malicious litigation and to assure the integrity of the courts. In Chapter 13, we recommend that the torts should be abolished and conclude that the policy concerns can be addressed, including through appropriate and transparent regulation and oversight of litigation funding. Regulation of litigation funding should therefore provide assurance in the integrity of the court system.

### Principles for designing a regulatory regime

- 14.48 The following principles have guided our recommendations for the development of regulation and oversight of litigation funding:
- (a) To facilitate access to courts, the litigation funding market should be sustainable and competitive and promote consumer confidence.
  - (b) To ensure substantively just outcomes in class actions, the costs of litigation funding to representative plaintiffs and class members and the terms of litigation funding agreements should be fair and reasonable.
  - (c) To assure the integrity of the court system, and recognise defendant concerns in funded proceedings, the involvement and role of litigation funders in funded proceedings should be appropriate and transparent.

### *The market should be sustainable and competitive and promote consumer confidence*

- 14.49 We think the objective of improving access to justice, and particularly access to courts, can best be furthered by regulation that allows the nascent litigation funding market in Aotearoa New Zealand to grow and sustain itself in a way that protects plaintiffs who are consumers of litigation funding. There was strong support from submitters for regulation and oversight of litigation funding that supports a competitive market.
- 14.50 In order for the market to be sustainable and competitive and promote consumer confidence, we recognise that litigation funding needs to be commercially viable for litigation funders. Regulation that is too burdensome may cause funders to leave or not enter the market.
- 14.51 The law also needs to clarify that litigation funding is permitted in Aotearoa New Zealand, and to what extent. In the absence of specific regulation of litigation funding, the parameters within which funders should operate are unclear. This uncertainty may increase the risk and cost of funding litigation, impacting on the availability and affordability of litigation funding. The lack of transparency in the law may also have a negative impact on consumer confidence. While it is difficult to measure the impact of uncertainty in the law on the litigation funding market and access to justice, several submitters echoed these concerns.

### *The costs of litigation funding in class actions should be fair and reasonable*

- 14.52 In class actions, we think it is essential that the costs of litigation funding to representative plaintiffs and class members are fair and reasonable. In *Houghton v Saunders*, Te Kōti Matua | High Court acknowledged that access to justice for a plaintiff may be “diluted” where a substantial sum of any award will be paid to a litigation funder.<sup>45</sup> The access to justice objective of permitting litigation funding will not be met if litigation funding only facilitates access to courts and does not facilitate access to substantively just outcomes.
- 14.53 Ensuring that costs to representative plaintiffs are fair and reasonable will also help to support consumer confidence in litigation funding and assure the integrity and public perceptions of the court system.

### *The involvement and role of litigation funders should be appropriate and transparent*

- 14.54 The involvement and role of litigation funders in funded proceedings needs to be appropriate and transparent in order to assure the integrity, and public perceptions, of the court system. We think transparency will also improve funder accountability. Transparency and accountability may, in turn, improve consumer confidence in the market and accordingly support the availability of funding.
- 14.55 Transparency around the involvement of litigation funders also recognises legitimate defendant interests in information about the litigation that is proceeding against them. This allows the defendant to take steps, for example applying for a stay of proceedings if they think the proceeding is an abuse of process or applying for security for costs.<sup>46</sup>
- 14.56 We recognise that transparency is not appropriate in relation to all aspects of litigation funding arrangements. In *Waterhouse v Contractors Bonding*, for example, Te Kōti Mana Nui | Supreme Court recognised that a funded litigant should not be required to disclose the financial means of the funder, or terms that might give the defendant an unfair or tactical advantage (such as the terms on which funding can be withdrawn).<sup>47</sup>

### *Form of regulation and oversight*

- 14.57 We think the courts are best placed to consider the fairness and reasonableness of funding agreements in class actions, including funding commissions, to ensure the interests of representative plaintiffs and class members are protected. Court oversight was also submitters’ preferred option for regulation and oversight in funded class actions.
- 14.58 The courts in Aotearoa New Zealand have already recognised their important supervisory role in representative actions to ensure that the interests of class members are

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<sup>45</sup> *Houghton v Saunders* [2020] NZHC 1088 at [74].

<sup>46</sup> In Chapter 15, we recommend Te Komiti mā ngā Tikanga Kooti | Rules Committee consider developing a High Court Rules to create a rebuttable presumption that funded representative plaintiffs will provide security for costs in class actions. However, a defendant will still need to apply for security in other funded proceedings.

<sup>47</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [70]–[71].

protected.<sup>48</sup> Class actions raise the same concerns, and court oversight will help to ensure that litigation funding achieves its access to justice objective.<sup>49</sup>

- 14.59 In the absence of detailed statutory rules, however, the courts in Aotearoa New Zealand have questioned the institutional capacity of the courts to approve litigation funding agreements and assess the fairness of funding commissions. In *Southern Response Earthquake Services v Southern Response Unresolved Claims Group*, Te Kōti Pira | Court of Appeal said:<sup>50</sup>

There is nothing in r 4.24 which enables a court to approve funding arrangements or communications, and in the absence of rules creating a regime for approval, the status of any such approval would be uncertain ... There must also be questions about the institutional capacity of the courts to approve such arrangements in what is at best, in this country, a developing market for litigation funders, and given the absence of any detailed rules of procedure or legislation as exist in other jurisdictions. Rule 4.24 cannot bear the weight of a complex funding approval scheme.

- 14.60 The Supreme Court also commented generally on the difficulty of drawing a line between what is an acceptable level of funder profit and what is excessive in *Waterhouse v Contractors Bonding*, saying “whether a bargain is fair assumes the existence of an ascertainable objective standard against which fairness is to be measured”.<sup>51</sup>
- 14.61 Nevertheless, in some comparable jurisdictions there are signs that the courts are willing and able to assess the fairness and reasonableness of funding agreements, including funding commissions. In Ontario, for example, legislation recognises the courts’ competence to assess the fairness and reasonableness of funding agreements and commissions. The court may not approve a funding agreement unless it is satisfied that the agreement, including the indemnity for costs and funding commission, is fair and reasonable, the agreement will not diminish the representative plaintiff’s ability to instruct their lawyer or control the litigation, and the funder is financially able to satisfy any adverse costs order to the extent provided in the indemnity.<sup>52</sup> In deciding whether to approve a funding agreement, the court must consider whether the representative plaintiff received independent legal advice with respect to the agreement.<sup>53</sup> The funding agreement is of no force or effect unless it is approved by the court.<sup>54</sup>
- 14.62 Court approval of funding agreements has also been discussed in Australia. In 2018, the Australian Law Reform Commission recommended that litigation funding agreements

<sup>48</sup> See Issues Paper at [9.18]–[9.19]. In Australia, see similar comments in: Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (December 2020) at [11.53] and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.64].

<sup>49</sup> See Chapter 3, where we note the court may have a more active role in the control, supervision and disposition of class actions than in other litigation because of the need to ensure the interests of class members are adequately protected.

<sup>50</sup> *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [79].

<sup>51</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [48], citing *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [92] per Gummow, Hayne and Crennan JJ.

<sup>52</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 33.1(9)(a).

<sup>53</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 33.1(10).

<sup>54</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 33.1(2)–(3).



should require court approval in order to be enforceable.<sup>55</sup> This would provide the court with an opportunity to consider the terms of the agreement as a whole, including the scope and extent of any indemnity offered to the representative plaintiff, the degree of control sought by the funder, the funder's ability to unilaterally instruct a different plaintiff law firm, and the appropriateness of any dispute resolution mechanism.<sup>56</sup> It recommended court approval should also involve the court reviewing, amending or setting funding terms and commissions (when necessary to protect class members).<sup>57</sup> In 2019, the Australian Parliamentary Inquiry also recommended that litigation funding agreements should require court approval in order to be enforceable.<sup>58</sup> It recommended a power for the court to alter, vary or amend the terms of any funding agreement both prior to, and at the resolution of, a class action.<sup>59</sup> These recommendations have not been implemented.<sup>60</sup> To the extent, however, that Australian courts have been willing to approve or vary funding commissions in the context of making common fund orders, this indicates some acceptance that oversight falls within their expertise.<sup>61</sup>

- 14.63 Court approval of proposed settlements in class actions is also a key feature of overseas class actions regimes. In some jurisdictions, when a court considers whether to approve a class action settlement, it will consider the reasonableness of the funding commission.<sup>62</sup> Court oversight at this stage can provide an important defence against the risk that funders may take an excessive proportion of a class member's settlement sum.<sup>63</sup>
- 14.64 We think the concerns with litigation funding can best be addressed through regulation and court oversight of funding agreements in class actions, alongside professional regulation of lawyers acting in funded proceedings and changes to strengthen the

<sup>55</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018), Recommendation 14(a).

<sup>56</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.66].

<sup>57</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018), Recommendation 14(b).

<sup>58</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020), Recommendation 11.

<sup>59</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020), Recommendation 11.

<sup>60</sup> The Australian Treasury sought stakeholder views on “exposure draft legislation to promote a fair and reasonable distribution of class action proceeds in proceedings involving third party litigation funders” in September and October 2021, see The Treasury “Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders” <[www.treasury.gov.au](http://www.treasury.gov.au)>. The Australian Attorney-General subsequently stated that any class action reforms will be deferred until after the 2022 Australian Federal Election: Michael Pelly “No time for federal ICAC: Cash” *The Australian Financial Review* (online ed, 7 February 2022).

<sup>61</sup> In *BMW Australia Ltd v Brewster*, for example, one of the dissenting judges specifically rejected the argument that making a common fund order required the Court to embark on an inquiry that was beyond its institutional competence: *BMW Australia Ltd v Brewster* [2019] HCA 45, (2019) 374 ALR 627 at [115] per Gageler J. See also *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [22]–[25].

<sup>62</sup> The Competition Appeal Tribunal Rules 2015 (UK), r 94(9); and United States Federal Rules of Civil Procedure, r 23(e)(2)(C). See discussion in William B Rubenstein *Newberg on Class Actions* (online ed, Thomson Reuters) at §13:54. See Chapter 11 and Issues Paper at [21.25].

<sup>63</sup> For further discussion about court approval of class action settlements, see Chapter 11.

security for costs mechanism.<sup>64</sup> We set out an overview of our recommendations for the regulation and oversight of litigation funding at the end of this chapter.

14.65 We think this approach is the most practical and proportionate response to concerns about funder control, conflicts of interest, funder profits and funder capital adequacy. We considered other forms of regulation and oversight but have concluded:

- (a) Industry self-regulation and oversight is an inadequate response to the concerns with litigation funding, and an impractical response given the small size of the market in Aotearoa New Zealand and the fact that most funders are presently based overseas. While this model would support a competitive market, we think the concerns with litigation funding, particularly in class actions, warrant greater scrutiny to ensure that the permitting and regulating of litigation funding furthers the objectives of improving access to justice and providing assurance in the integrity of the court system.
- (b) The managed investment scheme and licensing requirements in the FMC Act are not a good fit for regulating litigation funding arrangements.<sup>65</sup> If we were to recommend this approach, we would be doing so in circumstances where the existing requirements have clear limitations and would require significant reform to properly address the identified concerns with litigation funding. We would also be doing so in the context of strong opposition from the FMA, the regulator responsible for overseeing the licensing regime.
- (c) It is not clear that the significant costs that would be involved in establishing and administering a tailored licensing regime for litigation funders are proportionate to the small size of the market in Aotearoa New Zealand or the concerns with litigation funding. For funders, there would be potentially significant compliance costs, including licensing fees and annual levies. These costs would inevitably be passed on to consumers. For any regulator, there would be the ongoing costs involved in the oversight of litigation funding arrangements and administration of the regime. In any case, there is no obvious regulator to oversee such a regime.
- (d) We do not support the creation of a new statutory body to oversee any regulation of litigation funders and funding arrangements. The cost of this option would likely be disproportionate to the small size of the litigation funding market in Aotearoa New Zealand. No submitters supported this option.

## OVERVIEW OF OUR RECOMMENDATIONS FOR REGULATION AND OVERSIGHT

14.66 In the section below and the chapters that follow, we explain our recommendations to regulate litigation funding in detail. Broadly, we propose the following approach.

14.67 In all funded proceedings:

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<sup>64</sup> In 2018, the Australian Law Reform Commission (ALRC) reached a similar conclusion in its report *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018). Although the ALRC had initially supported a licensing regime for funders in a Discussion Paper, and although licensing was strongly supported by submitters, the ALRC concluded that improved court oversight of litigation funders “would achieve at least the same level of consumer protection without the regulatory burden of a licensing regime”: at [6.37]. This view was supported by the Australian Securities and Investments Commission who told the ALRC that the court would be “better placed to regulate litigation funders, through court rules and procedure, oversight and security for costs”: at [6.37].

<sup>65</sup> For further discussion, see Issues Paper at [23.33]–[23.37].

- (a) Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider developing a High Court Rule to require funded plaintiffs to disclose their litigation funding agreement to the court and to the defendant. We discuss this recommendation below.
- (b) The Rules Committee should consider amendments to the High Court Rules 2016 (HCR) to require security for costs to be provided in a form that is enforceable in Aotearoa New Zealand, and to expressly empower the court to make orders directly against the funder in relation to security for costs and adverse costs. We discuss this recommendation in Chapter 15.
- (c) NZLS should consider amending the *Rules of conduct and client care for lawyers* 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 the funder that is financing the same matter in which they are acting. We discuss this recommendation in Chapter 16.

14.68 In funded class actions only:

- (a) The Class Actions Act we recommend should specify that any litigation funding agreement in a class action must be approved by the court in order to be enforceable by the funder. The court must be satisfied that the representative plaintiff has received independent legal advice on the funding agreement, and that the funding agreement (including the funding commission) is fair and reasonable in the circumstances of the case. To assist with this assessment, our proposed funding approval provision sets out factors the court may consider and provides that the court may appoint an expert to assist it with assessing the fairness and reasonableness of the funding commission. The factors the court may consider respond, among other things, to concerns about funder control of litigation, funder profits and conflicts of interest. We discuss these recommendations in Chapter 17.
- (b) The Class Actions Act should allow the court to review the funding commission when making a cost sharing order (discussed in Chapter 9) or when approving a proposed settlement (discussed in Chapter 11). The court should only be empowered to vary the funding commission when making certain cost sharing orders and, in limited circumstances, in opt-in cases that proceed to judgment (discussed in Chapter 17).
- (c) The Rules Committee should consider an amendment to the HCR to include a presumption for security for costs in funded class actions. We discuss this recommendation in Chapter 15.
- (d) NZLS should consider amending the *Rules of conduct and client care for lawyers* to prohibit a lawyer acting in a class action from claiming any unpaid legal expenses from the funded representative plaintiff if the funder fails to meet its financial commitment to pay those expenses. We discuss this recommendation in Chapter 16.

## DISCLOSURE OF LITIGATION FUNDING AGREEMENTS

### 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.

- 14.69 To support our proposals for the regulation and oversight of litigation funding, we think there should be a requirement for plaintiffs, in all funded proceedings, to disclose their funding agreement to the court and the defendant, with redactions to protect privileged matters or those that might confer a tactical advantage on the defendant.<sup>66</sup> We think disclosure of the funding agreement should 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.
- 14.70 Our recommendation is wider than the current principles applicable to the disclosure of funding agreements, as articulated by the Supreme Court in *Waterhouse v Contractors Bonding*.<sup>67</sup> In that case, the Supreme Court held that a funded litigant must disclose to the court and the non-funded party the fact that there is a litigation funder involved, the funder's identity, and whether or not the funder is subject to the jurisdiction of the New Zealand courts. It reasoned that the non-funded party needs to know these matters before it can decide whether to make an application for a stay on abuse of process grounds. In principle, the courts and the other party or parties are entitled to know the identity of the "real parties" to the litigation.<sup>68</sup>
- 14.71 The Supreme Court said the funding agreement itself should be disclosed to both the court and the non-funded party where an application has been made to which the litigation funding arrangement may be relevant. This may include an application for a stay of proceedings on abuse of process grounds, a non-party costs order or security for costs. Where disclosure occurs, the agreement should be redacted to protect privileged matters or those that might give a tactical advantage to the non-funded party.<sup>69</sup> There is otherwise no general obligation at present to disclose the funding agreement.<sup>70</sup>
- 14.72 We think disclosure of the funding agreement (with appropriate redactions) to the defendant in all funded proceedings will assist the defendant to make informed choices about whether to apply for security for costs or a stay of proceedings on abuse of process grounds. A requirement to disclose the funding agreement is simpler and more

<sup>66</sup> For an example from Ontario, see Class Proceedings Act SO 1992 c 6, s 33.1(5) and (7).

<sup>67</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [67]–[76].

<sup>68</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [68].

<sup>69</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [73].

<sup>70</sup> See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [86] (noting it would be "premature" to say there is an expectation that a funding agreement should be disclosed where the court grants leave for a representative action under HCR 4.24(b)).

efficient than requiring the defendant to apply for disclosure. It supports our access to justice objective for permitting and regulating litigation funding, which includes access to justice for defendants.

- 14.73 Disclosure of the funding agreement (with appropriate redactions) will also give the court an opportunity to stay the proceedings if it considers the funding agreement amounts to an abuse of process.<sup>71</sup> This supports our objective of assuring the integrity of the court system and our principle that the involvement and role of litigation funders in proceedings should be appropriate and transparent. A requirement in the High Court Rules for the disclosure of the funding agreement to the court and the defendant would also make the law more accessible.
- 14.74 Finally, in class actions, disclosure of the funding agreement to the court (with appropriate redactions) is necessary to give effect to our recommendation for court approval of funding agreements in Chapter 17.
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<sup>71</sup> For discussion of when a litigation funding agreement may amount to an abuse of process justifying a stay of proceedings, see Chapter 13 at [13.74]–[13.75].

## CHAPTER 15

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# Security for costs

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## INTRODUCTION

15.1 In this chapter, we discuss:

- (a) Concerns about the funder having insufficient resources to pay an adverse costs order in favour of the defendant.
- (b) The limitations of the existing security for costs regime to manage the concerns.
- (c) Our recommendations to strengthen the security for costs mechanism.

## DEFENDANTS MAY SUFFER LOSS IF FUNDER FAILS TO FULFIL ITS COMMITMENTS

15.2 In the Issues Paper, we noted that the principal financial obligation of a litigation funder is its obligation to pay the plaintiff's legal costs (comprising lawyer's fees and expenses).<sup>1</sup> A funder may also agree to meet any security for costs or adverse costs that are ordered against the plaintiff.

15.3 Litigation funders may become unable to meet their financial obligations for a variety of reasons, including poor financial management and unwise investment decisions. Even when well-managed, litigation funding is an inherently risky form of investment. If successful, it typically does not provide a return for several years. Funded litigation, particularly class actions, can be expensive, uncertain and protracted. There is also an inherent tension between investing and holding reserves, that is, a funder may be motivated to invest money in a new case notwithstanding that the same money could be required to meet the funder's obligations in an existing case.

15.4 A funder's failure to maintain adequate capital to fulfil its financial obligations risks leaving a successful defendant with a significant loss if both the funder and the funded plaintiff are unable to meet an adverse costs order.

15.5 A funder's failure to maintain adequate capital to fulfil its financial obligations may also mean that the funded plaintiff's claim is discontinued, and they may be left with a significant liability in terms of unpaid legal fees or unpaid adverse costs in excess of any security for costs provided. In Chapter 16, we discuss these plaintiff concerns in more detail and our recommendation to respond to those concerns.

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<sup>1</sup> In Chapter 22 of the Issues Paper, we discussed the financial obligations of the funder to the funded plaintiff, the concern that funders may have insufficient resources to fulfil those obligations, and the consequences of a funder's failure to meet those commitments.

- 15.6 In the Issues Paper, we acknowledged that other consequences may also follow from a funder's failure to maintain adequate capital. For instance, the funded plaintiff's lawyer may be left out of pocket for any unpaid work, or the funded proceedings may be discontinued having wasted judicial resources. To some extent, a funder's failure to fulfil its financial obligations may negatively impact perceptions of the litigation funding industry, and we suggested that reputable funders may therefore have an interest in ensuring the capital adequacy of other funders operating in the market.

## SECURITY FOR COSTS MAY BE INADEQUATE TO MANAGE THE CONCERNS

- 15.7 In the Issues Paper, we explained that defendant concerns about funders' capital adequacy are addressed primarily through the security for costs procedure.<sup>2</sup> A defendant can reasonably assume that a plaintiff who requires litigation funding to bring their claim will be unable to satisfy an adverse costs order if the funder fails to meet this expense, and a security for costs order provides a degree of protection against that risk. The order requires the plaintiff to deposit a sum that the judge considers sufficient into court, or to provide security for that sum to the satisfaction of the judge or registrar.<sup>3</sup>
- 15.8 Currently, Te Kōti Matua | High Court may order security for costs under rule 5.45 of the High Court Rules 2016 (HCR) where it is just, and either the plaintiff is resident or incorporated outside of Aotearoa New Zealand or there is reason to believe that they will be unable to pay the defendant's costs if unsuccessful.<sup>4</sup> The court may also exercise its inherent jurisdiction to order security for costs in a representative action supported by a litigation funder, even if the plaintiff is a natural person resident in Aotearoa New Zealand.<sup>5</sup> In addition, the High Court has held that proceedings funded by an overseas-based funder may attract a security for costs order, engaging the "evident policy" in HCR 5.45.<sup>6</sup>
- 15.9 In general, the fact that proceedings are funded by a litigation funder is likely to influence the court to exercise its discretion to order security for costs. Further, the quantum is likely to be substantial and will tend towards relatively full security.<sup>7</sup>
- 15.10 Nevertheless, in the Issues Paper we noted that security for costs may not adequately manage the concerns about a funder's financial resources. For defendants, security for costs is still a matter for the court's discretion and HCR 5.45 does not explicitly contemplate the provision of security in funded proceedings, whether the funder is based locally or overseas. For funders, providing substantial security for costs can significantly increase the cost of funding litigation (particularly if the funder also pays an upfront premium for after-the-event insurance).

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<sup>2</sup> For further discussion, see Issues Paper at [22.10]–[22.16].

<sup>3</sup> High Court Rules 2016, r 5.45(3)(a).

<sup>4</sup> High Court Rules 2016, r 5.45(1). In the District Court, a power to order security is contained in the District Court Rules 2014, r 5.48.

<sup>5</sup> *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [36]. Te Kōti Pira | Court of Appeal referred to s 16 of the Judicature Act 1908 which confirmed the ongoing inherent jurisdiction of Te Kōti Matua | High Court. This provision is now found in the Senior Courts Act 2018, s 12.

<sup>6</sup> *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13].

<sup>7</sup> *Houghton v Saunders* [2013] NZHC 1824 at [125]; *Houghton v Saunders* [2015] NZCA 141 at [11]; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [79]; *Walker v Forbes* [2017] NZHC 1212 at [33] and [71].

## CONSULTATION QUESTIONS

- 15.11 In the Issues Paper, we identified two possible options for reform to address concerns about the capital adequacy of litigation funders:
- (a) Strengthening the security for costs mechanism for some or all kinds of funded litigation.
  - (b) Requiring litigation funders to meet minimum capital adequacy requirements.

### Strengthening the security for costs mechanism

- 15.12 We discussed the option of strengthening the security for costs mechanism, for example through a presumption or requirement that litigation funders will provide security for costs in funded proceedings, and a requirement that security for costs must be in a form that is directly enforceable in Aotearoa New Zealand.<sup>8</sup> We noted that, in Australia, there has been support for a presumption in favour of security being ordered in funded class actions.<sup>9</sup> We suggested that strengthening the security for costs mechanism could give defendants greater comfort that capital will be available and accessible to cover their costs in the event they successfully defend the proceedings.

### Minimum capital adequacy requirements

- 15.13 We also discussed the option of requiring litigation funders operating in Aotearoa New Zealand to comply with minimum capital adequacy requirements.<sup>10</sup> Broadly, such requirements would oblige a funder to maintain a minimum amount of available capital. The amount could be calculated as a proportion of the funder's total financial commitments across its investments, although a fixed dollar amount is also used in some jurisdictions.<sup>11</sup> Overseas, capital adequacy requirements generally include a combination of capital requirements, auditing requirements and continuous disclosure obligations.<sup>12</sup>
- 15.14 We suggested that such requirements may help to protect both the plaintiff and defendant in funded proceedings from the risk of funders failing to meet their financial obligations.<sup>13</sup> On the other hand, we said capital adequacy requirements may not be conducive to a competitive market if overseas-based funders are unwilling to bring their capital into the jurisdiction. They may create a barrier to entry and may advantage some incumbents in the market. Such barriers may be justified to ensure that only reputable and capable funders enter the market. That said, the funding market in Aotearoa New Zealand is already small, with very few locally based funders.<sup>14</sup>

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<sup>8</sup> For further discussion, see Issues Paper at [22.18]–[22.23].

<sup>9</sup> See Issues Paper at [22.19]–[22.22], citing Australian Law Reform Commission *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R 134, 2018) at Recommendation 12.

<sup>10</sup> Issues Paper at [22.26]–[22.51].

<sup>11</sup> For further discussion, see Issues Paper at [22.38].

<sup>12</sup> For further discussion, see Issues Paper at [22.36].

<sup>13</sup> For instance, such requirements may make funders more resilient to unexpected losses, help to mitigate the risk that new entrants to the funding market will not appreciate the costs of conducting complex litigation like class actions, and reassure plaintiffs that the funder has sufficient funds to finance the case for its entirety.

<sup>14</sup> For further discussion about the litigation funding market in Aotearoa New Zealand, see Chapter 14 of the Issues Paper.



- 15.15 Funders are subject to capital adequacy requirements in a number of overseas jurisdictions including England and Wales (albeit only funders belonging to the Association of Litigation Funders), the Abu Dhabi Global Market Courts and, in the arbitration context, Singapore and Hong Kong. As we discuss below, however, these requirements do not appear to be onerous. Class action litigation funders in Australia are required to hold an Australian Financial Services Licence (AFSL) and comply with managed investment scheme requirements.<sup>15</sup> Like other AFSL holders, they are obliged to “have available adequate resources ... to provide the financial services covered by the licence and to carry out supervisory arrangements”.<sup>16</sup>
- 15.16 We noted that key challenges with a capital adequacy requirement include how to formulate a minimum capital requirement, whether minimum capital adequacy requirements should be able to be satisfied if the funder’s capital is held in another jurisdiction, who should oversee compliance with any capital adequacy requirements, and what consequences should follow from non-compliance.<sup>17</sup>

## RESULTS OF CONSULTATION

- 15.17 In the Issues Paper, we asked submitters what concerns they have about the capital adequacy of litigation funders, whether the current security for costs mechanism is adequate to manage those concerns, how the security for costs mechanism might be strengthened, and whether funders should be subject to minimum capital adequacy requirements.

### Concerns about funders failing to fulfil financial obligations

- 15.18 We received 18 submissions on what concerns, if any, submitters have about the capital adequacy of litigation funders.<sup>18</sup> Of those, 14 submitters had concerns about funders’ capital adequacy,<sup>19</sup> and three submitters had no concerns.<sup>20</sup> In this section we summarise the concerns from the perspective of successful defendants, lawyers and the court. We summarise plaintiff concerns, and consider how to address them, in Chapter 16.

### Defendant concerns

- 15.19 The inability of funders to pay an adverse costs order was seen as a significant concern for defendants, due to the scale of the litigation funded and the burden it imposes on

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<sup>15</sup> Corporations Amendment (Litigation Funding) Regulations 2020 (Cth). See also Josh Frydenberg (Treasurer of the Commonwealth of Australia) “Litigation funders to be regulated under the Corporations Act” (press release, 22 May 2020).

<sup>16</sup> Corporations Act 2001 (Cth), s 912A(1)(d).

<sup>17</sup> Issues Paper at [22.35]–[22.51].

<sup>18</sup> Association of Litigation Funders of Australia, Bell Gully, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, DLA Piper, Michael Duffy, Institute of Directors, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson, Tom Weston QC, Vicki Wayne and Woodsford Litigation Funding.

<sup>19</sup> Bell Gully, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Michael Duffy, Institute of Directors, Insurance Council, Michael Legg, LPF Group, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Simpson Grierson, Tom Weston QC and Woodsford Litigation Funding.

<sup>20</sup> Association of Litigation Funders of Australia, Maurice Blackburn/Claims Funding Australia and Vicki Wayne. One submission was unclear.

defendants.<sup>21</sup> Carter Holt Harvey said the organisational resources and opportunity costs of facing years of litigation of uncertain but speculatively high value can be significant. It pointed to the *Feltex* representative action, which was struck out due to the funder's inability to satisfy a security for costs order. It said the *Feltex* litigation led to defendants facing years of litigation (as well as millions of dollars in costs) only for the plaintiffs to fail almost entirely, and then for their funder to withdraw funding for trial costs.

- 15.20 Dr Michael Duffy (Monash University) said successful defendants and plaintiffs suffer where funders who are liable for adverse costs either do not have the assets in the jurisdiction or use a subsidiary special purpose vehicle (SPV) that may have no claim on the funder parent entities due to limited liability. Chapman Tripp also noted that the use of SPVs to fund litigation gives rise to concerns about the adequacy of those SPVs.
- 15.21 On the other hand, some submitters were not concerned about funder capital adequacy.<sup>22</sup> The themes in their submissions were:
- (a) Defendants in funded proceedings should not be afforded a greater degree of protection than they would ordinarily receive.
  - (b) In any litigation, the defendant faces a risk the plaintiff will not be able to pay an adverse costs order in favour of the defendant or will run out of money mid-dispute. Impecuniosity is one of the inherent risks of litigation that all parties face and, if anything, the involvement of a funder may reduce that risk for defendants.
  - (c) Concerns about funder capital adequacy can be mitigated through other mechanisms, including security for costs, non-party costs, market forces, funders' reputational and commercial incentives to ensure they have enough capital to fund proceedings, lawyers' abilities to manage payment of invoices and to alert their clients to any issues with the payment of their invoices, after-the-event insurance, and the terms of litigation funding agreements.<sup>23</sup>

### Other concerns

- 15.22 Simpson Grierson raised a concern about lawyers (and any witness experts) being unpaid for their fees. On the other hand, Maurice Blackburn/Claims Funding Australia said that lawyers have the abilities and systems to ensure the timely payment of invoices, and to manage any concerns about a funder's ability to cover the plaintiff's legal fees and expenses. Further, it said the risk of lawyers not being paid their fees, or a portion of their costs, along the way is not different to the risk faced by lawyers acting for clients in ordinary unfunded commercial and civil litigation.
- 15.23 LPF Group said funders' ability to finance cases in their entirety is fundamental to achieving an accessible justice system. If a funder has insufficient capital then court time is wasted, and the court system becomes ineffectual. It said regulating funders' capital adequacy could address "the valid concern that litigation funding encourages

<sup>21</sup> Carter Holt Harvey and Insurance Council. Tom Weston QC pointed to the *Feltex* representative action to illustrate the risks if there is not capital adequacy. BusinessNZ said it is too early to say what future concerns might arise and therefore how these should be addressed.

<sup>22</sup> Association of Litigation Funders of Australia, Maurice Blackburn/Claims Funding Australia and Vicki Wayne. DLA Piper was also largely unconcerned.

<sup>23</sup> For example, terms enabling the funded party to terminate the funding agreement in the event of an unrectified default in payment by the funder.

opportunism and unscrupulous persons to take unmeritorious cases and frustrate justice”, although in its experience of funding in Aotearoa New Zealand this is not a significant issue.

### **Adequacy of the existing security for costs mechanism**

15.24 Fifteen submitters addressed the adequacy of the security for costs mechanism.<sup>24</sup>

#### ***Existing mechanism is inadequate***

15.25 Eight submitters thought the existing security for costs mechanism is inadequate.<sup>25</sup> Themes in these submissions were:

- (a) A funder’s ability to pay security for costs does not necessarily mean they have the resources to finance the legal action in its entirety.
- (b) Security for costs does not adequately protect defendants from the high costs of defending funded proceedings, particularly group litigation. In some cases, security may not be adequately set at the outset or revisited as the litigation progresses.
- (c) Security for costs is a discretionary matter for the court. As defendants are already being put to the burden of defending typically significant claims, they should not be put to the additional cost and effort of an application for security.
- (d) There is no requirement for the security to be in Aotearoa New Zealand’s jurisdiction.
- (e) The status quo is inconsistent with the regulation of similar forms of funding. Two submitters indicated that funders are essentially financial institutions, and the lack of regulation of funders’ capital adequacy seems inconsistent with the treatment of other such entities.<sup>26</sup> In addition, LPF Group considered it illogical for the law to require funded plaintiffs to provide security for costs, but not require defendants funded by insurance to do the same. It said there should be a reciprocal obligation on funded defendants to provide security.

#### ***Existing mechanism is adequate***

15.26 Three submitters thought the existing security for costs mechanism is generally adequate.<sup>27</sup> The themes in these submissions were:

- (a) A defendant should not be afforded a greater degree of protection for costs than they would ordinarily receive simply because a litigation funder is involved.
- (b) Security for costs is the most effective, targeted and straightforward way to ensure funders are able to meet their financial obligations to pay adverse costs. In contrast to a licensing regime with capital adequacy requirements, it is intended to directly

<sup>24</sup> Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, DLA Piper, Insurance Council, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson, Vicki Waye and Tom Weston QC.

<sup>25</sup> Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Insurance Council, LPF Group, Simpson Grierson and Tom Weston QC. NZLS did not comment on the adequacy of the security for costs mechanism, but supported funders being subject to minimum capital adequacy requirements.

<sup>26</sup> Insurance Council and NZLS.

<sup>27</sup> Association of Litigation Funders of Australia, DLA Piper and Vicki Waye. Maurice Blackburn/Claims Funding Australia said the existing security for costs mechanism is adequate, but it supported strengthening the mechanism.

address the credit risk imposed on defendants and representative plaintiffs and achieves the same level of consumer protection without the regulatory burden.

- (c) In addition to security for costs, market forces and the court's ability to order non-party costs directly against a funder can mitigate the concern that a funder will be unable to fulfil its financial commitments.

15.27 Bell Gully said the existing security for costs mechanism is adequate but needs to be strictly enforced. Claimants need to be held to account if security is not provided or there are delays in advancing the proceeding. It suggested security should be mandatory in funded class actions, which it said is effectively the position now but should be spelt out in any new class actions regime.

### Strengthening security for costs

15.28 Eleven submitters commented on whether the security for costs mechanism should be strengthened.<sup>28</sup>

### *Submissions that supported strengthening security for costs*

15.29 Seven submitters considered the security for costs mechanism should be strengthened in one or more ways.<sup>29</sup>

15.30 Four submitters supported a presumption that funders will provide security for costs in funded proceedings,<sup>30</sup> and one supported a requirement for funders to provide security.<sup>31</sup> A presumption would retain the court's discretion and could be rebutted in suitable cases, for example where the proceeding involves matters of broader public interest. Some thought there should only be a presumption in funded representative and class actions.

15.31 Five submitters supported a requirement for security for costs to be provided in a form that is enforceable in Aotearoa New Zealand.<sup>32</sup> Several commented that requiring a successful defendant to litigate in a foreign jurisdiction to recover the security provided is uncertain, risky and expensive. Defendants should not be put to this extra expense and risk to recover costs they are entitled to. For the same reason, some submitters suggested that after-the-event insurance should generally not be a satisfactory form of security, as it is usually underwritten abroad. Maurice Blackburn/Claims Funding Australia suggested funding agreements should contain standard terms that state the governing law under the agreements to be the laws of Aotearoa New Zealand and otherwise submit the funder to this jurisdiction for disputes arising from the litigation funding agreement.

15.32 Three submitters considered there should be a presumption or requirement that funders provide security calculated on a relatively full basis in funded proceedings.<sup>33</sup> As

<sup>28</sup> Barry Allan, Bell Gully, BusinessNZ, Chapman Tripp, Carter Holt Harvey, LPF Group, Maurice Blackburn/Claims Funding Australia, Insurance Council, Omni Bridgeway, Simpson Grierson and Tom Weston QC.

<sup>29</sup> Barry Allan, Bell Gully, Carter Holt Harvey, Chapman Tripp, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson. Omni Bridgeway did not think the security for costs regime should be strengthened. Three submissions were unclear.

<sup>30</sup> Bell Gully (in funded class actions), Maurice Blackburn/Claims Funding Australia (in funded class actions), Insurance Council and Simpson Grierson.

<sup>31</sup> Chapman Tripp.

<sup>32</sup> Bell Gully, Chapman Tripp, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>33</sup> Carter Holt Harvey, Chapman Tripp and Simpson Grierson.

defendants in funded proceedings are defending typically significant claims, they should not be put to the additional cost and effort of having to apply for full security.

### ***Submissions that did not support strengthening the security for costs mechanism***

- 15.33 Omni Bridgeway did not support strengthening the security for costs mechanism, as the court already has discretion to order security. It said the court ordinarily weighs up the competing interests of the parties and the circumstances of the case, including the capacity of the claimant to meet an adverse costs order, and this same balancing exercise should be conducted in funded litigation. It supported a licensing regime (including minimum capital requirements) and said that, if a funder has the capacity to meet an adverse costs order, there is no reason why security for costs should be ordered at all. It agreed that, if a case is unsuccessful, costs orders could be made directly against the funder to avoid the time and expense of enforcing a costs order against the plaintiff.

### ***Other submissions***

- 15.34 LPF Group cautioned that any additional security for costs obligations should not be imposed on funders lightly, as this will reduce the compensation payable to funded plaintiffs. It also submitted that funded plaintiffs and funded defendants should be subject to the same security for costs requirements. For example, plaintiffs and defendants should both be liable for costs on an indemnity basis if they lose, and each side should be required to post security for costs. It suggested that requiring defendants to also provide security would ensure only meritorious defences are run, which would free up court time, provide swifter management of cases and reduce the costs of class actions.

### ***Capital adequacy requirements***

- 15.35 We received 14 submissions on whether funders operating in Aotearoa New Zealand should be subject to capital adequacy requirements.<sup>34</sup> Seven submitters said there should be capital adequacy requirements,<sup>35</sup> and five said there should not.<sup>36</sup> One submission, from Te Mana Tatai Hokohoko | Financial Markets Authority (FMA), did not comment on whether funders should be subject to capital adequacy requirements or what those requirements should be, but strongly opposed FMA oversight of any such requirements.

### ***Submissions supporting capital adequacy requirements***

- 15.36 Submitters in support of capital adequacy requirements (in addition to, or instead of, strengthening the security for costs mechanism) considered these would protect defendants, given the scale of the litigation that funders typically fund and the possibility that security for costs may not be adequately set or revisited as the litigation develops. Capital adequacy requirements could also benefit funded plaintiffs by preventing entities

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<sup>34</sup> Barry Allan, Association of Litigation Funders of Australia, BusinessNZ, Chapman Tripp, DLA Piper, Te Mana Tatai Hokohoko | Financial Markets Authority (FMA), Insurance Council, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Simpson Grierson, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.

<sup>35</sup> Chapman Tripp, Insurance Council, NZLS, Omni Bridgeway, Simpson Grierson and Tom Weston QC. Woodsford Litigation Funding supported capital adequacy requirements, but only as part of an industry self-regulation and oversight model, as in England and Wales.

<sup>36</sup> Association of Litigation Funders of Australia, Barry Allan, BusinessNZ, Maurice Blackburn/Claims Funding Australia and Vicki Waye.

without sufficient capital from becoming involved in the industry and improving the resilience of funders.

- 15.37 There were various suggestions about how any capital adequacy requirements could be formulated, including:
- (a) Funders could be subject to requirements to maintain adequate financial resources at all times to fund all the disputes they have agreed to fund,<sup>37</sup> and to pay all debts when they become due and payable.<sup>38</sup>
  - (b) Minimum capital adequacy requirements could correlate to the funder's financial commitment in the particular proceedings, as this would provide greater reassurance to plaintiffs and defendants than an arbitrary figure.<sup>39</sup>
  - (c) Funders could be required to maintain access to a specified minimum amount of capital, as in England and Wales under the Association of Litigation Funders *Code of Conduct for Litigation Funders*.<sup>40</sup>
  - (d) Funders could be required to have access to capital in Aotearoa New Zealand.<sup>41</sup> They could have to demonstrate that access to the capital is readily available in Aotearoa New Zealand, including in an enforcement context, or that they have the assets appropriately 'ring-fenced' to avoid difficulties accessing it. LPF Group said funders could be required to have at least one director resident in Aotearoa New Zealand and their funding terms should be enforceable in accordance with New Zealand law.
- 15.38 Three submitters thought auditing requirements would be necessary to independently verify capital adequacy requirements are being met.<sup>42</sup> An appropriate regulator, such as the FMA, could obtain the audit results and oversee funders' compliance. Omni Bridgeway said funders should be required to conduct an impairment test on a half-yearly basis to determine whether any of its funded litigation investments should be written off or provisioned. The result of that test could be reported to the FMA. Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said funders should be subject to continuous disclosure obligations.
- 15.39 There was no consensus as to who should oversee a funder's compliance with any capital adequacy requirements. Two submitters indicated the court should oversee a funder's capital adequacy at the commencement of a class action.<sup>43</sup> Two submitters said funders operating in Aotearoa New Zealand should be subject to a licensing regime that includes capital adequacy and auditing requirements overseen by an appropriate regulator, such as the FMA.<sup>44</sup> However, as we discussed in Chapter 14, the FMA was strongly opposed to this option. One litigation funder favoured industry oversight of funders' compliance with any minimum capital adequacy requirements.<sup>45</sup> Te Kāhui Ture o Aotearoa | New

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<sup>37</sup> Chapman Tripp and Insurance Council.

<sup>38</sup> Insurance Council.

<sup>39</sup> Insurance Council.

<sup>40</sup> Woodsford Litigation Funding.

<sup>41</sup> Chapman Tripp, Insurance Council and LPF Group.

<sup>42</sup> Insurance Council, Omni Bridgeway and Simpson Grierson.

<sup>43</sup> Insurance Council and LPF Group.

<sup>44</sup> Omni Bridgeway and Simpson Grierson.

<sup>45</sup> Woodsford Litigation Funding.

Zealand Law Society said litigation funding is a financial product, and therefore any regulatory response should ensure market participants are appropriately capitalised. It suggested litigation funding has similarities with the insurance industry, so the regulatory regime applying to insurance companies, which focuses on the financial strength of insurance companies and how this is communicated to policyholders, is a possible model.<sup>46</sup> It suggested Te Pūtea Matua | Reserve Bank of New Zealand could have a role in regulating the prudential requirements for litigation funders.

- 15.40 Submitters suggested a range of consequences for non-compliance with any capital adequacy requirements, including civil penalties,<sup>47</sup> a prohibition on a funder enforcing its rights under a funding agreement (unless non-compliance was accidental or inadvertent),<sup>48</sup> or a provision that a funding agreement in respect of a class action has no force or effect unless it is approved by the court as part of a threshold legal test.<sup>49</sup>

### *Submissions opposed to capital adequacy requirements*

- 15.41 Five submitters were opposed to minimum capital adequacy requirements.<sup>50</sup> The themes in their objections were:

- (a) Capital adequacy concerns are not based on any evidence of widespread or systemic misconduct by funders and there are few, if any, examples where the lack of capital adequacy of a funder has led to financial loss to plaintiffs.
- (b) Capital adequacy requirements have never ensured funders have enough to pay an adverse costs order, and there is never any guarantee that a lender (in any sector) will not fall over.
- (c) Capital adequacy regulation was rejected in the United Kingdom because it imposes a disproportionate regulatory burden, and this reasoning applies even more so in the smaller market of Aotearoa New Zealand. The utility and administrative burden associated with annual audits is questionable, and a regulator could instead be empowered to require an audit on an as-needs basis.
- (d) Security for costs, or enhanced security for costs, is a better response to the concern that funders might lack resources. It can be tailored to the actual costs of a particular case, rather than an abstract (and often low) minimum capital requirement which may represent only a small fraction of the funder's total commitments.
- (e) Capital adequacy requirements will add to the compliance costs for funders, which may impact on the availability and affordability of litigation funding for plaintiffs. Such requirements may discourage market entry and cause the exit of some funders from the market. They would likely stifle competition by favouring funders based in Aotearoa New Zealand and large-scale funders that are able to sustain the costs of maintaining a commercial presence and capital in this jurisdiction.

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<sup>46</sup> This is contained in the Insurance (Prudential Supervision) Act 2010.

<sup>47</sup> Insurance Council.

<sup>48</sup> Simpson Grierson.

<sup>49</sup> Tom Weston QC supported Ontario's regulation of litigation funding in class actions in the Class Proceedings Act SO 1992 c 6, s 33.1. See also Chapter 17 and Issues Paper at [23.50].

<sup>50</sup> Barry Allan, Association of Litigation Funders of Australia, BusinessNZ, Maurice Blackburn/Claims Funding Australia and Vicki Waye.

## RECOMMENDATION

**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.

### Successful defendants may suffer significant loss

- 15.42 Like a number of submitters, we are concerned that a funder's failure to maintain adequate capital may mean a successful defendant is left with a significant loss if the funder and the funded plaintiff are unable to meet an adverse costs order.<sup>51</sup> In addition to the financial implications, defendants may suffer an unnecessary burden if proceedings are ultimately discontinued due to the funder's lack of capital. The organisational resources and opportunity costs for defendants of facing years of litigation of uncertain but speculatively high value is significant. In addition, a funder's failure to maintain adequate capital to continue to support the proceedings has resource implications for the court system.
- 15.43 The *Feltex* representative action illustrates this burden for defendants. That claim was filed on behalf of 3,600 shareholders in 2008 and did not conclude until the High Court struck out the case in 2020 due to a failure to provide security for costs for a stage two trial.<sup>52</sup> The defendants were put to significant cost over the course of this proceeding.<sup>53</sup> The case involved a 14-week substantive hearing, as well as a significant number of interlocutory decisions and appeals.<sup>54</sup>
- 15.44 We think the risk for successful defendants is greatest in class actions. Class members are likely to use litigation funding when they cannot otherwise afford to litigate, and it can reasonably be assumed that they will be unable to cover the defendant's costs if the litigation funder fails. Class actions tend to be more expensive and protracted than ordinary proceedings, and the overall cost is significant compared to individual class

<sup>51</sup> We discuss plaintiff concerns regarding a funder's failure to maintain adequate capital in Chapter 15.

<sup>52</sup> In May 2020, the High Court 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: *Houghton v Saunders* [2020] NZHC 1088 at [92]. This was upheld by the Court of Appeal: *Houghton v Saunders* [2020] NZCA 638. Te Kōti Mana Nui | Supreme Court has declined leave to appeal the Court of Appeal's decision: *Houghton v Saunders* [2021] NZSC 38.

<sup>53</sup> The defendants were awarded costs at the conclusion of the litigation, see *Houghton v Saunders* [2021] NZHC 3590.

<sup>54</sup> *Houghton v Saunders* [2021] NZHC 3590 at [7].



member claims, increasing the financial risks for defendants. Below, we discuss how security for costs should be strengthened to respond to this risk.

### Existing security for costs regime does not adequately protect defendants

- 15.45 For the reasons below, we do not think the existing security for costs mechanism adequately protects defendants in funded proceedings or promotes efficiency and economy in litigation. We think defendants in funded class actions need greater certainty that capital will be available to cover their costs in the event they are successful.
- 15.46 In our view, the involvement of a funder should shift the court's focus from the plaintiff's potential impecuniosity and place of residence or incorporation to the funder's potential impecuniosity and place of residence or incorporation. Currently, HCR 5.45 allows the court to order security for costs where it is just, and either the plaintiff is resident or incorporated outside of Aotearoa New Zealand or there is reason to believe that the plaintiff will be unable to pay the defendant's costs if unsuccessful. In practice, the courts have relied on their inherent jurisdiction and the "evident policy" in HCR 5.45 to order security for costs in funded proceedings.<sup>55</sup> However, we think it would be preferable for the High Court Rules to explicitly address security for costs in funded proceedings so that the law is more accessible and transparent.
- 15.47 Security for costs is currently ordered at the discretion of the courts, and only if sought by the defendant. We think this provides insufficient certainty and protection for defendants in funded class actions. As previously noted, defendants can reasonably assume that a class that requires litigation funding to bring its claim will be unable to satisfy an adverse costs order if the funder fails to meet this expense. We do not think defendants should be put to the additional cost and effort of having to apply for security in these cases.
- 15.48 If the funder (or any after-the-event insurer) is based overseas, as is often the case in relation to funded proceedings in Aotearoa New Zealand, a successful defendant may be put to the additional expense, risk and inconvenience of litigating in a foreign jurisdiction to enforce the security provided.<sup>56</sup> We do not think that is reasonable as a matter of public policy.<sup>57</sup> We think this risk may arise in any proceedings funded by an overseas-based funder and is not limited to class actions.
- 15.49 Currently, HCR 5.45 only empowers the court to order a plaintiff to provide security for costs.<sup>58</sup> In some proceedings, this will not accurately reflect the dynamics of the case. In funded class actions, for example, the funder is usually contractually responsible for paying the full costs of the litigation including any security for costs.

<sup>55</sup> See for example *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13]–[14].

<sup>56</sup> See *Houghton v Saunders* [2013] NZHC 1824 at [112]–[121]; *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13]–[15] (cited with approval in *Houghton v Saunders* [2020] NZHC 2030 at [65]).

<sup>57</sup> The Australian Law Reform Commission also held this view. See Australian Law Reform Commission *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.51].

<sup>58</sup> Although in exceptional circumstances the court can make a costs order directly against a non-party funder who takes an active role in the proceedings: see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]–[53].

## The security for costs regime should be strengthened in funded proceedings

### *Presumption for security for costs in funded class actions*

- 15.50 While security for costs is a targeted and effective way to ensure funded plaintiffs meet their obligations to defendants in class actions, the burden currently rests with the defendant to establish that security for costs should be ordered. We think a presumption for security would more accurately reflect the significant costs of class actions, which tend to be considerably more expensive, protracted and risky than ordinary proceedings.
- 15.51 A presumption will reduce interlocutory disputes at the commencement and throughout the proceedings. It will shift the onus from the defendant, who is ordinarily required to satisfy the court that security should be provided, to the representative plaintiff (in reality, the funder) if they wish to rebut the presumption.
- 15.52 We think a presumption is preferable to a requirement for security for costs, as it retains the court's discretion and ensures the presumption can be rebutted in suitable cases. This could include, for example, class actions that engage matters of significant public interest.
- 15.53 Our recommendation responds to submitters' concerns that security for costs is only ordered at the discretion of the court, and on the application of the defendant. It is intended to give defendants in funded class actions greater comfort that capital will be available to cover their costs in the event that they are successful, and to make the process of obtaining security for costs more efficient and cost-effective. For the same reasons, the Australian Law Reform Commission (ALRC) and the Australian Parliamentary Inquiry recommended a statutory presumption that funders will provide security for costs in class actions.<sup>59</sup> The Federal Government of Australia has agreed with these recommendations.<sup>60</sup>
- 15.54 We do not think there is a need for a presumption for security in other funded proceedings. In Aotearoa New Zealand, the practice of the courts has been to order security in all funded proceedings (not just representative actions) on the basis that the funder's interest is not in having its own rights vindicated but in making a commercial profit.<sup>61</sup> We are not persuaded that a funder's profit motive alone increases the risk to defendants or justifies a presumption for security. In some funded proceedings the risk and cost involved may well justify security being ordered, but we think this can be sought on a case-by-case basis as necessary. However, as we explain in Chapter 14, we think the requirements for disclosure of funding agreements should be strengthened in all funded proceedings. Among other things, this will assist defendants in non-class actions cases to make more informed choices about whether to apply for security.

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<sup>59</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 12; Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the Regulation of the Class Action Industry* (December 2020) at Recommendation 10.

<sup>60</sup> It said a presumption will provide greater assurance to defendants that their costs will be met if they successfully defend the class action, while maintaining the court's discretion to allow the presumption to be rebutted in suitable cases: Australian Government *Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services report: Litigation Funding and the Regulation of the Class Actions Industry and The Australian Law Reform Commission report: Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (October 2021) at 26.

<sup>61</sup> See Issues Paper at [15.44]–[15.47].

- 15.55 We considered whether the High Court Rules should be amended to reflect the practice of the courts to award security on “a relatively full basis” in funded proceedings but concluded this is unnecessary. In practice, the courts have indicated the quantum is likely to be substantial and will tend towards relatively full security.<sup>62</sup> We do not consider reform is necessary, as the law appears to be clear and settled. Further, we think making this practice into a presumption or requirement would diminish the court’s discretion to determine the appropriate quantum in each case.
- 15.56 We acknowledge that a presumption for security may increase the cost of litigation funding, reducing the recovery for plaintiffs. However, this may not be a significant change from the status quo, as the practice of the courts has been to order security on a relatively full basis in funded proceedings. On balance, we think a presumption strikes an appropriate balance between the access to justice needs of plaintiffs and defendants.

### ***Presumption that security must be enforceable in Aotearoa New Zealand***

- 15.57 We think there should be a presumption in all funded proceedings that security will be provided in a form that is enforceable in Aotearoa New Zealand. By that, we mean enforcement is a matter governed by New Zealand law, and following the making of an enforcement order by a court in Aotearoa New Zealand, there is no realistic prospect that further enforcement action will be required in a foreign jurisdiction. Requiring a successful defendant to litigate in a foreign jurisdiction to recover the security provided is uncertain, risky, time-consuming and expensive.<sup>63</sup> It undermines the efficacy of security for costs. The risk may arise in any proceedings funded by an overseas-based funder and is not limited to class actions. While we do not want to restrict the acceptable forms of security, we have concluded it is unreasonable for defendants to be put to additional expense and effort to recover the costs they are entitled to.
- 15.58 Our view is consistent with the ARLC’s recommendation that funders who fund class actions should provide security in a form that is enforceable in Australia.<sup>64</sup> In October 2021, the Federal Government agreed with this recommendation.<sup>65</sup>
- 15.59 Most funders operating in Aotearoa New Zealand are based overseas, and any after-the-event insurance will almost certainly be underwritten abroad. To our knowledge, there are no after-the-event insurers based in Aotearoa New Zealand and very few in Australia.

<sup>62</sup> *Houghton v Saunders* [2013] NZHC 1824 at [125]; *Houghton v Saunders* [2015] NZCA 141 at [11]; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [79]; *Walker v Forbes* [2017] NZHC 1212 at [33] and [71].

<sup>63</sup> See *Houghton v Saunders* [2013] NZHC 1824 at [112]–[121]; *White v James Hardie New Zealand* [2019] NZHC 188, (2019) 24 PRNZ 493 at [13]–[15] cited with approval in *Houghton v Saunders* [2020] NZHC 2030 at [65].

<sup>64</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 12 and [6.51]. Contrast the Australian Parliamentary Inquiry, which did not recommend that security should be in a form that is enforceable in Australia. It acknowledged the argument that a defendant should not have to litigate in a foreign jurisdiction in order to recover their legal costs when they have been successful in a class action, but recognised that a jurisdictional requirement could restrict the options available to a funder to satisfy a security for costs order: Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the Regulation of the Class Action Industry* (December 2020) at [10.59].

<sup>65</sup> It said it is unreasonable to expect a defendant to litigate in a foreign jurisdiction to recover against the security provided: Australian Government *Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services report: Litigation Funding and the Regulation of the Class Actions Industry and The Australian Law Reform Commission report: Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (October 2021) at 26.

Most appear to be London-based. This would mean that, in most (if not all) funded litigation, a deed of indemnity from an after-the-event insurer would not be enforceable in Aotearoa New Zealand and would need to be enforced through ancillary litigation in another jurisdiction. The presumption we recommend would avoid the need for such ancillary litigation.

### **Express power for the court to make orders directly against the litigation funder**

- 15.60 We think a power for the court to order that security for costs be provided by the funder would more accurately reflect the dynamics of funded proceedings. In our view, the involvement of a funder should shift the focus from the potential impecuniosity of the plaintiff to the potential impecuniosity of the funder. Further, in funded class actions, the funder will usually be contractually responsible for paying the full costs of the litigation, including any security for costs ordered.
- 15.61 However, we recommend that the court's powers regarding costs not be limited to security for costs. Currently, in exceptional circumstances, the common law allows the court to make a non-party costs order against a funder who takes an active role in the proceedings.<sup>66</sup> Such an order is particularly directed to a non-party who funds the litigation, has a close role in its conduct, and also seeks to benefit from it.<sup>67</sup> It is not controversial that a litigation funder's involvement can attract costs liability.<sup>68</sup> We do not intend to widen the scope of the court's power as it currently exists, but we think an express power for the court to order adverse costs directly against the funder will make the law more accessible by codifying the common law.

### **Funders should not be subject to minimum capital adequacy requirements**

- 15.62 We do not consider capital adequacy requirements should be imposed on litigation funders at this stage. We think defendant concerns can be more effectively managed by strengthening the court's power to order security for costs in funded proceedings.

### **Security for costs is a more targeted response to defendant concerns**

- 15.63 Compared to minimum capital adequacy requirements, we think strengthening security for costs in funded proceedings is a more targeted and effective way to manage defendant concerns about the funder's ability to fulfil its financial commitments.
- 15.64 The FMA's submission cautioned that a licensing regime, including capital adequacy requirements, will not automatically mean that a funder has adequate financial resources to meet an adverse costs order or continue to fund the proceedings.
- 15.65 Similarly, in Australia there has been considerable discussion about the efficacy of licensing to manage concerns about funders failing to meet their financial obligations. The ALRC favoured capital adequacy requirements in a 2018 discussion paper but did not

<sup>66</sup> See *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]–[53].

<sup>67</sup> *Houghton v Saunders* [2021] NZHC 3590 at [82].

<sup>68</sup> See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [52]. With respect to security for costs, see for example: *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [89]; *Houghton v Saunders* (2011) 20 PRNZ 509 at [231] (plaintiff's application to lift the interim stay was granted subject to the plaintiff or the funder providing security for costs); *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 3105 at [104].

recommend them in its final report.<sup>69</sup> It concluded that security for costs and improved court oversight would achieve the same level of protection as a licensing regime with minimum capital adequacy requirements, but without the regulatory costs.<sup>70</sup>

- 15.66 In December 2020, when the Australian Parliamentary Inquiry recommended a statutory presumption that class action funders will provide security for costs, it reasoned that:<sup>71</sup>

...the Australian Financial Services Licence (AFSL) does not require litigation funders to have adequate financial resources. Nor does the AFSL extend to holding adequate security for costs for litigation purposes. The AFSL requirements do not seek to prevent AFSL holders from becoming insolvent, or failing due to poor business models or cash flow problems.

Further, the Australian Securities and Investments Commission's financial requirements do not protect against credit risk or provide compensation for loss, or address the risk that a litigation funder may run out of funds before a case is complete.

- 15.67 Security for costs has the advantage that it can be tailored to the actual costs of the case, rather than an abstract (and often low) minimum capital requirement. In England and Wales, the Association of Litigation Funders (ALF) *Code of Conduct for Litigation Funders* requires members of the ALF to maintain access to £5 million of capital (or such other amount as stipulated by the ALF).<sup>72</sup> It has been suggested that this is not a large sum in the context of the litigation funding industry. The majority of funders belonging to the ALF operate with capital of more than £30 million under management.<sup>73</sup>

- 15.68 As we noted in the Issues Paper, one of the key challenges with the capital adequacy option is how to formulate a minimum capital requirement.<sup>74</sup> We suggested that specifying a particular amount would provide a baseline and would be simple to administer and audit. However, a specific amount might not correlate to a funder's actual risk and expenditure (as the overseas examples above suggest). Correlating minimum capital requirements to a funder's portfolio of investments would more accurately reflect the funder's risk but might be more difficult and more costly to administer and audit. Very few submitters addressed this issue, and those that did were divided in their views.<sup>75</sup>

<sup>69</sup> Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC DP85, 2018), Proposal 3-2.

<sup>70</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.34] and [6.37].

<sup>71</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation Funding and the Regulation of the Class Action Industry* (December 2020) at Recommendation 10 and [10.56]–[10.57]. See also Australian Securities and Investments Commission, Submission No 39 to Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (June 2020) at [104] and [106].

<sup>72</sup> Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.4.2], and Association of Litigation Funders *Rules of the Association* (July 2016), r 3.15.1.

<sup>73</sup> See Issues Paper at [22.38]. Similar amounts are prescribed in the Abu Dhabi Global Market Courts Litigation Funding Rules 2019, the Hong Kong Code of Practice for Third Party Funding in Arbitration, and Singapore's Civil Law (Third-Party Funding) Regulations 2017.

<sup>74</sup> Issues Paper at [22.37].

<sup>75</sup> Woodsford Litigation Funding supported a fixed minimum amount pursuant to a voluntary code of conduct, as in England and Wales. The Insurance Council thought minimum requirements should correlate to the funder's financial commitment in the particular proceeding.

### *Security for costs is a more cost-effective option*

- 15.69 Establishing and overseeing minimum capital adequacy requirements would have resource implications for the responsible regulator or oversight body, as well as for funders and consumers of litigation funding. For example, if the licensing and managed investment scheme requirements in the Financial Markets Conduct Act 2013 were to apply to litigation funders, significant tailoring of the existing regulations and FMA exemptions would be required (as has been needed in Australia). As we discuss in Chapter 14, we do not think the resource implications for any regulator or oversight body are proportionate to the concerns or the small size of the market for litigation funding in Aotearoa New Zealand. Strengthening the security for cost mechanism avoids this regulatory burden.
- 15.70 Capital adequacy requirements would add significant compliance costs to the provision of litigation funding services, including the administrative burden of an annual audit and any licensing fees or levies. These costs will likely be passed on to consumers of litigation funding, potentially impacting on access to justice.
- 15.71 There is also a risk that capital adequacy requirements would stifle market competition if overseas funders were unwilling to bring their capital into the jurisdiction. The requirements might favour funders based in Aotearoa New Zealand and large-scale funders that are able to sustain the costs of maintaining a commercial presence and capital in the jurisdiction. This could be problematic, given that the funding market is already small with very few locally based funders.<sup>76</sup> While a presumptive requirement for funders to provide security that is enforceable in Aotearoa New Zealand may have a similar effect to some degree, security for costs is at least proportionate to the funder's level of involvement in this market.
- 15.72 In our view, strengthening the security for costs mechanism in funded proceedings is a more cost-effective response to defendant concerns than imposing capital adequacy requirements on funders. This response better aligns with our guiding principle that the litigation funding market should be sustainable, competitive and fair.

### *Unclear who would oversee compliance with any capital adequacy requirements*

- 15.73 Initially we thought the FMA may be an appropriate regulatory body to oversee compliance with any capital adequacy requirements, for example in the context of a licensing regime. However, the FMA was strongly opposed to having any role in overseeing litigation funders or funding arrangements, except to the extent that litigation funders raise funds from retail investors to operate.<sup>77</sup> It submitted that this would not fall within its remit as a regulator of financial markets conduct. The submission from Hīkina Whakatutuki | Ministry of Business, Innovation and Employment also cast doubt on the suitability of the FMA to regulate and oversee litigation funding.
- 15.74 While some submitters pointed to the litigation funding industry or the Reserve Bank as oversight options, there was little support for them. Oversight by an alternative regulator, such as the Reserve Bank, would have resource implications and, as we concluded above, we are not persuaded these costs are proportionate to the concerns in Aotearoa New Zealand at this time. In Chapter 14, we also conclude industry oversight is not a sufficiently

<sup>76</sup> For further discussion about the litigation funding market in Aotearoa New Zealand, see Issues Paper at Chapter 14.

<sup>77</sup> We set out the FMA's submissions in Chapter 14 at [14.18].

robust option for managing the concerns with litigation funding, including concerns about a funder's ability to meet its financial obligations under the funding agreement.

- 15.75 Therefore, in addition to the reasons above, we think court oversight of a strengthened security for costs regime is the most practical and proportionate response to the concern about a funder's ability to fulfil its financial obligation to pay an adverse costs award to a successful defendant.

### Other concerns do not require a regulatory response

- 15.76 We do not think regulation is required to manage the concern that lawyers (and any expert witnesses) may have unpaid legal fees and disbursements if the funder fails to meet these costs. As discussed above, a lawyer can require the funder to pay their legal fees up front or in stages throughout the funded proceedings, rather than waiting until the proceeding is concluded to pay the entire legal bill. Lawyers also have systems in place to ensure the timely payment of invoices and can alert their clients to any issues in respect of non-payment of invoices (which may lead to termination of the funding agreement). There are strong commercial incentives for lawyers to recommend funders that, in their assessment, are competent and financially stable otherwise they may be left unpaid.
- 15.77 The concern that judicial resources will be wasted if proceedings are discontinued or struck out due to the funder's lack of capital is illustrated by the *Feltex* representative action.<sup>78</sup> However, we do not think this concern requires specific regulation as it is not unique to funded litigation. In any litigation there is a risk that the plaintiff will be unable to fund their proceedings to completion. We expect that in most cases, the involvement of a reputable funder will mean litigation is unlikely to be struck out or discontinued because the funder has insufficient capital.
- 15.78 Only DLA Piper commented that the litigation funding industry may be negatively impacted by poorly capitalised litigation funders. LPF Group, a litigation funder based in Aotearoa New Zealand, said in its experience this is not a significant issue.
- 15.79 We disagree with the suggestion that plaintiffs and defendants should be subject to the same security for costs requirements. The security for costs mechanism is for the protection of defendants.<sup>79</sup> It balances the plaintiff's right of access to the court and the defendant's interest in being protected from a barren costs order.<sup>80</sup> In deciding whether or not to fund a claim, the funder will carefully consider the defendant's ability to pay any judgment award or settlement sum.

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<sup>78</sup> In upholding the High Court's decision to strike out the proceedings due to the funder's difficulties in satisfying the security for costs order, the Court of Appeal said "...it is clearly contrary to the public interest to permit this proceeding to continue to absorb the finite resources of the courts, to the detriment of other litigants, for a further – potentially lengthy – period": *Houghton v Saunders* [2020] NZCA 638 at [89].

<sup>79</sup> Security for costs is governed by High Court Rule 5.45. It may be awarded where it is just, and either the plaintiff is not resident or incorporated in Aotearoa New Zealand, or there is reason to believe they would be unable to pay the defendant's costs if unsuccessful.

<sup>80</sup> *McGechan on Procedure* (online ed, Thomson Reuters) at [5.45], citing *Clear White Investments Ltd v Otis Trustee Ltd* [2016] NZHC 2837 at [4].



## CHAPTER 16

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# Professional regulation of lawyers in funded proceedings

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## INTRODUCTION

16.1 In this chapter, we discuss:

- (a) Concerns about lawyer-plaintiff conflicts of interest in funded proceedings.
- (b) Concerns about the funder having insufficient resources to meet its financial commitments to the plaintiff.
- (c) Our recommendations that Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) should consider:
  - (i) how conflicts of interest should be avoided and managed in funded proceedings; and
  - (ii) prohibiting the lawyer from claiming unpaid legal expenses from the funded representative plaintiff if the funder fails to pay them.

## LAWYER-PLAINTIFF CONFLICTS OF INTEREST

### Conflicts can arise between the interests of the lawyer and the funded plaintiff

16.2 In funded proceedings, there is a tripartite relationship between the funder, the plaintiff and the lawyer.<sup>1</sup> In many instances the interests of all three will align. However, in some circumstances their interests may diverge and conflict.

16.3 The relationship of trust and confidence between lawyer and client is an essential tool for safeguarding the plaintiff's interests in litigation.<sup>2</sup> However, litigation funding arrangements can complicate that relationship. Under a conventional retainer, the lawyer owes professional obligations to the client when providing legal services and the client pays the lawyer directly for those services. This straightforward exchange between the

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<sup>1</sup> In Chapter 3, we address the relationship between the representative plaintiff and the class in a class action, and we address the relationship between the lawyer and the class in Chapter 7.

<sup>2</sup> We discuss lawyer-plaintiff conflicts of interest in the Issues Paper at Chapter 20.



obligations owed and fees paid is interrupted in funded litigation, because while the lawyer still owes duties to the plaintiff, the lawyer's fees are paid by the funder.

- 16.4 Conflicts between a lawyer and plaintiff in funded litigation are most likely to arise where the lawyer has an ongoing relationship with the funder (or wants to cultivate a relationship with the funder in the hope of securing future work), owes duties to both the funder and the plaintiff, or where the funder exerts control over the litigation. Conflicts may also arise from any commercial ties between the lawyer and the funder (for example, where the lawyer has a financial interest in the funder).
- 16.5 Conflict-prone stages of funded litigation include determining the litigation strategy and deciding whether to settle a claim. During these stages, the lawyer may be incentivised to protect or promote their own interests by advising or persuading the plaintiff to adopt the funder's preferred course of action. These situations may be more common and more pronounced in class actions.<sup>3</sup>

### **Rules of conduct and client care for lawyers may not adequately manage concerns**

- 16.6 Although lawyers are already subject to extensive duties regarding conflicts of interest,<sup>4</sup> there is some uncertainty about how these duties would or should apply when issues arise in proceedings involving a litigation funder. It seems clear that failing to disclose a benefit provided to the lawyer by the funder would breach the lawyer's fiduciary duties to their client.<sup>5</sup> However, there may be other scenarios that are less clear. For example, where a lawyer hopes to secure future work from the funder. While this type of issue is not unique to litigation funding, it may raise particular concerns in funded class actions where the lawyer's client (that is, the representative plaintiff) and class members may be less able to monitor and protect their own interests (due to a lack of litigation experience or being distanced from their claim). We are aware of only one case involving an alleged breach of the *Rules of conduct and client care for lawyers* by a lawyer in a funded proceeding, and the case did not explicitly address the issue of lawyer-plaintiff conflicts of interest.<sup>6</sup> As we discuss in Chapter 7, there is also uncertainty about whether and to what extent lawyers owe obligations to class members in class actions.

### **Consultation questions**

- 16.7 In the Issues Paper, we identified three broad options to address the concerns about lawyer-plaintiff conflicts of interest:<sup>7</sup>
- (a) Encourage or require funders to include minimum terms in their funding agreements. For instance, minimum terms that:

<sup>3</sup> For further discussion of these issues, see Issues Paper at [20.36]–[20.46].

<sup>4</sup> For example, see the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 5.4, 5.5, 5.9 and 6.1. See also Issues Paper at [20.47].

<sup>5</sup> The Western Australian Supreme Court held that a lawyer breached their fiduciary duty in failing to disclose that the funding agreement provided the lawyer with a 20 per cent reduction in fees if the case was unsuccessful, and a 25 per cent uplift if the claim succeeded: *Clairs Keeley (a Firm) v Treacy* [2003] WASCA 299, (2003) 28 WAR 139 at [28]–[29].

<sup>6</sup> The Committee determined that, in the particular circumstances, it was not unreasonable for the lawyer not to have advised the client about the possibility of funding being withdrawn: *National Standards Committee v Shand* [2019] NZLCDT 2 at [36]–[39] and [57].

<sup>7</sup> For more detailed discussion on these options, see Issues Paper at [20.49]–[20.58].

- (i) Limit the situations in which funding can be withdrawn, to reduce the incentive on a lawyer to advise the client to follow the funder's preferred course of action to keep proceedings afoot.
  - (ii) If a lawyer enters into retainer agreements with both the plaintiff and the funder, provide that the lawyer's professional and fiduciary duties to the plaintiff are to be prioritised over duties to the funder, and specifically, that the plaintiff's instructions are to be prioritised over those of the funder.
  - (iii) Prevent the funder from taking any steps that would cause or be likely to cause the lawyer to act in breach of their professional duties to the plaintiff.
  - (iv) Prevent the funder from seeking to influence the lawyer to cede control over the conduct of the litigation to the funder.
- (b) Develop new professional rules or guidelines for lawyers acting in funded proceedings. For example, to clarify the relationship between the lawyer and members of the class, or to define and require disclosure of relevant conflicts of interest and require informed consent and independent advice in respect of such conflicts before the lawyer can continue to act.
  - (c) Prohibit activities that give rise to lawyer-plaintiff conflicts of interest. For example, amending the *Rules of conduct and client care for lawyers* to prohibit lawyers from investing in funders, holding office, or having other interests in litigation funders. Another option would be to prohibit lawyers from taking instructions from both the plaintiff and the funder in funded litigation.
- 16.8 We asked submitters what concerns, if any, they have about lawyer-plaintiff conflicts of interest and if they are satisfied that existing mechanisms (such as the *Rules of conduct and client care for lawyers*) can adequately manage those concerns. If not, we asked submitters which option for reform they prefer and why.

## Results of consultation

### Concerns about lawyer-plaintiff conflicts of interest

- 16.9 We received 18 submissions that addressed concerns about lawyer-plaintiff conflicts of interest. Of those, 15 expressed concerns,<sup>8</sup> and three were generally unconcerned.<sup>9</sup>
- 16.10 Those who had concerns said a lawyer may be unable to provide independent advice if:
- (a) They are dependent on the funder for the payment of their bills and the continuation of the proceedings.
  - (b) They have an ongoing business relationship with the funder or want to secure future business. A lawyer who knows that a funder has identified them as a preferred lawyer, or who has consistently worked with a funder, may have an incentive to favour the interests of a funder in order to retain a mutually beneficial relationship.

<sup>8</sup> Barry Allan, Bell Gully, Buddle Findlay, Chapman Tripp, Te Tari Ture o te Karauna | Crown Law Office, Michael Duffy, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, International Bar Association (IBA) Antitrust Committee, LPF Group, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Simpson Grierson, Nicole Smith, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.

<sup>9</sup> DLA Piper and Omni Bridgeway (although Omni Bridgeway did suggest one amendment to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008). BusinessNZ said issues do not yet appear to have arisen in Aotearoa New Zealand, but there could merit in providing guidance if the use of funding increases.

Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said a similar situation can emerge in insured litigation, however insurers instructing lawyers have an overriding duty of utmost good faith to their customers (and lawyers have a similar duty) that litigation funders do not. Further, it said the majority of general insurers in Aotearoa New Zealand are also members of the Insurance Council and must comply with the Fair Insurance Code which sets out a number of customer-focussed obligations.

- (c) They are engaged by and taking instructions from both the plaintiff and the funder. In this situation, a lawyer may be unable to discharge their duties to one party without breaching their duties to the other.
- (d) They have financial incentives in the settlement or resolution outcome, or act as the funder. LPF Group noted, for example, that this might arise if the lawyer is entitled to a success fee that is tied to the outcome achieved rather than the lawyer's usual hourly rate.
- (e) They have financial or other interests in the funder that is financing the same matter on which they are acting. Woodsford Litigation Funding submitted that lawyers are better placed to protect the best interests of their clients if their own financial interests are not impacted by their clients' decisions. Dr Michael Duffy (Monash University) said close arrangements, relationships or cross ownership may tempt lawyers and funders to act in each other's interests rather than the plaintiff's interests.
- (f) Specifically in relation to funded class actions, concerns arise where:
  - (i) The plaintiff is distanced from their case. Michael Duffy said the risk of lawyer-plaintiff conflicts may be more pronounced in class actions because the representative plaintiff may have little involvement with their case. This may disincentivise their lawyer from properly ascertaining or advising the representative plaintiff about which strategies are in their best interests.
  - (ii) The lawyer also owes duties to class members. Submitters noted uncertainty about the extent to which lawyers owe fiduciary or other obligations to class members who have not retained them or entered into a funding arrangement.<sup>10</sup> If the lawyer owes duties to class members in this situation, conflicts may arise if the representative plaintiff's interests differ from the interests of class members, and if the class members have individual interests that diverge from other class members. Buddle Findlay said conflicts could arise if the representative plaintiff is seeking a common fund order that would result in a "substantial aggrandisement" of the fees to the lawyer and funder. In this instance, the interests of the funded and unfunded class members would be diametrically opposed.

16.11 The three submitters who were unconcerned about lawyer-plaintiff conflicts said the lawyer-plaintiff relationship does not appear to have caused any particular problems in

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<sup>10</sup> Buddle Findlay, Michael Duffy and Tom Weston QC.

Aotearoa New Zealand to date,<sup>11</sup> and existing mechanisms are adequate to manage any concerns.<sup>12</sup>

### *Adequacy of existing mechanisms to manage the concerns*

- 16.12 We received 13 submissions on whether existing mechanisms for managing lawyer-plaintiff conflicts are adequate.<sup>13</sup>
- 16.13 Eight submitters considered the *Rules of conduct and client care for lawyers* are inadequate to manage the concerns.<sup>14</sup> These submitters explained that:
- (a) The *Rules of conduct and client care for lawyers* are based on a standard lawyer-client paradigm and do not adequately cater for the sorts of issues likely to arise in funded proceedings. Buddle Findlay said this is particularly problematic in funded opt-out class actions. The submission from NZLS went further, saying the *Rules of conduct and client care for lawyers* are not well-equipped to address the range and complexity of issues that potentially arise in all tripartite and multi-party relationships (not just those involving funders). It said these issues include conflicts of interest, as well as related issues such as lawyers' obligations of independence and undivided loyalty to plaintiff-clients, confidentiality and disclosure, client autonomy in the selection and engagement of lawyers, and the no-contact rule.
  - (b) There needs to be greater clarity to ensure lawyers do not step into the role of the funder, and to ensure their independence to advise their clients.
  - (c) It is unclear to what extent the lawyer for the representative plaintiff owes fiduciary or other duties to unrepresented class members. Tom Weston QC said the law in relation to the professional obligations of lawyers in funded class actions is "entirely unsatisfactory and should be clarified".
- 16.14 Four submitters considered existing mechanisms are generally adequate to manage any concerns about lawyer-plaintiff conflicts,<sup>15</sup> for the following reasons:
- (a) The *Rules of conduct and client care for lawyers* adequately protect plaintiffs from lawyer-plaintiff conflicts of interest. DLA Piper said it sets high professional standards for lawyers, particularly in relation to their overriding duty to their client.
  - (b) Conflicts can and should be dealt with by the terms of the funding agreement. Two funders said their standard funding agreements provide that lawyers should prioritise the client's interests in the event the client's interests or instructions diverge from the funder's interests or instructions. Omni Bridgeway said its standard funding agreement provides that it will pay for the representative plaintiff to be independently advised on the agreement.

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<sup>11</sup> BusinessNZ.

<sup>12</sup> DLA Piper and Omni Bridgeway (although Omni Bridgeway did suggest one amendment to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008).

<sup>13</sup> Bell Gully, Buddle Findlay, BusinessNZ, Chapman Tripp, Crown Law Office, DLA Piper, Insurance Council, LPF Group, NZLS, Omni Bridgeway, Simpson Grierson, Tom Weston QC and Woodsford Litigation Funding.

<sup>14</sup> Bell Gully, Buddle Findlay, Chapman Tripp (implied in its suggestions for reform), Insurance Council, LPF Group, NZLS, Simpson Grierson and Tom Weston QC.

<sup>15</sup> BusinessNZ, DLA Piper, Omni Bridgeway and Woodsford Litigation Funding.

- (c) Some overseas-based funders are required to maintain conflicts management policies or have effective systems for detecting and managing potential conflicts. Omni Bridgeway said it manages conflicts of interest by maintaining a comprehensive conflicts management policy, as required by Australian law.<sup>16</sup> Woodsford Litigation Funding said the International Legal Finance Association *Best Practices* require members to maintain effective systems to detect and manage potential conflicts, including those that could impact the enforcement of an award or judgment.
  - (d) BusinessNZ considers existing mechanisms are effective but said the situation should be monitored in case difficulties arise.
- 16.15 Te Tari Ture o te Karauna | Crown Law Office said consideration should be given to how the *Rules of conduct and client care for lawyers* would or could assist to ensure that those who purport to be acting in the best interests of class members are in fact obliged to do so.

### Options for reform

- 16.16 There were some ambiguities in the submissions on options for reform. For instance, it was not always apparent if submitters were commenting on options for managing concerns about lawyer-plaintiff conflicts, funder-plaintiff conflicts, or both. It was also not always clear if submitters thought the options for reform should apply in all funded cases or only in funded class actions.
- 16.17 Several submitters supported minimum contract terms for funding agreements. These included terms around the termination of funding,<sup>17</sup> the settlement process,<sup>18</sup> dispute resolution,<sup>19</sup> a cooling off period,<sup>20</sup> a term requiring lawyers to prioritise their duties to the plaintiff above any duties owed to the funder,<sup>21</sup> and a term that in the event of a disagreement the instructions of the representative plaintiff prevail over those of the funder.<sup>22</sup> However, it was not always clear if submitters thought funders should be required, or simply encouraged, to include such terms in funding agreements. Professor Vicki Waye (University of South Australia) observed that mandatory minimum contract terms might increase the risk of expensive and time-consuming collateral litigation.
- 16.18 Nine submitters said the *Rules of conduct and client care for lawyers* should be reviewed and amended,<sup>23</sup> or commented more generally that new professional and ethical rules or

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<sup>16</sup> Corporations Regulations 2001 (Cth), r 7.6.01AB(2) and Australian Securities and Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

<sup>17</sup> Barry Allan, Bell Gully, Insurance Council, Maurice Blackburn/Claims Funding Australia, and Simpson Grierson. In addition, Chapman Tripp supported a prohibition on discretionary rights for funders to terminate funding agreements. DLA Piper supported guidelines on this minimum term but only if the status quo is considered inadequate.

<sup>18</sup> Bell Gully.

<sup>19</sup> Maurice Blackburn/Claims Funding Australia.

<sup>20</sup> Maurice Blackburn/Claims Funding Australia.

<sup>21</sup> Chapman Tripp and Simpson Grierson. DLA Piper supported guidelines on this minimum term but only if the status quo is considered inadequate.

<sup>22</sup> Chapman Tripp, Maurice Blackburn/Claims Funding Australia and Simpson Grierson. DLA Piper supported guidelines on this minimum term but only if the status quo is considered inadequate.

<sup>23</sup> Bell Gully, Insurance Council, LPF Group, NZLS, Omni Bridgeway and Woodsford Litigation Funding. Crown Law Office said consideration should be given to how the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 could assist.

guidelines should be developed.<sup>24</sup> These could include a positive obligation of disclosure of potential conflicts of interest and how these might be managed,<sup>25</sup> a prohibition on the lawyer or law firm having financial or other interests in the funder funding the same litigation in which they are acting,<sup>26</sup> client autonomy in the selection and engagement of the lawyer,<sup>27</sup> and the lawyer's duties to unrepresented class members.<sup>28</sup> NZLS said amendments to the *Rules of conduct and client care for lawyers* should not be limited to addressing issues specific to litigation funding, but should address conflicts of interest and other professional issues arising from all tripartite relationships between a lawyer, client and third party. It suggested that any new rules could be informed by guidance from Te Kōti Matua | High Court decisions, including decisions relating to the conduct of lawyers in tripartite relationships with insurers and policyholders.

- 16.19 Three submitters were concerned about lawyers having a financial stake in any damages or settlement sum.<sup>29</sup> NZLS submitted that contingency fee arrangements should remain prohibited. It commented that, depending on the terms of funding, funding agreements can present ethical concerns for lawyers if their interests in the funded claim become more closely aligned with its overall success. LPF Group said, to the extent lawyers are operating on conditional fee agreements, professional rules or guidelines should be developed to ensure their independence and that success fees or other fees generated as a result of a successful outcome are prohibited. It said the current position should be clarified to ensure success fees are only tied to the lawyer's usual hourly rates and not the outcome achieved (whether a percentage or otherwise).
- 16.20 Nine submitters commented on lawyers and law firms having financial or other interests in the funder of the litigation in which that lawyer or law firm is acting.<sup>30</sup> Of these submitters, six indicated that lawyers should be prohibited from having financial or other interests in the funder funding the litigation on which that law firm or solicitor is acting.<sup>31</sup> Submitters suggested this could be achieved by amending the *Rules of conduct and client care for lawyers*, or through some other statute. Woodsford Litigation Funding said that, when advising clients on funding arrangements (in particular, offers received from different funders), lawyers are better placed to protect their client's interests if their own financial interests are not impacted by their client's decision. It was generally unclear if submitters supported a prohibition in all funded cases or only in funded class actions.

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<sup>24</sup> Buddle Findlay and Tom Weston QC.

<sup>25</sup> Buddle Findlay and LPF Group. DLA Piper supports guidelines on disclosure if the status quo is considered inadequate.

<sup>26</sup> Insurance Council and Woodsford Litigation Funding.

<sup>27</sup> NZLS.

<sup>28</sup> Tom Weston QC.

<sup>29</sup> Buddle Findlay, LPF Group and NZLS.

<sup>30</sup> Bell Gully, Buddle Findlay, Chapman Tripp, DLA Piper, Insurance Council, Maurice Blackburn/Claims Funding Australia, Michael Duffy, Simpson Grierson and Woodsford Litigation Funding. In addition, Barry Allan said "a hard line needs to be drawn by the law" to respond to concerns about lawyer-plaintiff conflicts of interest, and that "a lawyer intent on feathering his or her nest with the funder is not going to serve the interests of the plaintiff". LPF Group said there should be a prohibition on "success fees or other fees generated as a result of a successful outcome".

<sup>31</sup> Bell Gully, Chapman Tripp, Insurance Council, LPF Group (implied), Simpson Grierson and Woodsford Litigation Funding. Buddle Findlay did not explicitly support a prohibition, but said conflicts are exacerbated where lawyers "have a significant financial stake in any success resolution outcome", and that it seems impossible for lawyers to provide independent advice in this situation.

- 16.21 Michael Duffy did not suggest lawyers should be prohibited from having an interest in the funder but said that, at a minimum, there should be full disclosure of any interest followed by the plaintiff's informed consent, including possible independent legal advice. He said there is a potential for conflicts of interest where lawyers and funders have close relationships or cross-ownership such that they may be tempted to favour each other's interests over the plaintiff's interests. While not expressly supporting a prohibition in Aotearoa New Zealand, Maurice Blackburn/Claims Funding Australia said it is clear the courts in Australia will not permit lawyers to have a significant financial interest in a litigation funder financing a claim.
- 16.22 DLA Piper was the only submitter opposed to a prohibition on a lawyer or law firm having financial or other interests in a funder. It was strongly of the view that a prohibition is inappropriate and unnecessary. It explained its association with Aldersgate Funding Limited (Aldersgate). Aldersgate is an independent company set up and owned by DLA Piper that provides DLA Piper clients with access to funds of up to £150 million across all jurisdictions in which it operates, including Aotearoa New Zealand. Aldersgate is a portfolio fund backed by Litigation Capital Management. DLA Piper said funding is provided under a contingency fee arrangement with the law firm. In its view, preventing a lawyer or law firm from having an interest in the funder "may have a chilling effect on the industry and prevent litigation funders from entering our market".
- 16.23 Another option suggested by submitters was to ensure that plaintiffs have access to independent legal advice on the funding agreement (from a lawyer not acting in the proceedings going forward), which should be paid for by the litigation funder.<sup>32</sup> Some also suggested a positive obligation on the lawyer to disclose any potential conflicts of interest to the plaintiff and how these might be managed, prior to entering into a funding arrangement.<sup>33</sup> Crown Law Office and Associate Professor Barry Allan (Te Whare Wānanga o Otāgo | University of Otago) supported limiting funder control to manage the risk of lawyer-plaintiff conflicts of interest. Crown Law Office said regulating conflicts and ensuring "that those who purport to be acting in the best interest of class members are in fact obliged to do so" means putting control of the litigation and key decisions, such as decisions about settlement or alternative resolution, in the hands of the plaintiff not the lawyer or funder.

## Recommendation

### 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.

<sup>32</sup> Bell Gully and Nicole Smith. Michael Duffy thought independent legal advice might be appropriate if there are potential conflicts of interest. Omni Bridgeway said its funding agreements already provide that it will pay for the representative plaintiff to be independently advised on the terms of the funding agreement.

<sup>33</sup> Buddle Findlay, BusinessNZ (would support this option if problems arise in the future), DLA Piper (through guidelines if the status quo is considered to be inadequate), LPF Group and Michael Duffy.

### *Avoiding and managing conflicts in funded proceedings*

- 16.24 Lawyer-plaintiff conflicts of interest can arise in any funded case, including where the lawyer owes duties to both the funder (under the funding agreement) and the client, or where the funder exerts control over the litigation. These situations are most likely to arise in class actions but are not limited to them. As we discuss in Chapter 14, funders may prefer to exercise more control in class actions than in commercial disputes, because the funded representative plaintiff is likely to be less commercially sophisticated or experienced in litigation than a commercial plaintiff. Conflicts may also arise in other situations, as we discuss above.
- 16.25 We think these concerns can best be managed through amendments to the existing *Rules of conduct and client care for lawyers*, rather than minimum contract terms.<sup>34</sup> This has the advantage that lawyers' professional obligations in funded litigation will derive from the same source as their general professional obligations. It is also a stronger option than voluntary guidelines for lawyers, as non-compliance may lead to a disciplinary response by a Lawyers Standards Committee. We think a strong response is required.
- 16.26 In Chapter 7, we recommend the Lawyers and Conveyancers Act 2006 should be amended to provide that, following certification of a class action, the lawyer for the representative plaintiff is regarded as the lawyer for the class and is considered to have a relationship with the class.<sup>35</sup> We also recommend that Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) consider what amendments may be required to the *Rules of conduct and client care for lawyers* to clarify the obligations of lawyers acting in class actions.
- 16.27 In addition to these recommendations, we recommend NZLS consider amending the *Rules of conduct and client care for lawyers* to clarify how the lawyer in a funded proceeding should avoid or manage conflicts of interest that may arise as a result of the involvement of the litigation funder. While the rules already subject lawyers to extensive duties regarding conflicts of interest, we agree with submitters who said that, because they are based on the standard lawyer-client paradigm, they do not adequately contemplate the conflicts of interest and professional issues that can arise where a funder is involved. In particular, we are influenced by NZLS's submission to this effect.
- 16.28 We acknowledge NZLS's submission that amendments to the *Rules of conduct and client care for lawyers* should not be limited to addressing conflicts arising from relationships involving a litigation funder and should also address the conflicts that can arise in all tripartite relationships between a lawyer, client and third party. As our terms of reference are limited to class actions and litigation funding, we have confined our recommendation to relationships involving litigation funders. However, NZLS may wish to address the funding issues within a wider review of tripartite relationships. NZLS currently has underway an *Independent Review of the statutory framework for legal services in Aotearoa*.<sup>36</sup> This will examine whether NZLS's representative functions should be separated from some or all of its regulatory functions, as well as which legal services are regulated and by whom.

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<sup>34</sup> In Chapter 17, we also consider but reject the option of minimum contract terms as a response to concerns about funder control and funder-plaintiff conflicts of interest.

<sup>35</sup> Prior to certification, we consider the lawyer should still act in the interests of the potential class as a whole.

<sup>36</sup> More information regarding the Independent Review is available on the NZLS website <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>



16.29 NZLS is best placed to undertake the necessary policy work in this area. Here we provide some general comments. Among other matters, NZLS may wish to consider specific rules, to the extent it considers existing rules insufficient, to oblige or assist the lawyer in a funded proceeding to:

- (a) Avoid conflicts or potential conflicts of interest when advising the client on litigation funding options and assisting the client to organise litigation funding. If a conflict of interest cannot be avoided at this critical stage, the lawyer should not give this advice or assistance, and the client should receive independent advice or assistance instead.
- (b) Disclose any conflicts or potential conflicts of interest and obtain the client's informed consent before they enter an agreement with the litigation funder and if any new conflicts or potential conflicts of interest arise during the course of the proceeding. Disclosure is an integral part of managing conflicts of interest. It promotes accountability and allows consumers of legal services to make informed choices.
- (c) Prioritise the client's instructions if there is a potential conflict between the client's interests and the funder's interests.
- (d) Not act, or continue to act, if it is or becomes apparent that the lawyer's ability to discharge the obligations owed to the client is compromised.
- (e) Maintain adequate practices to manage conflicts or potential conflicts of interest, including documenting, implementing, monitoring and regularly reviewing those practices. Adequate practices may, for example, include written procedures for:<sup>37</sup>
  - (i) Identifying and assessing situations where conflicts of interest might arise.
  - (ii) Effectively disclosing conflicts of interest. For example, disclosing conflicts in a timely, prominent and specific manner, with enough detail to enable the client to understand the potential impact of the divergent interests and make an informed decision about how the relationship may affect the services being provided to them.
  - (iii) In class actions, dealing with any recruitment of the representative plaintiff (that is, the client) if litigation funding is organised before a suitable representative plaintiff is found. For example, practices to ensure the lawyer will not engage in recruitment strategies that are likely to mislead or deceive (such as overstating the strength of the case or the potential compensation).

16.30 NZLS may also consider defining or providing guidance on how a past or current relationship between the lawyer and the funder could give rise to potential conflicts of interest that need to be avoided, disclosed or managed.

### ***Restricting or prohibiting lawyers from having interests in the funder***

16.31 When considering how conflicts should be avoided and managed in funded proceedings, we also recommend NZLS consider whether the *Rules of conduct and client care for lawyers* should restrict or prohibit a lawyer or law firm from having financial or other

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<sup>37</sup> See Australian Securities and Investments Commission *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013) and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.102]–[6.104].

interests in the funder that is funding the same matter in which they are acting. In all funded proceedings, we think this type of lawyer-plaintiff conflict may be unmanageable.

- 16.32 In Australia, the Australian Law Reform Commission (ALRC) and Australian Parliamentary Inquiry have both recommended that lawyers in class actions should be prohibited from having any interests in a funder that is funding the same matter in which the lawyer is acting.<sup>38</sup> The ALRC reasoned that it may not be possible for the lawyer to disclose the conflict to all class members and obtain their informed consent. Further, it may facilitate informal contingency fee arrangements ‘through the back door’. Finally, it said “the potential for unmanageable conflicts of interest issues to arise is heightened if a solicitor or law firm has a financial interest in a litigation funder”.<sup>39</sup>
- 16.33 The Australian Parliamentary Inquiry echoed the ALRC’s recommendation. It said conflicts arising from an arrangement where the lawyer or law firm acting for the representative plaintiff is connected to the litigation funding entity financing the case are simply “unmanageable”.<sup>40</sup> To illustrate this, it pointed to the class action *Bolitho v Banksia Securities Limited*.<sup>41</sup> There, the lawyers’ pecuniary interest in the class action through their involvement in the funder led to conduct the judge described as shattering confidence in, and expectations of, lawyers as part of an honourable profession, and corrupting the proper administration of justice.<sup>42</sup> The impropriety included issuing invoices that did not accurately reflect the real fee arrangements, providing false and misleading information to numerous parties including the court when seeking approval of the settlement agreement,<sup>43</sup> submitting to the court that there was no conflict of interest, and attempting to prevent or dissuade an appeal on the costs and funding commission charged.
- 16.34 The Australian Parliamentary Inquiry concluded that a prohibition on lawyers having financial or other interests in the funder is “the best approach for ensuring uncompromised, objective and independent advice to, and advocacy of, the representative plaintiff”.<sup>44</sup> It also defined the “other interests” that should be prohibited:<sup>45</sup>

‘Other interest’ should encompass other arrangements that do not necessarily amount to a pecuniary interest in the litigation funder, but which nonetheless may give rise to the likelihood that the interests of the litigation funder may be prioritised over the interests of

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<sup>38</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at Recommendation 21; Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at Recommendation 26.

<sup>39</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [7.153].

<sup>40</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [15.101].

<sup>41</sup> *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582. See the summary of this case in Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at 276–278.

<sup>42</sup> *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 at [3].

<sup>43</sup> This included information about the fee agreements, work completed, fees charged and paid, the role and commission of the funder, and a misleading assessment of the reasonableness of the costs by a costs assessor appointed by the team of lawyers and litigation funder.

<sup>44</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [15.102].

<sup>45</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at Recommendation 26.

the representative plaintiff or class members, including common directorships, family ties and ongoing and/or reciprocal commercial arrangements.

- 16.35 We think the risk of lawyer-plaintiff conflicts of interest arising from a lawyer's interest in the funder is not limited to class actions and could arise in any funded proceedings. In all funded cases, there is a concern about lawyers circumventing the prohibition on contingency fees by having or organising their financial affairs or investments to include interests in the funder. It may not be possible for this conflict, and perceptions of conflict, to be overcome by obtaining the client's consent. We think lawyers would be better placed to protect the interests of their client if their own financial interests were not directly impacted by the client's decisions.
- 16.36 There is support for this view in Singapore, where lawyers and law firms in any funded proceeding are prohibited from having financial and other interests in the litigation funder (or receiving commissions, fees or a share of litigation proceeds).<sup>46</sup>

### *Other matters we considered*

- 16.37 Some submitters expressed concern about lawyers' billing arrangements in funded proceedings. For example, they reiterated that lawyers' fees should not be proportionally tied to the success of the outcome. While we are alive to this concern, we think the law in Aotearoa New Zealand is clear. The Lawyers and Conveyancers Act 2006 prohibits lawyers from charging contingency fees but allows them to charge conditional fees in some circumstances.<sup>47</sup> A contingency fee is where the lawyer obtains a fee calculated as a proportion of any sum recovered if the outcome is successful, and nothing if the outcome is unsuccessful. A conditional fee is where the lawyer also obtains nothing if the outcome is unsuccessful, but is allowed to charge a fee based on a lawyer's normal hourly rate plus a premium that "is not calculated as a proportion of the amount recovered" if the outcome is successful.<sup>48</sup> The premium is to compensate the lawyer for the risk of not being paid at all, and may be calculated as a proportion of the lawyer's expenses or a fixed amount. As with all legal fees, a conditional legal fee must be "fair and reasonable".<sup>49</sup> We think the law is well-understood within the legal profession and does not need to be clarified.
- 16.38 We also considered the risk of blended billing arrangements, where the plaintiff receives partial litigation funding (for some legal costs, disbursements, security for costs or adverse costs) as well as having a conditional fee arrangement with the lawyer. This could potentially reduce the plaintiff's compensation if both the funder and the lawyer charge a premium price for the risk of not being paid if the litigation is unsuccessful. This could be concerning in class actions, given the potential vulnerabilities of the representative plaintiff and class members and the access to justice justification for litigation funding in that context. However, no submitter on the Issues Paper raised this as a concern. In any case, the risk may be mitigated by our recommendations for court approval of funding agreements (including funding commissions) in class actions, and court oversight in the context of cost sharing orders. Further, lawyers have a professional obligation not to

<sup>46</sup> Legal Profession (Professional Conduct) Rules 2015 (Singapore), r 49B.

<sup>47</sup> Lawyers and Conveyancers Act 2006, ss 333–336 and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 9.8–9.12.

<sup>48</sup> Lawyers and Conveyancers Act 2006, ss 333.

<sup>49</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 9.2 and 9.9.

charge a client more than is fair and reasonable,<sup>50</sup> and any billing complaints can be made to the NZLS Lawyers Complaints Service.

- 16.39 Some of the concerns raised by submitters about conflicts of interest in funded class actions have been addressed in other parts of this report. For instance:
- (a) In Chapter 7, we recommend the Lawyers and Conveyancers Act 2006 should be amended to provide that, following certification of a class action, the lawyer for the representative plaintiff is regarded as the lawyer for the class and is considered to have a relationship with the class. We also recommend NZLS should consider what amendments to the *Rules of conduct and client care for lawyers* may be required to clarify the obligations of lawyers acting in class actions.
  - (b) In Chapter 17, we recommend the Class Actions Act should specify that the court must not approve a funding agreement unless it is satisfied that the representative plaintiff has received independent legal advice on the agreement (that is, advice from a lawyer that is not acting in the same proceeding going forward).
- 16.40 Finally, we considered whether to recommend that NZLS should consider developing a voluntary specialist accreditation course for class action lawyers. Among other things, this could provide training for lawyers on how to manage potential conflicts in funded cases. This is not an option we discussed in the Issues Paper, and it was not discussed by any submitters. The idea is based on a recommendation of the ALRC that the Law Council of Australia should develop a specialist accreditation course for lawyers in class actions, requiring “ongoing education in relation to identifying and managing actual or perceived conflicts of interest and duties in class action proceedings”.<sup>51</sup> We think this option could be considered once class actions are more established in Aotearoa New Zealand.

## PLAINTIFF’S POTENTIAL LIABILITY FOR UNPAID COSTS

### Plaintiff may be liable for unpaid costs if funder fails to fulfil financial commitments

- 16.41 In Chapter 15, we discuss the risks arising from a funder’s failure to maintain adequate capital to fulfil its financial obligations under a funding agreement. Our recommendations in that chapter focus on the risk for a successful defendant, who may be left with a significant loss if the funder and funded party are unable to meet an adverse costs order.
- 16.42 From the funded plaintiff’s perspective, the funder’s failure to fulfil its financial obligations may mean that the plaintiff is left with a substantial and unexpected liability for any unpaid legal costs or adverse costs in excess of any security provided. The funded equine influenza class action in Australia illustrates the risk of a funded representative plaintiff becoming personally liable for adverse costs.<sup>52</sup> Partway through the proceedings, the overseas funder became bankrupt amid allegations its parent company was engaged in fraudulent activities.<sup>53</sup> The plaintiffs negotiated a settlement for no compensation, with each side bearing its own costs. The Federal Court of Australia observed that the benefit

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<sup>50</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

<sup>51</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [7.139]–[7.148], Recommendation 20.

<sup>52</sup> *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119.

<sup>53</sup> Michael Legg “Regulations needed for litigation funders who can’t pay out when cases fail” *The Conversation* (online ed, Australia, 15 February 2017).

achieved by the plaintiffs was avoiding the possibility of a very substantial adverse costs order.<sup>54</sup> In Aotearoa New Zealand, the representative plaintiff in the *Feltex* proceedings was held personally liable for costs (alongside the funder and funding broker) when the proceedings were struck out due to inadequate funding to meet a security for costs order.<sup>55</sup>

- 16.43 Further, the funder's inability to continue financing the claim may result in the plaintiff's claim being discontinued or struck out, leaving the plaintiff with no other avenue to pursue their claim. The *Feltex* proceedings illustrate this concern.

### Consultation questions

- 16.44 In the Issues Paper, we discussed the option of introducing capital adequacy requirements for litigation funders. We suggested such requirements may protect not only the defendant in the funded proceeding, but also the funded plaintiff. They may mitigate the risk of the funder failing to fulfil its financial obligations, leaving the plaintiff liable for any unpaid legal costs and adverse costs in excess of the security provided.<sup>56</sup>
- 16.45 In Chapter 15, we recommend against introducing capital adequacy requirements and instead propose to protect defendants in funded proceedings by strengthening the security for costs mechanism. However, as we noted in the Issues Paper, the security for costs mechanism (even if strengthened) does not mitigate the risk of the funded plaintiff being liable for any unpaid legal costs if the funder fails to pay these costs.
- 16.46 Since the Issues Paper was published, we have identified an additional option for reform that submitters were not asked to comment on. That is, lawyers could be prohibited from claiming any unpaid legal expenses from the plaintiff if the funder fails to meet its financial commitment to cover these costs. We discuss this option below.

### Results of consultation

- 16.47 Some submitters were concerned that plaintiffs may be left with a substantial and unexpected liability for their own unpaid legal costs and for any adverse costs if the funder fails to fulfil its obligations under the funding agreement to meet these costs.<sup>57</sup>
- 16.48 Some litigation funders emphasised the importance of funders being adequately capitalised to protect plaintiffs. For example, LPF Group said that, if a funder has insufficient capital to finance a case in its entirety, "deserving plaintiffs lose out" and defendants are not held to account.
- 16.49 Maurice Blackburn/Claims Funding Australia acknowledged that, in class actions, an order for security for costs does not indemnify a representative plaintiff or class members for the unpaid legal fees of their solicitors in the event the funder fails. However, it said it is not aware of any instances where a funder has suffered financial failure and the representative plaintiff's solicitors have subsequently sought to enforce an obligation on the plaintiff to pay legal fees. It said there are strong commercial incentives for solicitors to select a litigation funder that, in their assessment, is competent and financially stable

<sup>54</sup> *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119 at [6].

<sup>55</sup> *Houghton v Saunders* [2021] NZHC 3590.

<sup>56</sup> Issues Paper at [22.16] and [22.27]–[22.29].

<sup>57</sup> LPF Group, Maurice Blackburn/ Claims Funding Australia and Simpson Grierson.

otherwise they will ultimately be left unpaid. This operates to the mutual benefit and protection of plaintiffs and class members.

## Recommendation

**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.

- 16.50 While there is a risk in any funded proceeding that the plaintiff may be liable for legal costs (including lawyers' fees and any expert fees) if the funder fails to pay them, we are particularly concerned about the potential liability of a funded representative plaintiff. This is because the legal costs in a class action will be disproportionate to the value of the representative plaintiff's own claim, and to the risks that other class members carry. Although we propose the lawyer for the representative plaintiff should also be the lawyer for the class,<sup>58</sup> the lawyer would be unable to recover fees from individual class members as there is no retainer relationship with them.
- 16.51 We are less concerned about other funded proceedings because these are often commercial in nature. Funded plaintiffs are therefore likely to have more litigation experience or expertise than a representative plaintiff and will be more actively engaged in the claim. Consequently, they will be better able to monitor and protect their interests during the proceedings and take steps if concerns about the funder's capital adequacy arise (for example, if the funder fails to pay an invoice for legal fees on time).
- 16.52 We recommend NZLS consider amending the *Rules of conduct and client care for lawyers* to prohibit lawyers from claiming unpaid legal fees and expenses from the representative plaintiff. Members of our Expert Advisory Group were generally unconcerned about a prohibition. Some members considered that any residual risk of personal liability for unpaid legal costs might deter people from taking on the role of the representative plaintiff. Alternatively, it could create misaligned incentives where representative plaintiffs are selected based on their risk tolerance or their finances. Our recommendation would address those concerns.
- 16.53 Further, we think a prohibition on lawyers claiming any unpaid legal fees from the representative plaintiff will encourage best practice. For example, it may incentivise lawyers to ensure that any expert fees, and their own fees, are paid up front or in regular instalments by the funder. It may also encourage lawyers to only recommend funders to their clients that, in their assessment, are competent and financially stable.
- 16.54 Our recommendations to strengthen the security for costs mechanism in Chapter 15 will help to alleviate the risk that the funded representative plaintiff may be liable for adverse costs exceeding any security for costs provided. In that chapter, we recommend a presumption for security for costs in funded class actions and note the current practice of ordering relatively full security in proceedings involving a litigation funder.

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<sup>58</sup> See Chapter 7.

- 16.55 We acknowledge that a funded representative plaintiff may be left with some residual liability for adverse costs in excess of any security provided. However, we do not think it is necessary to entirely eliminate the risks for representative plaintiffs. A member of our Expert Advisory Group commented that there may be benefits to representative plaintiffs having some “skin in the game”. It may encourage them to engage a reputable funder and ensure an adequate costs indemnity is provided.
- 16.56 We do not think regulation is necessary to manage the risk that the funded plaintiff’s claim may be discontinued due to lack of funding. There will always be some risk to plaintiffs who use litigation funding and, as long as they are properly advised as to the risk, they can choose whether or not to accept it. If problems with the funder’s capital arise during the proceedings, for example if the lawyer notices the funder is no longer paying invoices for legal fees, the lawyer should alert the plaintiff to the problem and may need to advise them to discontinue the proceedings or seek alternative funding. Funding agreements usually allow the funded party to terminate the agreement in the event of an unrectified default in payment by the funder.<sup>59</sup> As long as the proceedings are discontinued and not struck out, the ability to pursue the claim through other avenues should not be affected.<sup>60</sup>
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<sup>59</sup> See submission by Maurice Blackburn/Claims Funding Australia.

<sup>60</sup> We discuss discontinuance in Chapter 11.

## CHAPTER 17

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# Court oversight of funding terms and commissions

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## INTRODUCTION

- 17.1 In this chapter, we discuss:
- (a) Concerns about funder control and funder-plaintiff conflicts of interest.
  - (b) Concerns about funder profits.
  - (c) Our recommendations for court oversight of litigation funding agreements, including funding commissions, in class actions.
- 17.2 At the end of this chapter, we set out draft legislative provisions that could give effect to our recommendations on court oversight of litigation funding agreements in class actions.

## IMPACT OF FUNDING TERMS ON OUTCOMES

- 17.3 Plaintiffs may be unable to effectively negotiate fair and reasonable funding agreements where they are dependent on litigation funding to pursue their claim. There may be an imbalance in bargaining power, for example resulting from information asymmetry and differing sophistication. This may diminish the plaintiff's ability to achieve a substantively just outcome and undermine the rationale for permitting litigation funding. The risk is most likely to arise in cases where the plaintiff is less commercially astute or experienced in litigation, for example in many class actions.
- 17.4 In the Issues Paper, we considered funding terms that can have a particularly negative impact on the representative plaintiff and class members. In particular, terms that:
- (a) Give the funder considerable control over the claim, and allow the funder to prioritise its own interests over the interests of the representative plaintiff and class members when those interests diverge; or
  - (b) Entitle the funder to an excessive share of any settlement or damages obtained, diminishing the returns to the representative plaintiff and class members.



## Funder control and funder-plaintiff conflicts of interest

### *Funder may promote its own interests at the expense of the plaintiff's interests*

- 17.5 Concerns about funder control and funder-plaintiff conflicts of interest are closely related. Although we discussed these concerns separately in the Issues Paper,<sup>1</sup> they were often discussed together in the submissions we received. We therefore discuss these concerns together in this chapter.
- 17.6 In the Issues Paper, we acknowledged that funders have a legitimate commercial interest in protecting their investment and are unlikely to invest in litigation unless they are allowed some measure of control.<sup>2</sup> However, there is a risk that the funder may use its influence and control over the funded claim to protect and promote its own interests at the expense of the funded plaintiff's interests, particularly where those interests diverge. Such behaviour may diminish the plaintiff's ability to obtain a substantively just outcome and corrode public perceptions about the quality of justice achieved through the courts.
- 17.7 Misaligned interests between a funder and plaintiff are particularly likely to arise and create problems where one wishes to settle but the other does not.<sup>3</sup> A plaintiff may not always be motivated solely by claim maximisation and personal factors, such as the stress of the litigation, may mean they want to settle earlier than a funder who is driven to maximise profit. Alternatively, commercial pressures may affect the funder's interest in, or ability to continue with, the case. For instance, an immediate problem with cash flow or more lucrative investment opportunities could result in a funder wanting to accept an early but low settlement offer. While accepting such an offer might be in the interests of the funder (or its investors), it could come at the expense of the plaintiff who may receive a greater amount if they continue the litigation.

### *Existing mechanism to manage these concerns may be inadequate*

- 17.8 In Aotearoa New Zealand, the courts will look at the funder's control of the litigation (as well as its profit share and the role of the lawyers acting) when considering whether a litigation funding agreement amounts to an abuse of process justifying a stay of proceedings.<sup>4</sup> This might include the funder's role in instructing the lawyer and in decisions about when to settle and on what terms.<sup>5</sup> Funding agreements may also entitle the litigation funder to withdraw funding, with or without cause. Such termination provisions can put pressure on plaintiffs and influence the power dynamics in settlement discussions.
- 17.9 In *PricewaterhouseCoopers v Walker (PwC v Walker)*, Elias CJ addressed the question of when funder control becomes objectionable and suggested:<sup>6</sup>

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<sup>1</sup> Issues Paper at Chapter 19 and Chapter 20.

<sup>2</sup> For instance, funders want to be kept informed of important developments in the litigation and most will also expect to be consulted before major decisions are taken, particularly in relation to settlement. They may also want to approve or choose the legal team responsible for conducting the case. See Issues Paper at [19.2]–[19.4].

<sup>3</sup> See Issues Paper at [20.6]–[20.9]. For completeness, we note the interests of the funder and plaintiff will often align.

<sup>4</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

<sup>5</sup> For example, see *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [126] per Elias CJ.

<sup>6</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [122].

To be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed to by the litigation funder.

- 17.10 In that case, the majority of Te Kōti Mana Nui | Supreme Court was satisfied that the funder could not exercise inappropriate control, based on undertakings the funder made to the Court.<sup>7</sup> The majority considered that, in the absence of these undertakings, it was arguable the funder had a level of control and profit that amounted to an impermissible assignment of the plaintiff's cause of action.<sup>8</sup> However, Elias CJ considered that the funder could exercise inappropriate control despite the undertakings, and regarded the funder's control over settlement or discontinuance to be "substantial" when compared to other funding agreements the courts had seen.<sup>9</sup> Given this decision, it is not clear what level of funder control is objectionable and will lead to the courts exercising their power to stay proceedings.
- 17.11 There is currently no regulation or oversight of funder-plaintiff conflicts of interest.<sup>10</sup> Funders and plaintiffs are responsible for negotiating funding agreements privately, including how any conflicts of interest will be managed. Plaintiffs may seek legal advice on the proposed terms and benefit from legal representation in any negotiations. While this might provide adequate protection for commercially sophisticated or experienced parties, there is a danger that inexperienced plaintiffs may not be able to afford a lawyer and may not adequately foresee the risks of conflicts of interest or have the ability to assess the terms they agree to. This can create an asymmetry of bargaining power between the funder and the plaintiff.
- 17.12 In class actions, the relative passivity of class members and their dependence on litigation funding can further elevate the risk of their interests not being adequately protected during the litigation. In Chapter 16, we discuss why lawyers might be incentivised to prioritise their own interests (or the funder's interests) over the interests of their client.

## Funder profits

### *Funder profits may impact on the ability of funded plaintiffs to achieve substantive justice*

- 17.13 In the Issues Paper we explained that, where there is an imbalance in bargaining power because the plaintiff is dependent on litigation funding to pursue their claim, the plaintiff may be unable to effectively negotiate a fair and reasonable funding commission.<sup>11</sup> The risk is that funding commissions will significantly diminish returns to plaintiffs, impacting on their ability to achieve substantively just outcomes. This concern is more likely to arise in a representative or class action, where the representative plaintiff and class members will often have no litigation experience or expertise.

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<sup>7</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [91] per Glazebrook, Arnold, O'Regan and Ellen France JJ.

<sup>8</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [82] per Glazebrook, Arnold, O'Regan and Ellen France JJ.

<sup>9</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [126].

<sup>10</sup> Issues Paper at [20.10]–[20.12].

<sup>11</sup> Issues Paper at [21.7]–[21.8].

- 17.14 Excessive funder profits also risk the misuse of the proper function of the courts.<sup>12</sup> A core function of the courts, as a forum where parties can seek to enforce and defend their substantive rights, may be diminished where the court process serves the economic purposes of litigation funders. Further, public perceptions of the civil justice system and perceptions about the quality of justice may be corroded if a claimant's compensation is substantially diminished because of their reliance on litigation funding.

***Existing mechanism to manage this concern may be inadequate***

- 17.15 The prohibition against assignments of bare causes of action is one possible way to meet the concern that funders will profit excessively from funding litigation. The profit share of a funder is a factor the courts will consider when determining whether a funding agreement amounts to an impermissible assignment of a bare cause of action, justifying a stay of proceedings.<sup>13</sup> However, the court may be reluctant to assess a funder's profit share without knowing the amount that will be recovered and the costs that will be incurred in recovering it.<sup>14</sup> We think the effectiveness of the existing stay of proceedings mechanism may be questioned, given the lack of a clear body of case law to guide funder behaviour.

## CONSULTATION QUESTIONS

### Funder control and funder-plaintiff conflicts of interest

- 17.16 In the Issues Paper, we asked submitters what concerns, if any, they have about funder control of litigation and whether these concerns can be adequately managed through existing mechanisms, such as the court's power to order a stay of proceedings.<sup>15</sup> We also asked submitters what concerns, if any, they have about funder-plaintiff conflicts of interest and whether these concerns can be adequately managed by allowing funders and plaintiffs to negotiate their own contractual terms.
- 17.17 We discussed and sought feedback on options for reform, including:
- (a) Encouraging or requiring litigation funders to include minimum terms in their litigation funding agreements.<sup>16</sup> For example, terms that:
    - (i) Provide that the funder will not seek to influence the plaintiff or the plaintiff's lawyer to give control or conduct of the litigation to the funder or take steps that are likely to cause the plaintiff's lawyer to act in breach of their professional duties.

<sup>12</sup> Issues Paper at [21.9]–[21.11].

<sup>13</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

<sup>14</sup> *PricewaterhouseCoopers v Walker* [2016] NZCA 338 at [31].

<sup>15</sup> The Issues Paper also discussed other possible mechanisms for managing the concerns about funder control, including the court's powers to strike out proceedings or make a non-party costs order. However, we considered these mechanisms would only manage the concerns to a limited extent. See Issues Paper at [19.13]–[19.22].

<sup>16</sup> The use of minimum contract terms to manage funder control has been adopted in England and Wales in the Association of Litigation Funders *Code of Conduct for Litigation Funders* (which applies to members of the Association of Litigation Funders), by the Abu Dhabi Global Market Courts and, in the arbitration context, in Singapore and Hong Kong. See Issues Paper at [19.23]–[19.28] and [20.15]–[20.19].

- (ii) Set out the funder's role in decisions about whether to settle the proceedings and on what terms, or a specific procedure that will be applied to reviewing and deciding whether to accept a settlement offer.
  - (iii) Set out the circumstances in which a funder may terminate the funding agreement and that the funder shall not be entitled to terminate except in those specified circumstances.
  - (iv) Set out the process for resolving disputes between the funder and the funded plaintiff about settlement or termination of the funding (or any dispute).
- (b) Requiring funders to have and follow an adequate conflicts management policy, as in Australia.<sup>17</sup> This could include practices for disclosing and managing potential or actual conflicts of interest that arise during the proceedings. An issue with this option is how compliance should be monitored and enforced.
- (c) Regulation to limit the amount of control a funder may exercise in a proceeding.<sup>18</sup> However, the risk of funder-plaintiff conflicts of interest may not be able to be completely managed through regulating funder control. As noted above, subtler forms of influence may be exerted by even a relatively passive funder, particularly if it retains the ability to terminate funding in a wide range of circumstances. Real consequences can flow from these pressures even where there is no explicit power for a party to act contrary to the interests of the other.

## Funder profits

- 17.18 In the Issues Paper, we asked submitters what concerns, if any, they have about funder profits. We also asked if they are satisfied that existing mechanisms (that is, leaving it to funders and plaintiffs to negotiate their own funding agreements) can adequately manage these concerns. If not, we asked which option for managing the concerns submitters preferred, and why.
- 17.19 We discussed three options for addressing concerns about funder profits:<sup>19</sup>
- (a) Facilitating competition in the litigation funding market (a market-centred approach).
  - (b) Court supervision of funding commissions in class actions (for example, in the context of exercising a power to make a common fund order or approve a settlement).
  - (c) Directly regulating the commissions that funders can charge (for example, by placing restrictions on how the funding commission can be calculated, or capping funding commissions at a fixed percentage or on a sliding scale).
- 17.20 In the Supplementary Issues Paper, in the context of our draft settlement approval mechanism, we also asked submitters whether the court should have an express power to amend the funding commission at settlement.

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<sup>17</sup> Issues Paper at [20.20]–[20.30].

<sup>18</sup> Issues Paper at [20.31]–[20.32].

<sup>19</sup> For further discussion, see Issues Paper at [21.16]–[21.27].

## RESULTS OF CONSULTATION

### Funder control and funder-plaintiff conflicts of interest

17.21 We received 24 submissions on funder control<sup>20</sup> and 24 submissions on funder-plaintiff conflicts of interest.<sup>21</sup> Most submitters expressed concerns and were not satisfied that existing mechanisms can adequately manage them.

#### *Concerns about funder control and funder-plaintiff conflicts of interest*

17.22 Funder control was frequently linked to concerns about funder-plaintiff conflicts of interest.<sup>22</sup> Professor Vicki Waye (University of South Australia) said funder control may not be a problem in itself, but it becomes a real problem when the possibility of a conflict of interest occurs and the funder can use its control for its own advantage. Some submitters commented on the different motivations of funders and plaintiffs, which can lead to conflicts where a funder has control. Whereas a funder's primary focus is profit, plaintiffs may be driven by other goals.

17.23 Five submitters indicated that funder control may compromise the access to justice rationale for permitting litigation funding, by undermining the fact it is the plaintiff's claim and should primarily be pursued for their benefit.<sup>23</sup>

17.24 Some submitters reiterated that, even where there are contractual limitations on funder control, the funder may in reality have significant influence or effective control over the proceedings.<sup>24</sup> Dr Michael Duffy (Monash University) said the funding agreement may state that the plaintiff's instructions override the funder's instructions in the event of a conflict, but this may be subject to the plaintiff's obligation to follow all reasonable legal advice and fully co-operate with the funder and the lawyer.

17.25 Some submitters commented that funder control can lead to conflicts in representative and class actions.<sup>25</sup> They said the power imbalance between the funder and representative plaintiff increases the risk the funder's commercial goals will be prioritised. Bell Gully said the plaintiff needs independent legal advice when entering a funding agreement to mitigate these concerns. It submitted that a lawyer engaged by, and taking instructions from, the funder (even if nominally through the representative plaintiff) is not in a position to provide independent advice.

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<sup>20</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, BusinessNZ, Colin Carruthers QC, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Consumer NZ, Te Tari Ture o te Karauna | Crown Law Office, DLA Piper, Michael Duffy, Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), Omni Bridgeway, Ross Asset Management Investors Group, Simpson Grierson, Nicole Smith, Vicki Waye and Woodsford Litigation Funding.

<sup>21</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, Buddle Findlay, BusinessNZ, Colin Carruthers QC, Chapman Tripp, Claims Resolution Service, Consumer NZ, Crown Law Office, DLA Piper, Michael Duffy, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Omni Bridgeway, Ross Asset Management Investors Group, Simpson Grierson, Nicole Smith, Vicki Waye and Woodsford Litigation Funding.

<sup>22</sup> Bell Gully, Chapman Tripp, Crown Law Office, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Maurice Blackburn/Claims Funding Australia, Simpson Grierson and Vicki Waye.

<sup>23</sup> Barry Allan, BusinessNZ, Colin Carruthers QC, Chapman Tripp and Insurance Council.

<sup>24</sup> Chapman Tripp, Michael Duffy and Tom Weston QC.

<sup>25</sup> Bell Gully, IBA Antitrust Committee and Ross Asset Management Investors Group.

- 17.26 Settlement was identified as a point where funder control and the risk of funder-plaintiff conflicts is most concerning, as disagreements may arise about whether to accept or reject a settlement offer.<sup>26</sup> Three submitters indicated plaintiffs should always retain significant control over settlement decisions, even if the decision is not in the funder's financial interest.<sup>27</sup> Te Tari Ture o te Karauna | Crown Law Office submitted that those who purport to act in the best interests of class members should be obliged to do so, including putting control of the litigation and key decisions such as settlement in the hands of plaintiffs.
- 17.27 Colin Carruthers QC submitted that, in general, while funders need to have some control, any decisions that affect the class should be a matter for the representative plaintiff or the litigation committee. Vicki Waye said that in Australia a funder will normally sit in on settlement discussions. However, she said it is important that funder control is constrained in relation to settlement decisions, as problems can arise when the funder has an opportunity to use its control to secure something they would not otherwise have been able to secure. Bell Gully noted that funder control creates a difficult dynamic in settlement discussions for class action defendants because, in many cases, it appears to be a numbers game for funders rather than the usual settlement discussion when redressing a personal claim.
- 17.28 Two submitters involved in the litigation funding market were less concerned and said funder control can be beneficial in some situations.<sup>28</sup> In class actions, an experienced funder that has control of day-to-day decisions can be valuable for a representative plaintiff who is inexperienced in litigation.

### *Adequacy of existing mechanisms to manage the concerns*

- 17.29 Most submitters who addressed the adequacy of existing mechanisms to manage funder control and funder-plaintiff conflicts of interest expressed concerns.
- 17.30 Claims Resolution Service and Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand said existing mechanisms, such as the court's ability to order a stay of proceedings for abuse of process, are not adequate to manage concerns about funder control. Another five submitters implied dissatisfaction by advocating for reform.<sup>29</sup> The Insurance Council said the courts have shown repeated reluctance to interfere with funding agreements, and there is uncertainty about when a court will grant a stay of proceedings on account of funder control.
- 17.31 Eleven submitters indicated that existing mechanisms are inadequate to manage concerns about funder-plaintiff conflicts.<sup>30</sup> Several submitters implied dissatisfaction by supporting options for reform.<sup>31</sup> The Insurance Council and Simpson Grierson expressed

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<sup>26</sup> Bell Gully, Consumer NZ, Insurance Council, Simpson Grierson and Vicki Waye.

<sup>27</sup> Consumer NZ, Crown Law Office and Insurance Council.

<sup>28</sup> DLA Piper and Omni Bridgeway.

<sup>29</sup> Barry Allan, Carter Holt Harvey, Chapman Tripp, Crown Law Office and Simpson Grierson.

<sup>30</sup> Barry Allan, Bell Gully, Chapman Tripp, Claims Resolution Service, Colin Carruthers QC, Insurance Council, IBA Antitrust Working Committee, Nicole Smith, Simpson Grierson and Tom Weston QC. Maurice Blackburn/Claims Funding Australia supports the current approach that parties should be able to privately negotiate contract terms, but also supports enhancing the status quo to ensure "greater accountability, transparency and enforcement" through regulation.

<sup>31</sup> For example, Barry Allan, Bell Gully, Chapman Tripp, Nicole Smith and Tom Weston QC.

concern about the lack of any regulation or oversight.<sup>32</sup> Simpson Grierson also said that allowing the funder and the representative plaintiff to negotiate their own contract terms is especially inadequate in representative and class actions where the representative plaintiff may not be commercially sophisticated.

- 17.32 However, a number of submitters, including litigation funders, considered existing mechanisms are adequate. For example, two submitters said court oversight in the context of considering a stay of proceedings for abuse of process can adequately address any issues about funder control.<sup>33</sup>
- 17.33 Three submitters indicated that a well-designed funding agreement can allay any concerns about funder control,<sup>34</sup> or funder-plaintiff conflicts of interest.<sup>35</sup> For example, the agreement can outline the role of the funder and the lawyer, state that the plaintiff retains control of the litigation and the funder should not interfere with the lawyer-client relationship, and set out how any conflicts of interest will be managed.
- 17.34 Some overseas-based funders noted they are already subject to regulations or best practice guidance, which they said is sufficient to mitigate any concerns about funder control and conflicts of interest.<sup>36</sup>

### Options for reform

- 17.35 We received 19 submissions on options for managing concerns about funder control,<sup>37</sup> and 19 submissions on options for managing funder-plaintiff conflicts of interest.<sup>38</sup> As some of the options we proposed for managing funder control and funder-plaintiff conflicts are the same, we summarise the submissions on these topics together below.

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<sup>32</sup> IBA Antitrust Committee noted that the litigation funding industry in the United Kingdom is self-regulated and considered this an insufficient safeguard against the risks of litigation funding.

<sup>33</sup> DLA Piper and Maurice Blackburn/Claims Funding Australia (although it also considers minimum contract terms could further assist in regulating funder control).

<sup>34</sup> Association of Litigation Funders of Australia, LPF Group and Omni Bridgeway.

<sup>35</sup> LPF Group and Omni Bridgeway.

<sup>36</sup> Woodsford Litigation Funding said the Association of Litigation Funders *Code of Conduct for Litigation Funders* (England and Wales) and International Legal Finance Association *Best Practices* prevent funders from taking control of litigation or settlement negotiations. The Association of Litigation Funders of Australia and Omni Bridgeway said the Australian Securities and Investments Commission's (ASIC) regulation requires Australian funders to maintain conflict management policies, and this is also reflected in the Association of Litigation Funders of Australia's *Best Practice Guidelines*.

<sup>37</sup> Barry Allan, Bell Gully, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Crown Law Office, DLA Piper, Michael Duffy, Insurance Council, IBA Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, Simpson Grierson, Nicole Smith, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.

<sup>38</sup> Barry Allan, Association of Litigation Funders of Australia, Bell Gully, Buddle Findlay, BusinessNZ, Chapman Tripp, Claims Resolution Service, Crown Law Office, Michael Duffy, Insurance Council, IBA Antitrust Committee, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Simpson Grierson, Nicole Smith, Vicki Waye, Tom Weston QC and Woodsford Litigation Funding.



## Minimum contract terms

- 17.36 Nine submitters indicated some level of support for minimum contract terms to address funder control<sup>39</sup> or conflicts of interest.<sup>40</sup> DLA Piper generally supported the minimum terms set out in the Issues Paper but thought these should take the form of guidance rather than mandatory terms. It was suggested that minimum terms could provide clarity to litigants about the boundaries that funders must operate within.<sup>41</sup> Compliance could be overseen by the courts,<sup>42</sup> or by an agency such as Te Mana Tatai Hokohoko | Financial Markets Authority (FMA) or Te Tāhū o te Ture | Ministry of Justice.<sup>43</sup>
- 17.37 With respect to particular minimum terms, five submitters supported a term defining the circumstances in which the funder may terminate funding.<sup>44</sup> Maurice Blackburn/Claims Funding Australia suggested the funder should be able to terminate funding where it ceases to be satisfied about the merits of the dispute, reasonably believes the dispute is no longer commercially viable, or where there has been a material unremedied breach of the agreement by the plaintiff justifying termination after notice. At the same time, it said prescribing specific circumstances that justify termination may have unintended consequences as the market develops, because novel cases may arise that justify further grounds for termination. DLA Piper said the parties should be able to terminate the funding agreement by mutual agreement. Five submitters supported a term that sets out the process for resolving disputes,<sup>45</sup> for example disputes about termination of funding.
- 17.38 Three submitters supported terms to limit funder control, such as terms requiring the representative plaintiff's instructions to prevail over the funder's instructions in the event of a dispute,<sup>46</sup> or preventing the funder from seeking to influence the plaintiff or the plaintiff's lawyer to give them control or conduct of the litigation.<sup>47</sup>
- 17.39 Chapman Tripp and Maurice Blackburn/Claims Funding Australia supported a "cooling off" period in which the representative plaintiff and class members would be able to seek legal advice on the agreement if they have not already done so. However, Associate Professor Barry Allan (Te Whare Wānanga o Otāgo | University of Otago) was unsure what advantage a cooling off period would have, as the expectation should be that the representative plaintiff and class members obtain legal advice before signing the funding agreement. Further, he said it is unclear how a cooling off period would apply in an opt-out class action.

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<sup>39</sup> Barry Allan, Bell Gully, Chapman Tripp, Claims Resolution Service, DLA Piper, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>40</sup> Barry Allan, Bell Gully, Chapman Tripp, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>41</sup> Bell Gully and Chapman Tripp (implied).

<sup>42</sup> Chapman Tripp and Simpson Grierson.

<sup>43</sup> Chapman Tripp.

<sup>44</sup> Barry Allan, Bell Gully, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson. In addition, Chapman Tripp supported a prohibition on discretionary rights for funders to terminate funding agreements.

<sup>45</sup> Bell Gully, Chapman Tripp, Insurance Council, Maurice Blackburn/Claims Funding Australia and Simpson Grierson.

<sup>46</sup> Maurice Blackburn/Claims Funding Australia.

<sup>47</sup> Bell Gully, Insurance Council and Simpson Grierson.



- 17.40 Two submitters expressed neutral views on minimum terms,<sup>48</sup> and three did not support this option.<sup>49</sup> Carter Holt Harvey said minimum contract terms do not resolve the issue of funder control, as it is possible to agree that the plaintiff's lawyer will not give control of the litigation to the funder while also requiring the funded party to follow the lawyer's legal advice and give the funder the right to appoint the lawyer.

### Court oversight of funding agreements

- 17.41 Several submitters supported some form of court oversight of funding agreements as a mechanism for managing concerns about funder control<sup>50</sup> or funder-plaintiff conflicts of interest.<sup>51</sup> Suggestions included empowering the court to look closely at funder control and conflicts of interest in the context of a power to approve funding agreements or approve settlements. Te Kāhui Ture o Aotearoa | New Zealand Law Society said the courts are best placed to review funding terms to make sure that each case “involves a genuine claimant who understands the terms they are signing up to”.
- 17.42 Maurice Blackburn/Claims Funding Australia did not support court approval of funding agreements, saying any preliminary review would duplicate existing judicial oversight and promote satellite litigation at the pre-trial stage. It favoured alternatives such as minimum contract terms, a requirement for the funder to maintain a conflicts management policy (together with regulatory guidance and oversight of the funder's compliance) and the general supervisory jurisdiction of the courts in class actions (including at settlement). It did not support a power for the court to vary the terms of litigation funding agreements.

### Conflicts management policy

- 17.43 Four submitters supported a requirement for funders to maintain an adequate conflicts management policy.<sup>52</sup> Two of these submitters commented on the Australian Securities and Investments Commission (ASIC) Regulatory Guide 248 (RG 248), which requires class action funders in Australia to maintain adequate conflicts management policies. The Association of Litigation Funders of Australia said having adequate arrangements for managing conflicts of interest is “essential to good business practice”. It said it requires its members to publish their policies, which must comply with ASIC regulations. Maurice Blackburn/Claims Funding Australia said RG 248 provides good guidance for funders, and it supports a similar requirement in Aotearoa New Zealand. Both submitters noted that more proactive enforcement of the guidance in RG 248 would be beneficial in Australia, for example through an annual reporting requirement on compliance.
- 17.44 Some submitters discussed a requirement for funders to maintain a conflicts management policy or manage conflicts of interest but did not express a clear view on whether funders operating in Aotearoa New Zealand should be subject to such a requirement.

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<sup>48</sup> Tom Weston QC regarded minimum terms as “one way to address the problems”, and Vicki Waye said that minimum terms could be an option but noted it might increase the risk of expensive collateral litigation.

<sup>49</sup> BusinessNZ, Carter Holt Harvey and NZLS.

<sup>50</sup> Bell Gully, Chapman Tripp, Insurance Council, IBA Antitrust Committee, Simpson Grierson and Tom Weston QC.

<sup>51</sup> Bell Gully, IBA Antitrust Committee and Nicole Smith.

<sup>52</sup> Association of Litigation Funders of Australia, Chapman Tripp, Insurance Council and Maurice Blackburn/Claims Funding Australia.

## Other options raised by submitters

- 17.45 There was limited support for a code of conduct to manage concerns about funder control or conflicts of interest. BusinessNZ supported a voluntary code with non-compliance having reputational repercussions for the funder concerned. Woodsford Litigation Funding noted that the Association of Litigation Funders (England and Wales) *Code of Conduct for Litigation Funders* limits funder control, and the International Legal Finance Association *Best Practices* require members to maintain effective systems to detect and manage conflicts of interest. It did not say whether a code of conduct would adequately respond to these concerns in Aotearoa New Zealand, but it did not think any government-led regulation of litigation funders is warranted or necessary. Bell Gully supported a code of conduct and/or minimum contract terms. However, it said that whatever form regulation takes, it should be “a set of principles with the force of law and overseen by the courts”. It considered guidelines or industry self-regulation would be insufficient to address the concerns about funder control, which can lead to funder-plaintiff conflicts.
- 17.46 Michael Duffy proposed a mutual statutory obligation of good faith, like the duty of utmost good faith in insurance law. Two other submitters commented favourably on recommendations made by the Australian Parliamentary Inquiry,<sup>53</sup> for example that funders should be required to disclose any potential conflicts of interest to the court.<sup>54</sup>

## Funder profits

### Concerns about funder profits

- 17.47 We received 30 submissions on the concerns about funder profits. Of those, 21 expressed concerns<sup>55</sup> and six had no concerns.<sup>56</sup>
- 17.48 Among the submitters who had concerns about funder profits, reasons included the following:
- (a) Funder profits can significantly diminish compensation for claimants, undermining the access to justice justification for permitting litigation funding.
  - (b) In representative and class actions, there is no true commercial tension in the negotiation of funding terms and commissions. The power lies with the funder, and the representative plaintiff and class members usually have no other option.

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<sup>53</sup> Buddle Findlay and Vicki Waye.

<sup>54</sup> For example, Recommendation 25 provides that funders should be obliged to disclose to the Federal Court of Australia any potential conflicts of interest, any new or potential conflicts that arise after the first case management conference, and the funder's conflict management policy (when applying for approval of a funding agreement): Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020).

<sup>55</sup> Andrew Barker QC, Bell Gully, Buddle Findlay, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Crown Law Office, Michael Duffy, Tony Ellis, Gilbert Walker, Insurance Council, International Bar Association (IBA) Antitrust Committee, Johnson & Johnson, Murray Lazelle, Michael Legg, NZLS, NZ Shareholders' Association, NZX, Ross Asset Management Investors Group, Simpson Grierson and Tom Weston QC.

<sup>56</sup> Association of Litigation Funders of Australia, DLA Piper, LPF Group, Maurice Blackburn/ Claims Funding Australia, Omni Bridgeway and Woodsford Litigation Funding. Three submissions were unclear.

- (c) Concerns may be greater in opt-out proceedings than opt-in proceedings because compensation that would otherwise be awarded to class members may be reduced by funding commissions and legal fees they have not actively agreed to.
- (d) Funded plaintiffs may be signing away vast portions of their returns without fully understanding what they are doing.
- (e) Funder profits are not necessarily commensurate with the risk attached to investing in litigation. Many funded cases are relatively low-risk, and in any case, funders can manage risk with adequate due diligence.
- (f) Examples of funders and lawyers benefiting from funded litigation at the expense of class members (and defendants) include *Strathboss Kiwifruit v Attorney-General*,<sup>57</sup> *PricewaterhouseCoopers v Walker*,<sup>58</sup> and *Huon Corporation*.<sup>59</sup>
- (g) Public perceptions of the justice system will be damaged if funders and lawyers are the main beneficiaries of litigation rather than plaintiffs.
- (h) There is a risk of funders and lawyers acting together to create and fund litigation without any real client at all. Te Kāhui Ture o Aotearoa | New Zealand Law Society said there is no public policy reason to permit a pure market in litigation in the absence of a genuine principal.
- (i) The way that funding commissions are calculated does not always incentivise funders to try and keep lawyers' costs low.
- (j) It is not easy to determine what constitutes acceptable funder profit and what constitutes excessive profit. There is a fine line between regulating litigation funding for the benefit of plaintiffs and discouraging the availability of litigation funding.
- (k) There is a lack of empirical evidence on the returns made by funders in Aotearoa New Zealand, and therefore a lack of transparency about whether the outcomes of funded litigation are in fact fair to plaintiffs. The exact terms of settlement are usually confidential, as is the amount actually received by plaintiffs.
- (l) Overseas-based funders will take their profits out of Aotearoa New Zealand.

17.49 Among the submitters who were unconcerned about funder profits, reasons included the following:

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<sup>57</sup> Gilbert Walker gave this example. In the *Strathboss* representative action, the parties reached a \$40 million settlement of a \$450 million claim, with the kiwifruit growers reportedly recovering 62 per cent of the settlement (about 5 cents in the dollar for what they claimed). However, the settlement followed a decision by Te Kōti Pira | Court of Appeal that it would not be fair, just or reasonable to make the Crown legally responsible for the loss, and that therefore, no legal duty of care was owed by Te Manatu Ahuwhenua, Ngāherehere | Ministry of Agriculture and Forestry staff to the plaintiffs. The plaintiffs filed an appeal against the decision to the Supreme Court, but the hearing was vacated following the out-of-court settlement.

<sup>58</sup> The Insurance Council explicitly gave this example, and some submitters appeared to refer to it indirectly. The settlements and payments made under litigation funding arrangements in respect of that litigation are being challenged in *100 Investments Ltd v Registrar of Companies* [2020] NZHC 880.

<sup>59</sup> Johnson & Johnson gave the example of *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493 (2 October 2014) ("*Huon Corporation*"), which was discussed in Victorian Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings* (March 2018) at [2.75]–[2.87]. The case attracted attention because the company's former employees, on whose behalf the litigation was conducted, received none of the payments ordered by the court. The entire \$5,107,259 award went to pay the litigation funder, lawyers and accountants. The litigation took 11 years to resolve.

- (a) Litigation funding is a commercial arrangement, and it should be uncontroversial that funders expect to profit from their investments. Parties should be free to enter into funding arrangements on commercial terms agreed by both parties.
- (b) Without litigation funding, many plaintiffs and class members would be unable to pursue their claims and obtain compensation or hold wrongdoers to account. It is preferable for plaintiffs and class members to receive something, rather than nothing.
- (c) Funder profits are commensurate to the inherent risks attached to investing in litigation. Further, it is not appropriate to assess funder profits solely on the basis of outcomes in individual cases, without considering the total costs and risks associated with all the cases in the funder's portfolio.

### *Adequacy of existing mechanisms to manage the concerns*

17.50 We received 26 submissions on whether existing mechanisms for managing the concerns about funder profits are adequate. Of those, 17 submitters were not satisfied that existing mechanisms are adequate to manage the concerns,<sup>60</sup> and six submitters considered existing mechanisms are adequate.<sup>61</sup>

17.51 Submitters who did not think existing mechanisms are adequate to manage concerns about funder profits said:

- (a) The light-touch approach endorsed by the Supreme Court in *Waterhouse v Contractors Bonding* is not an adequate basis for regulating litigation funding in class actions.<sup>62</sup> The Australian experience highlights the inadequacy of a light-touch approach.
- (b) The court's ability to stay proceedings on the basis of an impermissible assignment of a bare cause of action does not adequately manage the concerns. Based on the Supreme Court's decision in *PricewaterhouseCoopers v Walker*,<sup>63</sup> it is uncertain whether the court will stay proceedings on the basis of funder profit and control.
- (c) The torts of maintenance and champerty are not the right mechanism for regulating funding commissions. Their bluntness and ambiguity make them unsuitable for regulating sophisticated funding arrangements, and their policy rationale is no longer convincing.
- (d) Lawyers and representative plaintiffs do not necessarily provide an effective check on funding commissions. At the point of settlement, conflicts may arise between the lawyer and the representative plaintiff.<sup>64</sup> Conflicts may also arise between the

<sup>60</sup> Andrew Barker QC, Bell Gully, Buddle Findlay, Carter Holt Harvey, Chapman Tripp (at least in the absence of a mature and competitive funding market), Claims Resolution Service, Gilbert Walker, Insurance Council, IBA Antitrust Committee, Johnson & Johnson (implied), Murray Lazelle (implied), NZLS, NZ Shareholders' Association, NZX, Ross Asset Management Investors Group (implied), Simpson Grierson and Tom Weston QC.

<sup>61</sup> LPF Group and DLA Piper. This point was also made by the Association of Litigation Funders of Australia, Maurice Blackburn/ Claims Funding Australia, Omni Bridgeway and Woodsford Litigation Funding. However they appear to be commenting on the adequacy of existing mechanisms in Australia, rather than Aotearoa New Zealand. Three submissions were unclear.

<sup>62</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

<sup>63</sup> *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735.

<sup>64</sup> In Chapter 7, we recommend that, when a proceeding is certified as a class action, the representative plaintiff's lawyer should be regarded as the lawyer for the class and have a solicitor-client relationship with the class.

representative plaintiff and the class (if the representative plaintiff is to receive a payment for taking on the role).

17.52 Submitters who were satisfied with existing mechanisms thought concerns about funder profits can be adequately managed in one or more of the following ways:

- (a) The court's supervisory jurisdiction in representative and class actions, particularly court approval of settlements.<sup>65</sup> In Australia, for example, court approval of settlement includes an examination of what class members will receive after the funding commission and legal costs are deducted.
- (b) Competition in the litigation funding market.
- (c) The terms of the litigation funding agreement. A well-designed, fit-for-purpose funding agreement can manage concerns about funder profits by providing full disclosure of all fees and charges before the funding agreement is entered into. It can also moderate funder profits and protect class member interests through cooling off periods, support for class members to obtain independent advice, standard terms regarding management of conflicts of interest, and dispute resolution mechanisms (typically overseen by senior officers of the courts, such as Queen's Counsel).
- (d) The obligations of the lawyer for the representative plaintiff and the class as officers of the court, and their overriding obligation and fiduciary duty to their client.
- (e) General consumer law protections available to class members, for example in relation to unconscionable conduct, misleading and deceptive conduct and unfair contracts.

### Options for reform

17.53 We received 29 submissions commenting on options for managing funder profits.<sup>66</sup> We also received 19 submissions on the question in the Supplementary Issues Paper about whether the court should have the power to vary funding commissions at settlement.<sup>67</sup> Some submitters supported more than one option.

17.54 Thirteen submitters, including Te Komihana Tauhokohoko | Commerce Commission, supported facilitating competition in the litigation funding market, for example to make litigation funding more affordable.<sup>68</sup> Competition could increase consumer choice, enable consumers to negotiate better terms and increase the quality of the services provided by funders. While Aotearoa New Zealand could benefit from the involvement of more

<sup>65</sup> The Supreme Court has said that courts have the power to approve settlements in representative actions under HCR 4.24: *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126 at [82]. In Chapter 11, we recommend the courts should be required to approve settlements in class actions.

<sup>66</sup> Barry Allan, Association of Litigation Funders of Australia, Andrew Barker QC, Buddle Findlay, BusinessNZ, Carter Holt Harvey, Chapman Tripp, Claims Resolution Service, Commerce Commission, Crown Law Office, DLA Piper, Michael Duffy, Insurance Council, IBA Antitrust Committee, Johnson & Johnson, Murray Lazelle, Michael Legg, LPF Group, Maurice Blackburn/Claims Funding Australia, NZLS, NZ Shareholders' Association, NZX, Omni Bridgeway, Ross Asset Management Investors Group, Simpson Grierson, Nicole Smith, Tom Weston QC, Vicki Waye and Woodsford Litigation Funding.

<sup>67</sup> Bell Gully, David Bigio QC, Nikki Chamberlain, Chapman Tripp, Michael Duffy, Gilbert Walker, Andrew Harnos, Johnson & Johnson, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, MinterEllisonRuddWatts, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission), Nicole Smith, Tom Weston QC and Woodsford Litigation Funding.

<sup>68</sup> Barry Allan, Association of Litigation Funders of Australia, Claims Resolution Service, Commerce Commission, DLA Piper, Insurance Council, Maurice Blackburn/Claims Funding Australia, NZLS, NZX, Ross Asset Management Investors Group, Simpson Grierson, Vicki Waye and Woodsford Litigation Funding.

experienced overseas-based funders in the market, onerous regulation and compliance requirements could discourage market entry and favour funders based here.

- 17.55 However, two submitters stated that facilitating healthy competition should not mean watering down regulation.<sup>69</sup> Simpson Grierson commented that a clear regulatory framework for litigation funding may in fact make Aotearoa New Zealand a more attractive jurisdiction for litigation funders.
- 17.56 Thirteen submitters on the Issues Paper supported some form of court oversight of funding commissions in class actions.<sup>70</sup> They were fairly evenly split on whether the court should consider the funding commission at the beginning of the class action, later in the proceedings, or both.<sup>71</sup>
- 17.57 Submitters on the Supplementary Issues Paper were also split on whether the court should have an express power to vary the funding commission (outside the context of making a cost sharing order). While a few submitters supported this option,<sup>72</sup> for example to protect class member interests, the majority did not.<sup>73</sup> The concern was that this would introduce commercial uncertainty for funders and a risk of hindsight bias colouring assessments of what is a fair balance of risk and return. Maurice Blackburn/Claims Funding Australia submitted that, except for the purpose of making a common fund order, the court should not interfere with the private contractual dealings of consenting parties in the absence of evidence of wrongful conduct.
- 17.58 Some submitters supported a statutory cap on funding commissions or a legislated minimum return to class members. This could provide greater certainty for plaintiffs and ensure that class actions are run for the benefit of class members. There was no consensus on how funding commissions should be capped, but suggestions included: benchmarking against private equity returns,<sup>74</sup> creating a “multiplier and multiplicand”

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<sup>69</sup> NZX and Simpson Grierson.

<sup>70</sup> Andrew Barker QC, Association of Litigation Funders of Australia, Buddle Findlay, Carter Holt Harvey, Chapman Tripp, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia, NZLS, NZ Shareholders' Association, Simpson Grierson, Vicki Waye (implied), Tom Weston QC and Woodsford Litigation Funding.

<sup>71</sup> Six submitters supported the court considering the funding commission at the beginning of a class action: Andrew Barker QC, Carter Holt Harvey, Chapman Tripp, NZLS, Simpson Grierson and Tom Weston QC. Five submitters supported the court considering the funding commission later in the proceedings, such as when approving a class action settlement: Association of Litigation Funders of Australia, Andrew Barker QC, IBA Antitrust Committee, Maurice Blackburn/Claims Funding Australia and Woodsford Litigation Funding. Buddle Findlay submitted Aotearoa New Zealand should pay close heed to recent recommendations by the Australian Law Reform Commission and Parliamentary Joint Committee on Corporations and Financial Services, including recommendations for court approval of funding agreements and court supervision of funding commissions in the context of making a common fund order (if such orders are considered necessary). Some submitters expressed support for court oversight of funding commissions, but did not specify when this should occur.

<sup>72</sup> Bell Gully, Michael Duffy, Gilbert Walker, Johnson & Johnson, Nicole Smith and Tom Weston QC.

<sup>73</sup> David Bigio QC, Chapman Tripp, Andrew Harnos, Zane Kennedy, LPF Group, Maurice Blackburn/Claims Funding Australia, Omni Bridgeway, Shine Lawyers, Simpson Grierson, Philip Skelton QC/Kelly Quinn/Carter Pearce (joint submission) and Woodsford Litigation Funding. MinterEllisonRuddWatts submitted that the court should not have a power to vary funding commissions at settlement, except in cases where the real return to funders would be out of all proportion to the risk taken and costs incurred. Some submitters on the Issues Paper also commented on this option in the context of discussing the court oversight of funding arrangements option.

<sup>74</sup> Insurance Council.

tabled system similar to personal injury cases,<sup>75</sup> creating a sliding scale to cap fees,<sup>76</sup> capping fees by reference to multiples of the amount invested,<sup>77</sup> or legislating a minimum return to class members of 50 per cent of gross recoveries in funded class actions.<sup>78</sup>

- 17.59 Six submitters did not support a statutory cap on funding commissions.<sup>79</sup> A cap could stymie market competition, dissuade litigation funding for more complex cases and create a tendency for funders to charge fees at the cap. Chapman Tripp said a cap is a “blunt instrument” for managing concerns about funder profits, as it does not reflect that each case raises different risks that justify variable funding commissions.
- 17.60 Three submitters suggested alternative mechanisms. BusinessNZ said guidelines for funders may be appropriate to address funder profits if the court’s power to stay proceedings is inadequate. Chapman Tripp suggested a power for a regulator (such as the FMA) to review funding commissions as needed. Vicki Waye suggested an independent expert could assist the court to assess the reasonableness of the funding commission.
- 17.61 Three submitters supported the effective regulation of funding commissions but did not specify how funding commissions should be regulated.<sup>80</sup>

### *Survey of group members*

- 17.62 In our survey of group members who have participated in representative actions,<sup>81</sup> we asked whether funded participants were satisfied that the funding commission they were charged was fair and reasonable. Most participants who responded were neutral or satisfied with the funding commission.<sup>82</sup> Some of the participants may have been involved in proceedings that had not yet resolved, so they may not yet have had a clear understanding of how much would be deducted from any recovery. However, the results may indicate that funder profits do not cause concern in all cases or that submitters are unsure whether the funding commission in their case was reasonable.

## RECOMMENDATIONS

### **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.

<sup>75</sup> NZX.

<sup>76</sup> Vicki Waye. For example, where the claim is very small the funding commission might be capped at 50 per cent of any recovery, but where the claim is large the funding commission might be capped at 10 per cent of the recovery.

<sup>77</sup> Vicki Waye.

<sup>78</sup> Omni Bridgeway.

<sup>79</sup> Association of Litigation Funders of Australia, Chapman Tripp, Claims Resolution Service, Maurice Blackburn/Claims Funding Australia, NZ Shareholders’ Association and Woodsford Litigation Funding.

<sup>80</sup> Johnson & Johnson, Murray Lazelle and Michael Legg.

<sup>81</sup> For more information about the survey, see Chapter 1.

<sup>82</sup> Participants could give an answer from 1 to 5, with 1 being “very unsatisfied” and 5 being “very satisfied”. There were 228 responses to this question, and the average response was 3.51.

**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.

### Court approval of funding agreements at the commencement of class actions

- 17.63 In this section, we explain our recommendation that litigation funding agreements should be subject to court approval in class actions. We think the requirements relating to court approval of funding agreements should be included in the Class Actions Act, and our draft provisions are set out at the end of this chapter and in Appendix One.
- 17.64 We think court approval is necessary to protect the interests of representative plaintiffs and class members in funded class actions. The courts in Aotearoa New Zealand have already recognised their important supervisory role in representative actions to ensure that the interests of class members are protected.<sup>83</sup> Class actions raise the same concerns, and court oversight will help to ensure that litigation funding achieves its access

<sup>83</sup> See Issues Paper at [9.18]–[9.19]. In Australia, see similar comments in: Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (December 2020) at [11.53] and Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at [6.64].

to justice objective.<sup>84</sup> In particular, court approval responds to the concerns discussed in this chapter about funder control, funder-plaintiff conflicts of interest and funder profits, as well as some of the concerns about lawyer-plaintiff conflicts of interest discussed in Chapter 16. In addition, court approval will help to assure the integrity of the court system and improve transparency and funder accountability in class actions, in line with the objectives and guiding principles for permitting and regulating litigation funding discussed in Chapter 14. In effect, court approval requires the funder to publicly justify their funding terms and commission.

- 17.65 Given the often commercial nature of other funded proceedings, we consider that most individual funded plaintiffs are likely to be more sophisticated and able to protect their interests when negotiating funding agreements than representative plaintiffs and class members. Therefore, we think it would be disproportionate to the risk, in terms of the time and cost involved, to require court approval of funding agreements outside of the class actions context.
- 17.66 In the absence of detailed statutory rules, Te Kōti Pira | Court of Appeal has questioned the institutional capacity of the courts to approve funding arrangements. The Court has expressed concern that funding approval will assure claimants all is well with their claim and discourage them from undertaking their own assessment of the funding arrangements.<sup>85</sup>
- 17.67 However, as we discussed in Chapter 14, there is precedent for court approval of funding agreements in Ontario's class actions legislation.<sup>86</sup> The legislation, which codified existing practice, provides that a funding agreement will have no force or effect without court approval, and sets out factors the court must be satisfied of before approving the agreement. In Australia, the Australian Law Reform Commission (ALRC) and the Australian Parliamentary Inquiry have also recommended that funding agreements in class actions must be approved by the court to be enforceable.<sup>87</sup> Unlike Ontario's legislation, however, the ALRC and Australian Parliamentary Inquiry recommended the court should be expressly empowered to amend the terms of the funding agreement (not just approve or reject it).<sup>88</sup> In 2021, the federal government sought feedback on a draft Bill that would require court approval of the claim proceeds distribution method in a class action in order

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<sup>84</sup> See Chapter 14, where we set out objectives and guiding principles for permitting and regulating litigation funding. See also Chapter 3, where we note the court may have a more active role in the control, supervision and disposition of class actions than in other litigation because of the need to ensure the interests of class members are adequately protected.

<sup>85</sup> *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [79].

<sup>86</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 33.1. See also Issues Paper at [23.50].

<sup>87</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 169 (Recommendation 14(a)); Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at Recommendation 11.

<sup>88</sup> Australian Law Reform Commission *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC R134, 2018) at 169 (Recommendation 14(b)); Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at Recommendation 11.

for it to be enforceable, and empower the court to vary that method to ensure it is fair and reasonable.<sup>89</sup>

- 17.68 We recommend that the funder in a class action should be unable to enforce the funding agreement against the representative plaintiff or class members, unless the agreement has been approved by the court.<sup>90</sup> This means the funder will be unable to recover its funding commission unless the funding agreement is approved by the court, but ensures that the representative plaintiff will still be able to rely on the costs indemnity in the funding agreement if, for example, their claims fails at certification and before the funding agreement is approved. If the court declines to approve the funding agreement, it should provide reasons so that the funder, representative plaintiff and class members are able to renegotiate and amend the agreement if they wish to reapply for approval. We think this is preferable to a power for the court to vary the terms of the funding agreement at the funding approval stage.
- 17.69 As to mechanics, we think that the representative plaintiff should seek court approval of the funding agreement immediately after the class action is certified, by filing an interlocutory application for orders approving the funding agreement together with any supporting affidavit addressing the factors set out in our proposed court approval provision (discussed below).<sup>91</sup> If the parties reach a settlement prior to certification, court approval should be sought together with the application for settlement approval. If the funding agreement is entered into after certification, court approval should be sought as soon practicable after the agreement is entered into. If the terms of the funding agreement are amended during the proceedings, further court approval will be required, and we consider that this should be sought as soon as practicable after that amendment.
- 17.70 This timing will provide funders with some certainty at the commencement of proceedings, which is essential for the growth of a competitive and sustainable market in litigation funding and ultimately for funding to provide access to courts in class actions. We think it is important that the funding approval provision does not become a vehicle for creating further disputes. Therefore, we would not expect the defendant to be involved in any argument about the fairness or reasonableness of the funding terms or funding commission. At the same time, we think the defendant ought to be advised of the application for funding approval and the outcome of that application. We recommend Te Kōmiti mō ngā Tikanga Kooti | Rules Committee consider whether any amendments to the High Court Rules 2016 (HCR) are necessary to achieve this.
- 17.71 We recommend that the court may only approve a funding agreement if it is satisfied that the representative plaintiff has received independent legal advice on the funding agreement and the agreement as a whole is fair and reasonable.<sup>92</sup> The requirement for independent legal advice responds to the concern about the imbalance in bargaining power between the litigation funder and the representative plaintiff and class members, which increases the risk that the funder's commercial interests will be prioritised. It also

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<sup>89</sup> The Treasury “Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation funders” <[www.treasury.gov.au](http://www.treasury.gov.au)>. A “claim proceeds distribution method” means “a method... for determining the amount of any claim proceeds for the scheme that is to be paid or distributed to the scheme’s general members”.

<sup>90</sup> For a similar example of this approach in Ontario, see Class Proceedings Act SO 1992 c 6, s 33.1(3).

<sup>91</sup> The High Court Rules require any affidavit in support of an interlocutory application to be filed at the same time as the application: High Court Rules 2016, r 7.20.

<sup>92</sup> For an example of a similar approach in Ontario, see Class Proceedings Act SO 1992 c 6, ss 33.1(9)(a)(i) and 33.1(10).

emphasises that it is the role of the lawyer (not just the court) to protect and promote the interests of the representative plaintiff and class members in the process of negotiating the funding agreement. Given the risk of lawyer-plaintiff conflicts of interests involving the lawyer acting in the class action, we think it is appropriate for the representative plaintiff to receive advice from a lawyer who is not involved in the funded litigation.

17.72 In determining whether the funding agreement is fair and reasonable, we think the court should consider the following factors:

- (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.

17.73 We considered whether court approval of funding agreements should depend on the inclusion of mandatory minimum contract terms. We have concluded that the above factors will allow the court to look at the overall fairness and reasonableness of the funding agreement, and to evaluate this in the circumstances of each case. We think that factors to guide the courts' discretion will provide greater flexibility for funders, parties and the courts and incentivise more favourable funding terms for representative plaintiffs and class members. We comment on these factors and how they may be applied in more detail below. By contrast, mandatory minimum contract terms might – as the name suggests – incentivise the bare minimum and may make avoidance of the underlying intent easier.

17.74 Our proposed factors do not invite the court to assess the merits of the class action, nor should they discourage a representative plaintiff from undertaking their own assessment of funding arrangements.

17.75 We have not recommended a requirement for funders to maintain and implement a conflicts management policy (like ASIC's Regulatory Guide 248 in Australia). The issue with this option is who would oversee funders' compliance, given that we do not think oversight of litigation funding by a regulator (such as the FMA) is appropriate for Aotearoa New Zealand.<sup>93</sup> Submissions indicated that more proactive enforcement of the guidance in RG 248 would be beneficial in Australia, for example through an annual reporting requirement on compliance. While Aotearoa New Zealand could implement a requirement to provide a conflicts management plan to the court, absent an auditing or

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<sup>93</sup> See our discussion about models for regulation and oversight of litigation funding in Chapter 14.

reporting requirement, the court would have no way to determine whether or to what extent the funder is implementing their policy.

### *Termination of the funding agreement*

17.76 With respect to the circumstances in which the funder is entitled to terminate the funding agreement, we anticipate the court would not be satisfied that a funding agreement is fair and reasonable unless the agreement either:

- (a) Sets out the circumstances in which the funder can terminate the agreement, and that the funder shall not be entitled to terminate the agreement except in those circumstances. For example, the funder may be entitled to terminate where it reasonably ceases to be satisfied about the merits or commercial viability of the dispute, or where there has been a material unremedied breach of the agreement by the funded plaintiff justifying termination after notice.
- (b) Requires the funder to provide the funded plaintiff with notice of its intention to terminate the agreement and continue to perform its obligations under the funding agreement during the notice period. We think the notice period should provide the representative plaintiff with adequate time to seek alternative funding, for example 20 working days might be sufficient in complex litigation. We also anticipate that during the notice period the funder would not seek to be reimbursed for any security paid into court, unless and until alternative funding is secured.

17.77 This factor responds to the risk that the funder may use its influence and control to protect its own interests at the expense of those of the class when those interests diverge. In particular, it addresses the concern that a funder's unfettered discretion to terminate the funding agreement can put pressure on the funded representative plaintiff and effectively give the funder control of the claim. While some of the grounds we have discussed for terminating funding agreements are very broad, for example if the claim is no longer commercially viable, we also expect that a funding agreement will contain an appropriate dispute resolution process (discussed below). Specifying grounds for termination, rather than allowing funders complete discretion to terminate without notice or with limited notice, means disputes about whether those grounds are established can be dealt with through that process.

### *Plaintiff's ability to control the litigation*

17.78 We think the court should ensure the funding agreement will not significantly diminish the rights of the representative plaintiff to instruct the lawyer or control the litigation, or otherwise impair the lawyer-client relationship.<sup>94</sup> Some funder involvement in the claim is inevitable to enable it to protect its investment. For example, the funder will want to be kept informed of important developments in the litigation and will expect to be consulted before major decisions are taken, particularly in relation to settlement. Even so, we think the ability of the plaintiff to retain meaningful control over their claim is relevant to whether or not the funding agreement is fair and reasonable. The purpose of this factor

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<sup>94</sup> For examples of guidance to this effect in comparable jurisdictions, see: Association of Litigation Funders *Code of Conduct for Litigation Funders* (Civil Justice Council, January 2018) at [9.2]–[9.3]; Hong Kong Code of Practice for Third Party Funding of Arbitration 2018 at [2.9]; Abu Dhabi Global Market Courts Litigation Funding Rules 2019, r 9(1); and Singapore Institute of Arbitrators *Guidelines for Third Party Funders* (18 May 2017) at [6.1.1], [6.1.4] and [6.2.1].

is to mitigate concerns about funder-plaintiff conflicts of interest, as well as concerns about lawyer-plaintiff conflicts of interest (discussed in Chapter 16).

### **Dispute resolution process**

- 17.79 We think a comprehensive process for resolving disputes between the funder and the funded representative plaintiff is an essential part of every funding agreement. This is particularly so in relation to disputes about settlement of the litigation and termination of the funding agreement, which is where the interests of funders and plaintiffs are most likely to diverge and funder-plaintiff conflicts of interest may arise. Dispute resolution processes could include discussion, good faith negotiation, mediation, arbitration and/or expert determination. Where a third-party determination is required, we think the impartiality and expertise of the third-party will be important to the assessment of the dispute resolution process. We anticipate the funder would pay any costs of the process.

### **Law governing the agreement**

- 17.80 Related to the above factor, we think the court should consider whether the funding agreement provides that the governing law under the agreement is the law of Aotearoa New Zealand. This is important to allay concerns about the enforceability of funding agreements, and to ensure that funded representative plaintiffs and class members can resolve disputes under and in respect of the agreement in Aotearoa New Zealand with the assistance of local lawyers. As part of the court's assessment, it could also consider whether the parties have submitted to the exclusive jurisdiction of the courts of Aotearoa New Zealand.

### **Adverse costs indemnity**

- 17.81 Typically, the litigation funder will agree to cover any adverse costs payable to the defendant if the case is unsuccessful, and many class actions would be unable to proceed without this. We think an adverse costs indemnity is a vital safeguard for the representative plaintiff, whose liability for adverse costs might otherwise be disproportionate to the risks that other class members carry and to the value of their own claim. We anticipate that a full adverse costs indemnity will generally be required for the court to be satisfied the funding agreement is fair and reasonable.

### **Fairness and reasonableness of funding commission**

- 17.82 Finally, we think the fairness and reasonableness of the funding commission will be central to the court's decision to approve the funding agreement. In discussions with our Expert Advisory Group and judges, some concerns were expressed about the court's competence to assess the fairness and reasonableness of funding commissions. In *Waterhouse v Contractors Bonding*, the Supreme Court also commented on the difficulty of drawing a line between what is an acceptable level of funder profit and what is excessive, saying "whether a bargain is fair assumes the existence of an ascertainable objective standard against which fairness is to be measured".<sup>95</sup>
- 17.83 We appreciate it may be challenging for courts to make assessments about the fairness and reasonableness of funding commissions in the early years of a statutory class actions

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<sup>95</sup> *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [48].

regime, until a body of precedent develops that is specific to Aotearoa New Zealand and the application of our proposed factors. With any new statutory regime, the absence of relevant case law will be a challenge for the courts and others who use the regime. We expect that with time the development of case law and greater transparency around returns to funders and representative plaintiffs and class members (for example, through the mandatory settlement outcome reports we recommend in Chapter 11) will assist the court with its assessments of funding commissions.

- 17.84 The courts' competence to assess the fairness and reasonableness of funding commissions is accepted in some comparable jurisdictions. Ontario's class actions legislation provides that the court shall not approve a funding agreement unless it is satisfied "the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable".<sup>96</sup> In Australia, to the extent that the courts have been willing to approve or amend funding commissions when making common fund orders, this indicates an acceptance that it falls within their expertise.<sup>97</sup>
- 17.85 We think concerns about the competence of the courts to assess funding commissions can be overcome by a power for the court to appoint an expert to assist it to assess the funding commission in the class action, as well as factors to guide the court's assessment of whether the funding commission is fair and reasonable. We discuss experts to assist the court later in this chapter.
- 17.86 The factors we think the court should consider when assessing the fairness and reasonableness of funding commissions are:
- (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 (for example, legal fees, expert fees, witness fees, court fees, security for costs and adverse costs).
  - (d) The complexity and likely duration of the case (for example, the number of defendants, the anticipated number of witnesses and the number of causes of action).
  - (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.
- 17.87 We emphasise that these factors focus (at a high-level) on the costs and risks of the particular litigation for the funder, not on any other financial commitments the funder may have. In essence, we think the funding commission should be justified in light of the expected costs and rewards of each case. We do not agree that high funding commissions are justified on the basis that some compensation for funded representative plaintiffs and class members is better than no compensation. In each case, we think the funding commission must offer the possibility of substantive justice to those who rely on it. Access to justice is the main reason for permitting litigation funding in Aotearoa New Zealand, and our funding approval provision is designed to focus attention on the fairness

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<sup>96</sup> Class Proceedings Act SO 1992 c 6 (Ontario), s 33.1(9)(a)(i).

<sup>97</sup> For example, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148, (2016) 245 FCR 191 at [79]–[83], and *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 at [21]–[25].

and reasonableness of the funding commission in the circumstances of each funded class action.

- 17.88 We also disagree with the argument that high funding commissions are justified by the risk that other cases in the funder's portfolio may be unsuccessful. Litigation risk within the funder's portfolio is a matter for the funder to manage, not the courts. To the extent possible, our recommendations to regulate litigation funding aim to reduce commercial uncertainty for funders. For example, this concern factored into our recommendation about the timing for funding approval. However, we do not think that wider commercial risks for funders should materially factor into the court's assessment of whether the funding commission in the particular case is fair and reasonable.
- 17.89 With respect to the estimated total amount of monetary relief claimed, we note the High Court Rules 2016 (HCR) require a statement of claim seeking the recovery of a sum of money to state the amount as precisely as possibly.<sup>98</sup> We anticipate the amount claimed will be easier to quantify or estimate in some class actions than others. For example, in some shareholder class actions calculating each class member's claim may involve a simple numerical calculation. However, in other cases it may require individual assessment of the loss experienced by each class member (such as the extent of any damage to a house) and so it will be hard to be precise at an early stage of the proceeding. The class size will also be uncertain when the application for approval of a funding agreement is filed, because we have proposed this should occur prior to the opt-in or opt-out date.
- 17.90 With respect to the number of people likely to be entitled to a share of any relief, we think this could be expressed as an estimated range. In many cases the number of people likely to be entitled to a share of relief will be unknown and difficult to estimate at the funding approval stage of a class action.
- 17.91 We think the court should consider the estimated returns to the funder and how the returns will accommodate variation in other factors, such as variation between the estimated and actual number of people entitled to a share of any relief, and variation in the estimated and actual costs of the litigation. In our view, it would assist the court to see the modelling of the funder's potential returns in a range of scenarios, including reasonable best-case and reasonable worst-case scenarios.<sup>99</sup> Funders already undertake careful due diligence when deciding whether to fund a claim, and so we do not anticipate that providing modelling of the range of possible funding commissions will burden funders with extra work or expense. Further, we think this will encourage a more nuanced approach to setting funding commissions to help ensure fair and reasonable outcomes for representative plaintiffs and class members in all cases and to mitigate the risk of windfall profits for funders. It may also be attractive to funders, who gain the added security of knowing that their funding agreement is approved in the context of a range of situations, and therefore less likely to be reconsidered at a later stage.

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<sup>98</sup> High Court Rules 2016, rr 5.26(b) and 5.32.

<sup>99</sup> For example, if the amount recovered is [A], the number of claimants entitled to a share in any settlement or award is [B] and the costs amount to [C], then the funding commission will be [D].



### **Court oversight of funding commission later in the proceeding**

17.92 We also think it is important to preserve the court's ability to review the funding commission later in the proceeding to mitigate the risk of unfair outcomes for class members and windfall profits for funders. However, we think the court's ability to review funding commissions should be constrained to avoid creating uncertainty for funders and to limit the risk of hindsight bias colouring assessments of what is a fair and reasonable funding commission. Uncertainty and the risk of hindsight bias may undermine the commercial viability of litigation funding and deter funders from operating in Aotearoa New Zealand.

### **Court oversight of funding commissions at settlement**

17.93 In Chapter 11, we recommend the court should consider the commission payable to the funder when deciding whether a proposed class action settlement is fair, reasonable and in the interests of the class. We note that the funding commission will only be one factor the court considers when deciding whether or not to approve a proposed settlement. Further, our proposed test for approving a settlement does not require a standard of perfection. A settlement agreement is necessarily the result of a compromise between the parties, and there are likely to be a range of potential settlement terms that could meet the test. Nevertheless, a funding commission that is materially different from the estimated returns provided to the court at the funding approval stage may justify the court declining to approve the settlement.

17.94 We do not think the court should have a power to vary the funding commission at settlement except in the context of making a cost sharing order, which we discuss below. There was limited support from submitters for this option. We agree with the majority of submitters that a general power for the court to vary funding commissions at settlement, and the risk of hindsight bias colouring this assessment, could introduce commercial uncertainty for funders. This may have negative consequences for those seeking access to justice, by reducing the availability and affordability of litigation funding.

### **Court oversight of funding commissions in the context of making cost sharing orders**

17.95 In Chapter 9, we recommend the court should be expressly empowered to make cost sharing orders in class actions, and to vary funding commissions in the context of making certain cost sharing orders. A cost sharing order ensures the costs of the class action (including the funding commission) are equitably shared among all class members who benefit from the action, regardless of whether they signed an agreement with the funder. Cost sharing orders are usually only sought in opt-out class actions, as signing a funding agreement is normally a condition of joining an opt-in class action.

17.96 Cost sharing orders can also benefit the funder, for example by allowing them to obtain a funding commission from a greater number of class members than they are contractually entitled to. Where a cost sharing order will allow the litigation funder to receive a commission from class members who did not sign up to a funding agreement, we think the court should review the funding commission to ensure it is fair and reasonable and, if necessary, reduce it.

17.97 In Chapter 9, we recommend the court should set a provisional funding commission when making a cost sharing order at the commencement of a class action and, if that order will

allow the funder to receive a commission from class members who did not sign up to the funding agreement, the court should be able to review and vary the provisional rate later in the proceedings (for example, at settlement or when damages are distributed). As part of approving the funding agreement, we have recommended the court should consider the estimated returns to the funder in a range of scenarios. We anticipate that the funding commissions considered by the court will then become the provisional funding commissions set out in any cost sharing order. By approving a range of potential funding commissions, we expect the court will be less likely to vary the funding commissions later in the proceedings (or decline to approve a settlement on the basis of the funding commission). The exception to this will be where there has been a material change from the scenarios that were presented at the funding approval stage. We think this will give funders greater certainty about their returns at the commencement of class actions.

### ***Court oversight of funding commissions in opt-in cases that proceed to judgment***

- 17.98 We recommend the court should be expressly empowered to vary the funding commission in an opt-in case that proceeds to judgment, 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 funding agreement. In these cases, the court would otherwise have no oversight of funding commissions later in the proceedings. Further, without a power for the court to review the funding commission, funders may be less inclined to provide accurate modelling of their estimated returns when the funding agreement is approved by the court. The power we propose is narrowly prescribed to minimise commercial uncertainty for funders.

### **Expert to assist the court assessing funding commissions**

- 17.99 In Chapter 11, we recommend the court should have a power to appoint an expert to assist it to determine whether a proposed settlement is fair, reasonable and in the interests of the class. Similarly, we think the court should be empowered to appoint an expert at the funding approval stage, or in the context of making a cost sharing order, if this will assist it to determine whether a funding commission is fair and reasonable.
- 17.100 In Australia, the Federal Court can appoint an independent referee (at any point in the proceeding) to assess the reasonableness of costs in a class action.<sup>100</sup> In practice, the Federal Court has appointed a referee to inquire into and report on funding commissions proposed to be deducted from settlement sums, as well as legal costs.<sup>101</sup> In its 2020 report, the Australian Parliamentary Inquiry considered there would be benefit in costs referees being used more widely, and made recommendations to facilitate this.<sup>102</sup>

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<sup>100</sup> Federal Court of Australia Act 1976 (Cth), s 54A(1)-(2).

<sup>101</sup> Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at [11.82].

<sup>102</sup> It recommended the Federal Court's Class Actions Practice Note be amended to expressly state the court can appoint a referee to act as a litigation funding costs assessor at any point in the proceedings, including when the funder seeks court approval of the funding agreement and when settlement approval is sought. It recommended the referee should be a professional with market capital or finance experience, and considered that embedding a practice of appointing referees to assess litigation funding costs will establish a panel of competent and reputable experts in the capital market or finance from which the court can select a referee. See Parliamentary Joint Committee on Corporations and Financial Services *Litigation funding and the regulation of the class action industry* (December 2020) at Recommendation 13 and Recommendation 14, and at [11.88].

- 17.101 While the courts in Aotearoa New Zealand already have a general power to appoint an independent expert,<sup>103</sup> we think a specific provision in the Class Actions Act would draw the court's attention to this possibility in the context of funded class actions and help foster the development of relevant expertise in this jurisdiction. We recommend the provision also empower the court to order that the representative plaintiff or the litigation funder pay all or part of the costs of the expert.

### **Funding commissions should not be capped**

- 17.102 We do not think funding commissions should be regulated by way of a statutory cap or a legislated minimum return to class members. We considered a range of methods for capping funding commissions.<sup>104</sup> However, in our view any statutory cap is a blunt instrument for managing concerns about funder profits and will not necessarily ensure funding commissions are fair and reasonable in each case. Each case raises different risks for the funder, justifying variable rates. Higher risks require higher returns for funders to compensate for the greater uncertainty and risk. Similarly, lower risks require a lower return. Court oversight of funding commissions, with assistance from an independent expert if necessary, has the advantage of ensuring funding commissions are proportionate to the costs, complexity, risks and rewards of each case. There was limited support among submitters for a statutory cap or legislated minimum return to class members.

### **FUNDED REPRESENTATIVE ACTIONS UNDER HIGH COURT RULE 4.24**

- 17.103 Our recommendations for court oversight of funding agreements and funding commissions are confined to funded class actions. However, the same concerns about funder control, funder-plaintiff conflicts of interest and funder profits can arise in funded representative actions brought under HCR 4.24.
- 17.104 For reasons explained in Chapter 2, we consider HCR 4.24 should be retained as there may still be cases that are appropriately brought as representative actions. At the same time, we want to ensure that the representative actions procedure cannot be used to circumvent the protections for representative plaintiffs and class members in our statutory class actions regime. In Chapter 2, we therefore recommend the Rules Committee should consider amending HCR 4.24 (and the equivalent provision in the District Court Rules 2014) to provide that it should not be used where a proceeding is more appropriately brought as a class action.

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<sup>103</sup> High Court Rules 2016, r 9.36

<sup>104</sup> Including a fixed percentage-based statutory cap on funding commissions, a sliding scale cap (where the upper limit for funding commissions progressively drops as the amount recovered increases), a statutory cap calculated as a multiple of the funder's costs, a legislated minimum return to class members, and a multiplier and multiplicand table system. A multiplicand is a lump sum calculation that should represent the conservative basis figure of an award to an individual claimant while factoring in any potential costs involved, and a multiplier could then be applied to the multiplicand based on the number of claimants in the class action.

## DRAFT FUNDING APPROVAL PROVISIONS

17.105 Below we set out draft legislative provisions that could give effect to our recommendations on court oversight of litigation funding agreements in class actions.

### 7 Litigation funding agreements

- (1) A representative plaintiff must apply to the court for approval of a litigation funding agreement,—
  - (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.
- (2) A litigation funding agreement is enforceable by a funder only if it is approved by the court.
- (3) In this Act,—

**litigation funding agreement** means an agreement in which a non-party agrees to indemnify the representative plaintiff or provide money to pursue a class action proceeding, in return for a share of any monetary award or settlement funds or for any other consideration.

### 8 Approval of litigation funding agreements by High Court

- (1) A 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.
- (2) 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 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.
  - (3) When determining whether a funding commission is fair and reasonable under **subsection (2)(f)**, 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 in **paragraphs (a) to (d)**:
    - (f) any other matters the court considers are relevant.
  - (4) The court may appoint an expert if it considers that will assist the court's consideration of the fairness and reasonableness of a funding commission and may order that 1 or more of the representative plaintiffs or the litigation funder pay part or all of the costs of the expert.
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## CHAPTER 18

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# Reducing barriers to access to justice for class members

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## INTRODUCTION

18.1 In this chapter, we discuss:

- (a) The lack of funding available for public interest class actions and class actions seeking non-monetary relief.
- (b) The creation of a public class action fund to help address this funding gap.
- (c) The desirability of having publicly available information about the class actions process and class member rights.

## CLASS ACTION FUND

18.2 Throughout this review, we have discussed some of the barriers to access to justice for potential representative plaintiffs and class members.<sup>1</sup> We have noted that the costs associated with litigation, especially legal fees, mean seeking redress through the courts is beyond the means of most New Zealanders. Further, the adverse costs rule may act as a barrier to accessing the courts as it exposes the representative plaintiff to potential liability for the defendant's costs if the litigation is unsuccessful. The costs and risks are likely to be significant, given the typical complexity and duration of class actions.

18.3 While litigation funding can remove or reduce these barriers in some cases, it is only likely to be available in cases that are sufficiently profitable for a litigation funder. It is therefore unlikely to be available in public interest litigation, for example, or in a case where the primary relief sought is non-monetary.

### Class action funds overseas

18.4 In the Issues Paper, we noted that two Canadian jurisdictions have sought to address these barriers to access to justice by establishing a public class action fund. In Ontario, a

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<sup>1</sup> See Chapter 2. See also Issues Paper at Chapters 1, 5 and 17.

Class Proceeding Fund (the Fund) was established when the class actions regime was introduced.<sup>2</sup> The Fund provides financial support to approved representative plaintiffs for legal disbursements and indemnifies them for adverse costs.<sup>3</sup> It does not provide funding for legal fees, as class action lawyers in Ontario typically work on a contingency-fee basis.<sup>4</sup> The initial capital for the fund came from a \$500,000 grant from the Law Foundation of Ontario. It receives ongoing funding through a 10 per cent levy on any award or settlement received by a funded plaintiff plus a return of any funded disbursements.<sup>5</sup> A Class Proceedings Committee is responsible for deciding whether an applicant will receive support from the Fund. Considerations include the strength of the case, the scope of the public interests involved, the plaintiff's fundraising efforts, the likelihood of certification as a class action and availability of funds at the time of application.<sup>6</sup> The Fund's most recent figures show that in 2020, funding was approved for 10 of the 19 applications received.<sup>7</sup>

- 18.5 Québec also has a class action fund, known as the 'Fonds', which was established in 1978.<sup>8</sup> Representative plaintiffs may receive an indemnity for adverse costs as well as funding for legal fees and disbursements.<sup>9</sup> The Fonds has a variety of funding sources, including retaining a percentage of the recovery made in any class action (funded or not).<sup>10</sup> The funding criteria include consideration of the merits of the case and whether it could be brought without assistance from the Fonds.<sup>11</sup> In the 2018/19 financial year, the Fonds agreed to fund 227 of the 560 applications it received. One Canadian academic has argued that the Fonds provides significant access to justice to litigants in Québec, as well as acting as a "de facto screener of class actions".<sup>12</sup> She observed that, once it is

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<sup>2</sup> Law Society Act RSO 1990 c L-8, s 59.1; Jasminka Kalajdzic *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, Vancouver, 2018) at 153–154. According to the *Report of the Attorney General's Advisory Committee on Class Action Reform* (Ministry of the Attorney General, February 1990) at 59:

... [t]he answer to accessibility is not the removal of all risk of the obligations for costs, but rather, the support of worthwhile class proceedings through assistance with disbursements and protection against adverse costs awards.

<sup>3</sup> Law Society Act RSO 1990 c L-8 (Ontario), s 59.1(2).

<sup>4</sup> A contingency fee is where the lawyer obtains a fee calculated as a proportion of any sum recovered if the outcome is successful, and nothing if the outcome is unsuccessful.

<sup>5</sup> The Fund's levy is calculated in accordance with reg 10 of O Reg 771/92 (Class Proceedings) issued under the Law Society Act RSO 1990 c L-8 (Ontario).

<sup>6</sup> See *Edwards v Law Society of Upper Canada* (1995) 36 CPC (3d) 116 at 116–118. *Edwards* is a decision of the Class Proceedings Committee that outlines the Committee's approach to applications and is referred to on the Law Foundation of Ontario's website as a source of guidance for applicants. See The Law Foundation of Ontario "Class Proceedings Fund: Application Process" <[www.lawfoundation.on.ca](http://www.lawfoundation.on.ca)>.

<sup>7</sup> The Law Foundation of Ontario *Staying Connected: 2020 Annual Report* (July 2021) at 37.

<sup>8</sup> The 'Fonds' is short for *Fonds d'aide aux actions collectives*.

<sup>9</sup> Act respecting the Fonds d'aide aux actions collectives CQLR c F-3.2.0.1.1, Arts 27 and 29. Note that there is a maximum hourly rate at which legal fees are funded (\$100 per hour for senior lawyers and \$40 per hour for junior lawyers), which is significantly below the market rate: Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 802.

<sup>10</sup> The other sources of funding are: annual Government subsidies, reimbursement of funds paid (from costs awarded paid by unsuccessful defendants) and interests on investments. See Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 797–798.

<sup>11</sup> Act respecting the Fonds d'aide aux actions collectives CQLR c F-3.2.0.1.1, Art 23.

<sup>12</sup> Catherine Piché "Public Financiers as Overseers of Class Proceedings" (2016) 12 NYU JLB 779 at 803–804.

announced the Fonds will be funding a case, “a strong indication will be sent to the legal community and to the parties that the case is well worth litigating”.<sup>13</sup>

- 18.6 In 1988, the Australian Law Reform Commission recommended a public fund should be established to indemnify representative plaintiffs in class actions for adverse costs as well as provide funding for legal costs.<sup>14</sup> It considered a fund would acknowledge “there is a public purpose to be served by enhancing access to remedies where this is cost effective, especially where many people have been affected”.<sup>15</sup> It was envisaged the fund would be self-financing to some extent, although it was also expected to receive any money that remained unclaimed from eligible class members.<sup>16</sup> This recommendation was not implemented. Since then, Australian practitioners, judges and academics have reiterated the need for a public fund to assist representative plaintiffs with the costs of bringing litigation and mitigate the burden of adverse costs.<sup>17</sup>

## Results of consultation

- 18.7 The Issues Paper did not ask submitters whether a class action fund would be a good idea for Aotearoa New Zealand. Nevertheless, three submitters expressed support for the creation of a fund to support litigation of public interest or importance.<sup>18</sup> Professor Samuel Becher (Te Herenga Waka | Victoria University of Wellington) and Dr Tony Ellis considered the fund should be used to support class actions. Nicole Smith indicated the fund should support public interest litigation more broadly.
- 18.8 Professor Becher submitted that funding could be conditional on full or partial reimbursement if the litigation succeeds. He suggested the fund could be managed by a board, appointed by the Minister of Justice. It could include representatives of relevant governmental agencies, Te Komihana Tauhokohoko | Commerce Commission, the Attorney General, consumer organisations, the legal profession and academics. He also suggested that criteria for funding a class action could guide the board, such as the public and social importance of the class action and its contribution to access to justice, consumer welfare and effective deterrence of potential wrongdoers. Certain types of class actions could also be prohibited from receiving public funding.

## Recommendation

### 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.

<sup>13</sup> Catherine Piché “Public Financiers as Overseers of Class Proceedings” (2016) 12 NYU JLB 779 at 804–805.

<sup>14</sup> Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [307]–[314].

<sup>15</sup> Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [308].

<sup>16</sup> Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC R46, 1988) at [312]; Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.127].

<sup>17</sup> Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [5.127]–[5.128].

<sup>18</sup> Samuel Becher, Tony Ellis and Nicole Smith.



- 18.9 We think a public class action fund could have significant access to justice benefits, particularly given the pressures on the legal aid system and the fact that legal aid is unlikely to be available for many of the individual claims that make up a class action. For instance, legal aid would not have been available to homeowners in the *Southern Response v Ross* representative action, as assets are relevant to eligibility.
- 18.10 Further, as noted above, litigation funding will normally only be available in cases that are sufficiently profitable for a funder. It is therefore unlikely to be available where the primary relief sought is non-monetary. A key benefit of a public fund is that it will allow class actions to proceed that are unlikely to attract litigation funding, allowing a broader range of claims to proceed.
- 18.11 We have considered the justification for having a public fund that is only available for class actions and not for other forms of public interest litigation. We consider that class actions can provide meaningful access to justice to a large number of people in an efficient way. Class actions are likely to consist of claims by individuals who would otherwise be unable to bring their claim, and by grouping viable claims together, they can impose a lower social cost through economies of scale. While a public fund might also be worth considering in relation to other kinds of litigation, this would go beyond the scope of the present review.
- 18.12 Initially, we think the fund would require a significant government contribution. This would ensure it is not constrained in its ability to grant applications, particularly in its early stages.<sup>19</sup> In the long term, there is a range of ways in which the fund could support and sustain itself. For example, through a levy on any awards or settlements received by the funded class members,<sup>20</sup> reimbursement of the funds paid (from an adverse costs order in favour of the plaintiff) and interest on the fund's investments. The fund could also be supported by an alternative distribution award, where monetary relief that cannot be distributed to class members could be paid into the fund.<sup>21</sup> Alternatively, or additionally, the fund could be sustained through annual government subsidies, as in Québec. This would make the fund more robust but would mean it is not completely self-sustaining. In Ontario, where the Class Proceedings Fund is not sustained through annual government subsidies, "a cautionary note has been sounded about the ongoing utility of the Fund".<sup>22</sup> If adverse costs payments were to deplete the fund, this would put at risk the ability of the fund to continue funding present (and future) cases.
- 18.13 We think the fund should be able to indemnify representative plaintiffs for adverse costs, and to provide funding towards legal fees and disbursements (such as expert fees). Funding for security for costs could also be available. However, we anticipate that applications for security would rarely be made against the fund, as the defendant should not be concerned about the fund's ability to pay an adverse costs order. While the Canadian class action funds discussed above only offer funding for legal disbursements

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<sup>19</sup> See Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 170.

<sup>20</sup> Rachael Mulheron suggests legislation should identify whether the charge received by a public fund upon the recovery should take effect prior to, or following, the compensation of those class members who come forward to claim their individual compensation: Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 170.

<sup>21</sup> We discuss this in Chapter 10.

<sup>22</sup> Rachael Mulheron *Class Actions and Government* (Cambridge University Press, Cambridge, 2020) at 148, citing Law Reform Commission of Ontario *Review of Class Actions in Ontario – Issues to be Considered* (November 2013) at 7.

and indemnities for adverse costs, we do not think this would be sufficient to promote access to justice in Aotearoa New Zealand. This is because contingency fee arrangements, while common in Canada, are not permitted in Aotearoa New Zealand.<sup>23</sup>

- 18.14 A decision would be necessary on who should administer the fund. An independent board could be established, or the administration of the fund could be tied to an existing organisation. For example, one option is to establish a committee within Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) to administer the fund. NZLS already has some administrative capacity, and is well-informed about and well-connected within the legal profession. We think it is less likely to be appropriate for a government department, such as Te Tāhū o te Ture | Ministry of Justice, to administer the fund because applicants could seek funding to bring a class action against the government.<sup>24</sup> Legislation could determine how board or committee members should be selected, and their term of office.<sup>25</sup>
- 18.15 We think the board or committee should have discretion to decide what financial support applicants will receive from the fund, for example full or partial funding or indemnification. The legal fee arrangements in the case may be relevant to this decision — for example, whether the lawyer is acting on a conditional fee basis, or whether legal aid is available. Similarly, any funding provided could potentially be used alongside commercial litigation funding, and this would be relevant to the committee's decision about what financial support the applicant should receive. For instance, a funder might agree to provide an adverse costs indemnity alongside public funding for legal fees.
- 18.16 In deciding whether to grant an application for funding, we think the main objective of the fund should be access to justice. Consideration could be given to more detailed statutory criteria to guide the committee's assessments of funding applications. For example:<sup>26</sup>
- (a) The merits of the applicant's case.
  - (b) Whether the applicant has made reasonable efforts to raise funds from other sources.
  - (c) Whether the applicant has a clear and reasonable proposal for the use of any funds awarded.

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<sup>23</sup> The Lawyers and Conveyancers Act 2006 prohibits lawyers from charging contingency fees, but allows them to charge conditional fees in some circumstances. A contingency fee is where the lawyer obtains a fee calculated as a proportion of any sum recovered if the outcome is successful, and nothing if the outcome is unsuccessful. A conditional fee is where the lawyer also obtains nothing if the outcome is unsuccessful, but is allowed to charge a fee based on a lawyer's normal hourly rate plus a premium that "is not calculated as a proportion of the amount recovered" if the outcome is successful. The premium is to compensate the lawyer for the risk of not being paid at all, and may be calculated as proportion of the lawyer's expenses or a fixed amount. See Lawyers and Conveyancers Act 2006, ss 333–336 and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 9.8–9.12.

<sup>24</sup> Although we note that legal aid is administered by the Ministry and is available for claims against the Government, for example Waitangi Tribunal claims.

<sup>25</sup> In Ontario, for example, the Law Society Act RSO 1990 c L-8 provides that the Law Foundation shall administer the Class Proceedings Fund. It establishes a Class Proceedings Committee comprising one member appointed by the Foundation, one member appointed by the Attorney General, and three members appointed jointly by the Foundation and the Attorney General. Each member holds office for a period of three years and is eligible for re-appointment. Three members constitute a quorum. Members are not remunerated but are entitled to compensation for any expenses. See Law Society Act RSO 1990 c L-8, s 59.2.

<sup>26</sup> See Law Society Act RSO 1990 c L-8 (Ontario), s 59.3(4) and O Reg 771/92 (Class Proceedings), s 5.

- (d) Whether the applicant has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award.
  - (e) The extent to which the issues in the proceeding affect the public interest.
  - (f) How many people would be likely to benefit from the funding.
  - (g) If the application for funding is made before the proceeding is certified as a class action, the likelihood that it will be certified.
  - (h) The amount of money in the fund that has been allocated to provide financial support in respect of other applications or that may be required to make adverse costs payments to defendants.
  - (i) Any other matters the committee considers are relevant.
- 18.17 We suggest public funding should not automatically be available for appeals. A recipient of funding should be required to reapply for funding for an appeal. A recipient should be able to apply for supplementary funding at any time in the proceedings.<sup>27</sup>

## FACILITATING CLASS MEMBER UNDERSTANDING AND PARTICIPATION

### Recommendation

**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.

- 18.18 Class members do not have the status of parties and generally do not take an active role in the litigation but will be bound by any judgment or settlement. For these reasons, it is important that a class actions regime contains safeguards to protect the interests of class members. These include the court's supervisory role, the representative plaintiff's duty to act in what they believe to be the best interests of the class and the role of the lawyer for the class.<sup>28</sup>
- 18.19 While class members have a largely passive role in the litigation, there are certain stages where we propose there should be an opportunity, or requirement, for them to take an active step in the litigation. These are:
- (a) The opportunity to opt into or opt out of the class action.
  - (b) Where the court requires a class member to provide discovery.<sup>29</sup>
  - (c) The ability for a class member to apply to replace the representative plaintiff, including for the purposes of an appeal.<sup>30</sup>

<sup>27</sup> See Law Society Act RSO 1990 c L-8 (Ontario), s 59.3(5).

<sup>28</sup> See Chapter 3 and Chapter 7.

<sup>29</sup> We recommend an express provision relating to class member discovery in Chapter 8.

<sup>30</sup> See Chapter 6 and Chapter 10.

- (d) When class member participation is required to determine an individual issue, such as giving evidence at a hearing.<sup>31</sup>
  - (e) The opportunity for class members to object to a settlement.<sup>32</sup>
  - (f) Where class members must take active steps to participate in a settlement.<sup>33</sup>
- 18.20 Class members need sufficient understanding of these stages to be able to participate in them and may need assistance to take particular steps. Meaningful participation rights in class actions are an important aspect of access to justice, which is a key objective of class actions.<sup>34</sup> There are elements of our proposed class actions regime that will assist class members to participate in these stages of a class action, including our proposed notice requirements and the procedure for objecting to a class action. However, we think there are some broader ways of facilitating class member understanding and participation in class actions, including developing a guide for class members and opportunities for free legal assistance.

### Class member guide to class actions

- 18.21 Many class members (or potential class members) will have no experience of litigation, let alone large group litigation. Concepts in a class action will be unfamiliar to many members of the public, such as what an opt-in or opt-out process is, the role of the representative plaintiff and the binding nature of a judgment.<sup>35</sup>
- 18.22 This is supported by the survey of group members who have participated in representative actions that we conducted.<sup>36</sup> Some survey participants indicated confusion around their role in the proceeding (for example, whether or not they were the representative plaintiff) and the role of the litigation funder.<sup>37</sup>
- 18.23 While some information will be provided in the opt-in or opt-out notice, this will need to convey a range of case-specific information and there may be little room for general information about class actions. We suggest a general guide to class actions could be developed that provides a clear overview of what a class action is, and what being a class member involves. This would enable class members to better understand the process of a class action and their rights.
- 18.24 The information should use clear, concise language and be designed to effectively communicate with class members. As well as the language used, the visual design can

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<sup>31</sup> We discuss options for determining individual issues in an efficient manner in Chapter 8.

<sup>32</sup> We discuss settlement in Chapter 11.

<sup>33</sup> See Chapter 11.

<sup>34</sup> See Chapter 2.

<sup>35</sup> See Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Report* (March 2018) at [4.223] and Todd B Hilsee, Shannon R Wheatman and Gina M Intrepido “Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More Than Just Plain Language: A Desire to Actually Inform” (2005) 18 *The Geo J Legal Ethics* 1359 at 1365.

<sup>36</sup> We explain the scope and methodology of the survey in Chapter 1.

<sup>37</sup> We asked participants whether they were “a representative or lead plaintiff”, “a member of a plaintiff committee or management committee”, “neither a representative plaintiff nor a member of the plaintiff committee”, or “unsure”. We received 409 responses. Of those, 239 survey participants indicated they were neither the representative plaintiff nor a member of the plaintiff committee, 17 participants identified as a representative or lead plaintiff, 5 participants identified as a member of a plaintiff committee or management committee, and 148 participants were unsure.

have a significant impact on how easily understandable the information is for class members.<sup>38</sup> We suggest that any guide to class actions could be similar to the style and length of information for the public on the Ministry of Justice's website, such as the guide to bringing civil claims.<sup>39</sup> The information should be made available in accessible formats and could include short videos.<sup>40</sup> It may also be appropriate to make the information available in te reo Māori or other languages.

- 18.25 In Chapter 5, we recommend creating a class actions webpage on Ngā Kōti o Aotearoa | Courts of New Zealand website. The class member guide could be available on this webpage. Opt-in or opt-out notices could also direct class members to the class member guide.

### Class action clinic

- 18.26 Class members may also require legal assistance with some of the stages in which they can participate. There are some matters the lawyer for the class can assist with, such as assisting a class member to comply with an order for discovery or answering questions about a class action notice. However, there are other matters where independent legal advice would be needed, such as where a class member wants to object to a settlement or is deciding whether to opt out of a class action or accept an individual settlement offer. While some class members will be able to afford to engage a lawyer, this will not always be the case. We think it would be desirable if class members could access free or low-cost legal assistance in appropriate situations.
- 18.27 One option would be to have this available through community law centres.<sup>41</sup> Some community law centres have specialist drop-in sessions, such as advice on employment law on a particular evening. Lawyers might be willing to volunteer for such a clinic. However, the eligibility criteria (including income and asset considerations) for free legal advice and assistance from community law centres would likely exclude many potential class members from this service.
- 18.28 Another option is to support the establishment of a class actions law clinic, perhaps attached to a law school. We are aware of this occurring in other jurisdictions. For example, the Windsor Law Class Action Clinic in Ontario aims to provide class members across Canada with information, assistance with filing claims in settlement distribution processes, and representation in court proceedings.<sup>42</sup> The clinic also works to create greater awareness about class actions through public education, outreach and research.

<sup>38</sup> See Todd B Hilsee, Shannon R Wheatman and Gina M Intrepido "Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More Than Just Plain Language: A Desire to Actually Inform" (2005) 18 The Geo J Legal Ethics 1359 at 1377–1380, Margaret Hagan "A Human-Centred Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly" (2018) 6 Ind J L & Soc Equal 199 at 234 and Federal Judicial Center "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (2010).

<sup>39</sup> Ministry of Justice "Civil" (11 March 2022) <[www.justice.govt.nz/courts/civil/](http://www.justice.govt.nz/courts/civil/)>.

<sup>40</sup> Information should comply with relevant accessibility standards or guidelines.

<sup>41</sup> In *Ross v Southern Response Te Kōti Matua* | High Court directed a copy of the judgment approving notice to be provided to Community Law Canterbury and the Greater Christchurch Claims Resolution Service to "achieve a greater level of completed communication with class members" as they could be relied upon to "bring the class members notice to the attention of any policyholder they encounter": *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 at [164].

<sup>42</sup> Class Action Clinic: Windsor Law "Our Mission and Services" <[www.classactionclinic.com](http://www.classactionclinic.com)>.

The clinic is attached to the Faculty of Law at the University of Windsor and is staffed by law students, a supervising lawyer and a faculty director. We are aware of a similar clinic in Tel Aviv, Israel.<sup>43</sup>

- 18.29 We think facilitating free or low cost legal assistance to class members through a community law centre or class actions law clinic could help to facilitate meaningful participation in class actions. Class members or potential class members could book an appointment, as a drop-in service may not be sustainable. The service could help class members with matters such as:
- (a) Assisting a potential class member who seeks leave to intervene on an application for certification.
  - (b) Understanding the implications of opting into or opting out of the class action.
  - (c) Where the court has certified more than one concurrent action, deciding between class actions.
  - (d) Deciding whether to accept an individual settlement offer.
  - (e) Understanding a proposed settlement agreement and deciding whether to lodge an objection.
  - (f) Supporting an objecting class member to lodge an objection.
  - (g) Helping a class member to file a claim once a settlement has been approved.
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<sup>43</sup> Clinical Legal Education Tel Aviv University “Class Action Clinic” <[www.en-law.tau.ac.il](http://www.en-law.tau.ac.il)>.

## APPENDIX 1

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# Draft Class Actions Legislation

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## COMMENCEMENT OF CLASS ACTION

### 1 Commencement of class action in High Court

- (1) A person may commence a class action proceeding against 1 or more defendants as the proposed representative plaintiff—
  - (a) on behalf of a proposed class; and
  - (b) if the claims of the members of the proposed class all raise a common issue.
- (2) A proceeding under **subsection (1)** may be commenced by more than 1 proposed representative plaintiff.
- (3) A State entity may commence a class action proceeding against 1 or more defendants as the proposed representative plaintiff on behalf of a proposed class if—
  - (a) it is itself a member of the proposed class and the claims of the members of the proposed class all raise a common issue; or
  - (b) another Act authorises it to bring a class action proceeding.
- (4) This section does not itself confer jurisdiction on the court to hear a proceeding, which must otherwise be within the jurisdiction of the court.
- (5) In this section,—

**class** means,—

  - (a) in the case of a proceeding brought under **subsection (1)**, at least 2 persons together with the proposed representative plaintiff, who must also be a class member;
  - (b) in the case of a proceeding brought under **subsection (3)**, at least 2 persons in addition to the State entity

**common issue** means a common issue of fact or law.

## 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 proposed representative plaintiff and at least 2 other persons with a claim against that defendant:
  - (b) if there are 2 or more proposed representative plaintiffs, it is not necessary for each of them 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 certification of class action

When a class action proceeding is commenced, it must be accompanied by an application for an order certifying the proceeding as a class action proceeding and appointing 1 or more representative plaintiffs for the proceeding.

## 4 Certification of class action

- (1) Subject to **section 6** (which relates to the certification of concurrent class actions), a court must certify a proceeding as a class action proceeding if it is satisfied that—
  - (a) the proceeding discloses 1 or more reasonably arguable causes of action; and
  - (b) there is a common issue of fact or law in the claim of each member of the proposed class; and
  - (c) there is at least 1 representative plaintiff that is suitable and will fairly and adequately represent the class; and
  - (d) a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members; and
  - (e) 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.
- (2) When assessing the suitability of a proposed representative plaintiff and whether they will fairly and adequately represent the proposed class under **subsection (1)(c)**, the court—
  - (a) must consider whether there is or is likely to be a conflict of interest that could prevent them from properly fulfilling the role as representative plaintiff:
  - (b) must consider whether they have a reasonable understanding of the nature of the claims and the duty and responsibilities of a representative plaintiff, including potential liability for costs:



- (c) must be satisfied that they have received independent legal advice on the duty and responsibilities of a representative plaintiff:
  - (d) if they will be representing members of their hapū or iwi, may consider the tikanga of the hapū or iwi as relevant to representation in the proceeding:
  - (e) may consider any other factors it considers relevant.
- (3) When assessing under **subsection (1)(d)** whether a class action proceeding is an appropriate procedure for the efficient resolution of the claims of class members, the court must consider—
- (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.
- (4) When assessing under **subsection (1)(e)** whether the mechanism proposed for the proceeding is an appropriate means of determining class membership, the court may consider—
- (a) the potential size of the proposed class and how potential class members will be identified:
  - (b) the characteristics of the proposed 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 the mechanism would unfairly prejudice the defendant in running their defence:
  - (f) any other factors it considers relevant.

## CONCURRENT CLASS ACTIONS

### 5 Commencement of concurrent class actions

- (1) A concurrent class action proceeding must be commenced—
  - (a) 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
  - (b) at a later time with the leave of a court.
- (2) In this Act,—

**Class Actions Register** means a register of class action proceedings published on an Internet site maintained by or on behalf of the Ministry of Justice

**concurrent class action proceeding** means a class action proceeding that has the following 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 1 defendant.

## **6 Procedure for certification of concurrent class actions**

- (1) The applications for certification of concurrent class action proceedings must be considered by a court together.
- (2) If the court considers that more than 1 of the proceedings meets the test for certification under **section 4**, it must decide whether all, and if not all which, of those proceedings will be certified.
- (3) When deciding which of the proceedings will be certified, the court must consider what approach will best allow the claims of class members to be resolved in a just and efficient way.
- (4) When assessing which approach is best under **subsection (3)**, the court may consider—
  - (a) how each proceeding is formulated:
  - (b) the preferences of potential class members:
  - (c) any litigation funding arrangements for each proceeding:
  - (d) the legal representation for each proceeding:
  - (e) any other factors the court considers relevant.
- (5) If the court decides under **subsection (2)** that a proceeding will not be certified, the application for certification must be dismissed.
- (6) If the court decides that more than 1 of the proceedings will be certified, it may make further orders for the management of those proceedings, including orders that—
  - (a) the proceedings be case managed together:
  - (b) the proceedings be consolidated:
  - (c) the proceedings be heard together or successively:
  - (d) 1 or more of the proceedings be temporarily stayed.

## **LITIGATION FUNDING AGREEMENTS**

### **7 Litigation funding agreements**

- (1) A representative plaintiff must apply to the court for approval of a litigation funding agreement,—
  - (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.
- (2) A litigation funding agreement is enforceable by a funder only if it is approved by the court.
- (3) In this Act,—
- (4) **litigation funding agreement** means an agreement in which a non-party agrees to indemnify the representative plaintiff or provide money to pursue a class action proceeding, in return for a share of any monetary award or settlement funds or for any other consideration.

## 8 Approval of litigation funding agreements by High Court

- (1) A 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.
- (2) 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 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.
- (3) When determining whether a funding commission is fair and reasonable under **subsection (2)(f)**, the court may consider—
  - (1) the type of relief claimed, including the estimated total amount of monetary relief;
  - (2) the number of people likely to be entitled to a share of any relief;
  - (3) the estimated costs if the litigation is successful or unsuccessful;
  - (4) the complexity and likely duration of the case;
  - (5) the estimated returns to the funder, and how the returns will accommodate variation in the factors in **paragraphs (a) to (d)**;
  - (6) any other matters the court considers are relevant.
- (4) The court may appoint an expert if it considers that will assist the court's

consideration of the fairness and reasonableness of a funding commission and may order that 1 or more of the representative plaintiffs or the litigation funder pay part or all of the costs of the expert.

## EFFECT OF JUDGMENT ON COMMON ISSUE

### 9 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 cause of action 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.

## AGGREGATE MONETARY RELIEF

### 10 Aggregate assessment and distribution of monetary relief

- (1) A court may make an aggregate assessment of the monetary relief to which a class is entitled (the **aggregate monetary relief**) if it is satisfied that it can make a reasonably accurate assessment of that amount.
- (2) 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.
- (3) The court may make an award in the amount assessed as the aggregate monetary relief.
- (4) The court may also 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) 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 way of an alternative distribution under **section 11**:
  - (e) directing how the costs of the distribution are to be met.
- (5) 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 or at a later time if allowed by the court.

## 11 Alternative distribution

- (1) This section applies if—
  - (a) it is not practical or possible for an award made under **section 10** or any portion of it to be distributed to individual class members; or
  - (b) the costs of distributing the award made under **section 10** or any portion of it to class members would be disproportionate to the amount they would receive.
- (2) The court may order that the award or any portion of it 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; or
  - (b) an entity prescribed by regulations as an eligible charity or organisation for the purposes of this section.

## SETTLEMENT

### 12 Settlement of class action

- (1) The settlement of a class action proceeding is not binding unless approved by a court.
- (2) An application for approval of a settlement must be made by the representative plaintiff or proposed representative plaintiff if the application is made prior to certification.

### 13 Settlement application before certification of proceeding

- (1) This section applies if an application for approval of a settlement is made before the certification of a class action proceeding.
- (2) Before considering that application, the court must consider whether the proceeding meets the requirements of **section 4** (with any necessary modifications), and if the court considers the application does so, for the purposes of settlement it must—
  - (a) certify the proceeding as a class action proceeding; and
  - (b) appoint 1 or more representative plaintiffs.

### 14 Approval of settlement

The court must approve the settlement if it is satisfied that the settlement is fair, reasonable, and in the interests of the class, and when making that assessment the court must consider—

- (a) the terms and conditions of the proposed settlement, including—
  - (i) the type of relief that will be provided to class members, and if this includes monetary relief, the total amount of that monetary relief; and
  - (ii) how the benefits of the settlement will be allocated as between class members; and

- (iii) whether class members are treated equitably in relation to each other; and
- (iv) the proposed method of determining the entitlement of individual class members; and
- (v) any steps a class member must take to benefit from the settlement; and
- (vi) the proposed method of dealing with any unclaimed settlement amounts; and
- (b) any legal fees and funding commission 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) any steps taken to manage potential conflicts of interest; and
- (f) any other factors it considers relevant.

## 15 Steps following approval of settlement

- (1) If the court approves a settlement under **section 14**, it—
  - (a) may order that a class member may opt out of the settlement, but only if—
    - (i) opting out is permitted by the terms of the settlement agreement; or
    - (ii) the court considers that the interests of justice require that 1 or more class members be given the opportunity to opt out of the settlement; and
  - (b) may order that a person who was eligible to become a class member but did not do so (an **eligible person**) may opt in to the settlement, but only if—
    - (i) opting in is permitted by the terms of the settlement agreement; or
    - (ii) the court considers that the interests of justice require that 1 or more eligible persons be given the opportunity to opt in to the settlement; and
  - (c) must describe which class members will be bound by the settlement.
- (2) A settlement is binding on the parties to the settlement and all class members described by the court under **subsection (1)(c)** on and from the date of the court order approving the settlement.

## 16 Administration and implementation of settlement

- (1) The court retains the jurisdiction to oversee the administration and implementation of a settlement it approves under **section 14**.
- (2) The court may appoint a person as an administrator to implement the settlement.
- (3) The court may make any other order it considers appropriate for the administration and implementation of the settlement.
- (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 implementation of the settlement within 60 days of the implementation process being completed or at a later time if allowed by the court.

## 17 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 assess whether a settlement is fair, reasonable, and in the interests of the class.
  - (2) The court may order that 1 or more of the parties pay part or all of the costs of the counsel or expert.
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## APPENDIX 2

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# List of Submitters

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The Law Commission received submissions from the following organisations and persons during the course of this review:

### In response to the Issues Paper

#### *Organisations*

- Association of Litigation Funders of Australia
- Bell Gully
- Buddle Findlay
- BusinessNZ
- Carter Holt Harvey
- Chapman Tripp
- Claims Resolution Service
- Te Komihana Tauhokohoko | Commerce Commission
- Consumer NZ
- Te Tari Ture o te Karauna | Crown Law Office
- DLA Piper
- Te Mana Tatai Hokohoko | Financial Markets Authority
- Gilbert Walker
- Institute of Directors
- Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand
- International Bar Association Antitrust Committee
- Johnson & Johnson
- Joint Action Funding
- LPF Group
- Marsh
- Maurice Blackburn/Claims Funding Australia (joint submission)
- Meredith Connell
- Hīkina Whakatutuki | Ministry of Business, Innovation and Employment



- Te Kāhui Ture o Aotearoa | New Zealand Law Society
- New Zealand Shareholders' Association
- NZX
- Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner
- Omni Bridgeway
- Ross Asset Management Investors Group
- Simpson Grierson
- Te Hunga Rōia Māori o Aotearoa | Māori Law Society
- Tempest
- Woodsford Litigation Funding

### *Individuals*

- Associate Professor Barry Allan (Te Whare Wānanga o Otāgo | University of Otago)
- Andrew Barker QC
- Professor Samuel Becher (Te Herenga Waka | Victoria University of Wellington)
- Jennifer Braithwaite
- Colin Carruthers QC
- Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland)
- Dr Michael Duffy (Monash University)
- Dr Tony Ellis
- Associate Professor Jasminka Kalajdzic (University of Windsor)
- Murray Lazelle
- Professor Michael Legg (University of New South Wales)
- Ryan O'Connor
- Michael Riordan
- Nicole Smith
- Christopher St Johanser
- Associate Professor Kate Tokeley (Te Herenga Waka | Victoria University of Wellington)
- Professor Vicki Waye (University of South Australia)
- Tom Weston QC

### *In response to the Supplementary Issues Paper*

#### *Organisations*

- Bell Gully
- Chapman Tripp

- Consumer NZ
- Te Tari Ture o te Karauna | Crown Law Office
- Te Mana Tatai Hokohoko | Financial Markets Authority
- GCA Lawyers
- Gilbert Walker
- Institute of Directors
- Te Kāhui Inihua o Aotearoa | Insurance Council of New Zealand
- International Bar Association Antitrust Committee
- Johnson & Johnson
- LPF Group
- Maurice Blackburn
- Maurice Blackburn/Claims Funding Australia (joint submission)
- MinterEllisonRuddWatts
- Te Kāhui Ture o Aotearoa | New Zealand Law Society
- Omni Bridgeway
- Ross Asset Management Investors Group
- Russell Legal
- Shine Lawyers
- Simpson Grierson
- Woodsford Litigation Funding

### *Individuals*

- David Bigio QC
  - Nikki Chamberlain (Waipapa Taumata Rau | University of Auckland)
  - Dr Michael Duffy (Monash University)
  - Andrew Harmos
  - Zane Kennedy
  - Professor Vince Morabito (Monash University)
  - Rhonson Salim (Aston University)
  - Philip Skelton QC, Kelly Quinn and Carter Pearce (joint submission)
  - Nicole Smith
  - Tom Weston QC
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