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The Legal 500 Country Comparative Guides

New Zealand
CLASS ACTIONS

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in New Zealand.

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NEW ZEALAND
CLASS ACTIONS

1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

New Zealand does not currently have a statutory regime for class actions, although the New Zealand Law Commission has recently recommended the enactment of such a regime, including a Class Actions Act, and the New Zealand government has accepted this recommendation in principle. In practice, though, it is likely to be some time before such a regime is implemented.

In the absence of a statutory class action regime, the representative action procedure in the High Court Rules has been developed through judicial decision making into a close substitute for the class action procedure available in other jurisdictions.

The current form of the representative action procedure is set out in Rule 4.24 of the High Court Rules 2016 (**HCR**). The Rule in its entirety provides that:

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—

1. *with the consent of the other persons who have the same interest; or*
2. *as directed by the court on an application made by a party or intending party to the proceeding.*

Most representative actions in New Zealand are brought under Rule 4.24(b), the procedure most analogous to a class action insofar as it allows proceedings to be brought without first obtaining the consent of each person in the claimant group.

HCR 4.24(b) requires the approval of the Court for the matter to proceed as a representative action. The threshold for a representative action is that the class members have the same interest in the subject matter of the proceeding. The courts have taken the view that this test should not have a high threshold and a 'liberal and flexible approach should be taken'.

Defendant representative actions are also allowed under HCR 4.24. This is where a plaintiff brings a claim against a group of defendants, who have the same interest in respect of the claim and are represented by a representative defendant. However, there have been very few defendant representative actions in New Zealand.

While representative actions are the main collective redress mechanism in New Zealand, there are number of specific statutory procedures that allow a person to bring claims on behalf of a group of persons:

1. section 173 of the Companies Act 1993 allows the High Court to appoint a shareholder to represent other shareholders with substantially the same interest;
2. the Health and Disability Commissioner Act 1994, Human Rights Act 1993, and Privacy Act 1993 allow specified office holders to bring proceedings in the Human Rights Review Tribunal on behalf of a class of persons;
3. a number of provisions in the Employment Relations Act 2000 provide the basis for a representative form of proceedings in the Employment Relations Authority and Employment Court; and
4. regulators such as the Commerce Commission and the Financial Markets Authority have specific powers under a number of Acts to bring proceedings on behalf of others.

In addition to these statutory collective redress procedures, judicial review provides a long recognised basis on which an individual can challenge decision-making that affects a large group of individuals.

Finally, a form of collective redress particular to the New Zealand context is the long recognised ability of Māori (the indigenous people) to bring proceedings in respect of the rights of a collective, such as an iwi (tribe) or hapu

(subtribe).

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

For representative actions under HCR 4.24, there is little restraint on who may bring the claim beyond the ordinary court rules relating to minors and a plaintiff having capacity to understand the issues on which their decision will be required and to give sufficient instructions in the proceedings.

The Court of Appeal has said that a representative plaintiff can advance only those claims which its own claim "represents". Therefore, where there is no single claimant whose claims represent all of the group's claims, there may be the need for representative plaintiffs for each sub-group of claimants so that all claims have a representative.

There is no restriction on a government entity being a representative plaintiff and there is at least one recent example of this occurring

3. Which courts deal with class actions or collective redress proceedings?

Representative actions are generally brought in the High Court. However, there is a representative action procedure in Rule 4.24 of the District Court Rules 2014 which is identical to that in the High Court, enabling representative actions to be brought in the District Court as well. In practice, the limit on the District Court's civil jurisdiction to proceedings in which the amount claimed does not exceed NZ$350,000 is likely to make the District Court a relatively unattractive forum for representative actions.

The representative action procedures set out in various statutes allow forums other than the District Court and High Court to be used. For example, the Employment Relations Act 2000 allows particular actions to be brought in the Employment Relations Authority and Employment Court while the Health and Disability Commissioner Act 1994, Human Rights Act 1993, and Privacy Act 1993 allow certain representative proceedings to be brought in the Human Rights Review Tribunal.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

For the most part, any conduct that would ordinarily ground a civil claim can be relied upon as the basis for a representative action, provided the threshold requirement of the class members having the same interest in the subject matter of the proceeding is met.

In the New Zealand Law Commission issues paper *Class Actions and Litigation Funding*, the Commission identified the range of cases in which the representative action procedure has been used, grouping these into categories:

1. government: representative actions where the Government has been a plaintiff or defendant and the proceeding involved some amount of public issues with these cases traversing Māori land claims; taxation, rates and ACC levies; social security; immigration; negligence; and contractual issues;
2. investor: representative actions brought by investors or shareholders where the defendants have included auditors, accountants, company directors, a company, and banks;
3. general commercial: actions involving claims in equity, contract, tort and restitution as well as statutory claims, including under the Fair Trading Act 1986 and the Companies Act 1993;
4. consumer: actions involving product liability claims relating to building materials, claims related to the resolution of insurance claims arising out of the Canterbury earthquakes, and one claim in respect of bank fees; and
5. environmental claims.

Although government and investor claims have been the two most common types of representative action, consumer claims are growing with two such representative actions being commenced last year. The first case involved allegations as to the combustibility of a type of cladding, with the plaintiffs' application for representative orders being declined, but leave to appeal subsequently being granted. The other case is a proceeding against banks with respect to alleged breaches of the Credit Contracts and Consumer Finance Act 2003, for which leave was granted to proceed as a representative action.

5. Are there any limitations of types of claims that may be brought on a collective

basis?

There are few restrictions on the type of claim that can be brought as a representative action.

The representative action process cannot be used for criminal proceedings, given it originates from rules of civil procedure and there is no equivalent procedure in the Criminal Procedure Act 2011.

However, the most significant limitation in New Zealand by comparison with other jurisdictions is in respect of personal injury claims. The Accident Compensation Act 2001 bars any proceedings for damages arising out of personal injury that is covered by the compensation scheme Act. This applies to ordinary proceedings as well as representative actions. As a result, personal injury claims in New Zealand are rare and even more rarely successful.

6. How frequently are class actions brought?

The New Zealand Law Commission issues paper *Class Actions and Litigation Funding* identifies 44 cases, as at 4 December 2020, which have been allowed to proceed as representative actions under HCR 4.24, with the majority of these being filed after 2000. While the number of representative actions is growing, such actions still represent a small percentage of the overall claims brought. The Law Commission noted in its issues paper that the 15 representative actions filed in the 2010s contrasted with the 2,176 claims filed in the High Court in 2019 alone.

There are a number of likely reasons why New Zealand has not seen as many representative actions as comparable jurisdictions. The relatively small size of the population and the reluctance of the courts to award punitive damages of any significance make representative actions less financially attractive to litigation funders. The inability to bring claims in respect of personal injury also markedly restricts the range of representative actions able to be brought. These characteristics of the market will likely continue to act as a brake on the scope of growth of representative actions in New Zealand.

However, there are other factors that have historically restricted the growth of representative actions in New Zealand that have now reduced or fallen away. Previously, the New Zealand courts considered that litigation funding offended the torts of champerty and maintenance with the result that it was difficult to find a way to fund large scale representative actions. The courts have moved past these former prohibitions and recognised the role that third party litigation funding plays in facilitating access to justice. As a result, there has been growth in the number of third party litigation funders willing to fund representative actions in New Zealand.

Another historical restraint was the lack of procedural rules providing guidance as to the initiation and progression of representative actions. In the last fifteen years, there has been a growing body of case law as to the procedures for representative actions, so that there is now more certainty at the inception of such litigation as to whether a representative action is likely to be approved by the court and how it may progress after approval has been given. A feature of this case law is a recognition by the courts of the valuable role representative actions play in facilitating access to justice and a consequent unwillingness to apply a narrow or inflexible approach that might frustrate this role.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

Based on the representative actions filed in the High Court over the last fifteen years, claims most commonly arise out of the following:

Misleading statements in IPO / continuous disclosure breaches

Some of the most high profile representative actions have been based upon investors being misled by a prospectus issued during an Initial Public Offering or through a listed company failing to comply with its continuous disclosure obligations.

In the Feltex proceedings, shareholders in Feltex Carpets Limited brought claims against, among others, the company's directors, alleging that there had been misleading statements in the failed company's prospectus during its IPO. The shareholders were successful in the Supreme Court in respect of their claim that there was an untrue statement in the prospectus, but the proceedings did not reach the stage two hearing as to what remedies were available, due to the plaintiff's failure to lodge security for costs within the timeframe ordered by the High Court. As a result, after thirteen years, the proceedings were struck out.

There are at least four current representative actions by investors arising out of alleged misleading statements in IPO documents and alleged breaches of the continuous disclosure obligations in the listing rules. Two of those actions arise out of the failure of the CBL group of companies in early 2018, and are to be heard at the

same time as regulatory claims by the Financial Markets Authority with the hearing beginning in April 2024. The third relates to Inteuri Education Group. In that case, the plaintiff shareholders took the bold step of attempting to obtain summary judgment on liability in respect of some of the claims, but were unsuccessful.The other relates to alleged misleading statements made by The A2 Milk Company to the Australian and New Zealand stock exchanges regarding its revenue and earnings forecasts. Unlike the other actions referred to above, A2 is an active company that continues to trade. These proceedings have been stayed by the High Court pending the outcome of two similar representative actions in Australia arising out of the same allegations.

Consumer law breaches

There have been two relatively high profile representative actions brought against major New Zealand trading banks by their customers in relation to fees charged or information provided by those banks when varying loans. The first involved claims by a large number of customers against four banks, challenging the charging of a range of credit card and deposit account banking fees. The proceedings ultimately settled prior to any substantive hearing.

The other is a claim against two major New Zealand banks by customers in respect of alleged misleading statements or failures of disclosure during loan variations. The two banks had already settled with the Commerce Commission, admitting breaches of the lender responsibility principles in the Credit Contracts and Consumer Finance Act 2003, but customers have brought proceedings under a different section of the Act seeking additional relief.

Product liability

Finally, there have been a number of product liability representative actions arising out of cladding systems used in New Zealand. Three of these actions have arisen out of New Zealand's weathertight homes crisis and have alleged that a particular cladding product that was formerly widely used in the residential market, Harditex, was defective. In one of these cases, judgment was delivered following a nearly four month trial. The homeowner plaintiffs' case failed in its entirety.12 Another was discontinued following completion of the plaintiffs' evidence at trial with the plaintiffs paying costs of $1.25 million to the defendant. The third proceeding is currently still continuing.

A further recent attempt at a representative action alleged that the PE core in Alucobond cladding causes the rapid spread and severity of fire, similar to that which occurred in the Grenfell Tower fire. The application for a representative order was dismissed but leave to appeal has been granted.

8. Is your jurisdiction an "opt in" or "opt out" jurisdiction?

Early representative action cases in New Zealand were brought on behalf of all members who fell within a defined class without members being provided with an opportunity to opt-out of the proceeding. This subsequently changed in the Feltex litigation. As noted earlier, the plaintiff shareholder brought claims alleging that he had been misled by statements in the prospectus for Feltex's initial public offering. Initially, he sought and obtained a representation order on an opt-out basis, allowing him to represent more than 3,600 shareholders in the company. On review, the order was replaced with an opt-in order, on the basis that an opt-out order did not fall within the scope of HCR 4.24. Subsequent to this decision, all representative actions in New Zealand proceeded on an opt-in basis.

This position changed as a result of the Ross v Southern Response litigation, where the plaintiff sought an opt-out order, notwithstanding the High Court decision in Feltex. While initially unsuccessful in the High Court, the plaintiffs obtained an opt-out order on appeal in the Court of Appeal with this decision then being upheld in the Supreme Court. The latter Court considered that HCR 4.24 allowed opt-out orders, where appropriate, and that such orders assisted in improving access to justice.

As a consequence, both opt-in and opt-out orders are now available in representative actions in New Zealand.

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

A proposed representative plaintiff has two options under HCR 4.24 when seeking to commence a representative action:

1. obtain the consent of all persons who will be represented by the plaintiff in the proceedings; or
2. apply to the Court for a representative order on either an opt-in or opt-out basis.

If the consent of all claimants is obtained prior to filing, no application for a representative order is needed, although the Court still has the power to prevent a proceeding from continuing as a representative action if it transpires that the members of the claimant group do not have the requisite common interest. As a

practicality, the representative plaintiff may need to provide evidence that all members of the claimant group have given their consent.

Most representative actions commence with an application for a representative order, given the time and expense of obtaining prior consent where the claimant group is large. Applying for a representative order involves filing an interlocutory application with supporting affidavits at the same time that the statement of claim is filed in the High Court. The application and supporting evidence needs to define the proposed class with sufficient precision and establish that there is the requisite common interest between members of that class in the subject matter of the proceeding. Ordinarily, the application will also seek ancillary orders as to the time period for class members to opt-in or opt-out of the proceedings, depending on which type of representative action is sought.

10. What remedies are available to claimants in class action or collective redress proceedings?

The same remedies are available in a representative action that would be available in any other form of civil proceeding, including compensatory, general, and exemplary damages; declarations; and injunctive relief.

Where damages are sought and each class member's loss is likely to vary, then the Court may need to assess loss on an individual basis, notwithstanding the proceeding has been approved as a representative action. With opt-out representative actions, this means that, at the time individual losses need to be assessed, the proceedings effectively become opt-in.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

Exemplary damages are available in representative actions as they would be in ordinary civil proceedings, although to date there have been no such awards.

The New Zealand courts have been conservative in the size of awards for exemplary damages with the highest recorded award being NZD $85,000. As previously noted, this is a factor in representative actions in New Zealand being less financially appealing to third party litigation funders.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

Under section 16 of the Senior Courts Act 2016, civil jury trials are restricted to cases involving defamation, false imprisonment, or malicious prosecution. Given the personal nature of these causes of action, it is relatively unlikely, though not impossible, that a representative action would be founded upon them.

13. What is the measure of damages for class actions or collective redress proceedings?

There is no particular measure of damages required due to a proceeding being a representative action. Ultimately, the appropriate measure of damages depends upon the causes of action relied upon by the claimant group in the proceedings.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

There are no jurisdictional requirements specific to representative actions. Where the proceedings are required to be served outside of New Zealand, service can only occur without leave of the Court if one or more of the detailed grounds set out in Rule 6.27 of the High Court Rules can be made out.

If leave of the Court is required, the representative claimant would need to establish that the claim has a real and substantial connection with New Zealand, there is a serious question to be tried on the merits, New Zealand is the appropriate forum for the trial, as well as any other relevant circumstances that support an assumption of jurisdiction.

Even if the Court has jurisdiction, there are circumstances where the court may not allow the claim to proceed. For instance, under the Trans-Tasman Proceedings Act 2010 (the **TTPA**), the courts have the power to order a stay of proceedings where it is satisfied that an Australian court has jurisdiction and is the more appropriate court to determine those matters. This was recently utilised in the representative action context in *Whyte v The A2 Milk Company Limited* [2023] NZHC 22. In that case, a New Zealand shareholder sought to bring a representative action in relation to statements made by the defendant company to both the Australian and New Zealand stock exchange, which were alleged to have been misleading and deceptive. Two class actions

had already been brought in Victoria, Australia in respect of those statements. The High Court allowed the matter to proceed as a representative action, but stayed the proceeding under the TTPA pending delivery of a judgment on liability in the Australian proceedings or final settlement of them.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

Under a representative action, there is no limitation on the ability of claimants of other nationalities or domiciles to participate in these proceedings, provided the High Court accepts that it has jurisdiction over the matter.

Since opt-out representative actions were recognised as being available in New Zealand in *Ross v Southern Response*, there has been a live issue as to whether the claimant group in an opt-out action should be able to include persons who reside out of New Zealand.

In its *Class Actions and Litigation Funding* report, the New Zealand Law Commission recommended that its proposed Class Actions Act specify that a person who resides outside of New Zealand should only be able to join a class action by opting in.17 The rationale for this is that an essential method of protecting opt-out class members is ensuring they receive adequate notice of the fact that they will be bound by the judgment if they do not opt-out by the required date.

Where class members are based overseas, it is likely to be more difficult and costly to provide notice to these members – particularly where they are based in multiple jurisdictions. Issues could also arise where a class member receives the notice but doesn't understand it because of language differences. The aim behind the Law Commission's recommendation is that if overseas class members are required to opt-in, they can provide contact details which should make any further notice more straightforward.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

There are no international laws that directly impact the conduct of representative actions in New Zealand.

In developing the representative action jurisdiction, the courts have had regard to the class actions procedures available under the domestic law of comparative common law jurisdictions, particularly Australia.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

The High Court and District Court rules do not contain any specific mechanism for collective settlement of representative actions. Where the parties to a representative action reach a settlement between themselves, there is an ability for the Court to scrutinise that settlement, as is discussed below.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

There is no specific provision in either the High Court Rules or District Court Rules for judicial oversight of settlements of representative actions. However, in *Ross v Southern Response*, the Supreme Court observed that proceedings conducted on an opt-out basis should be subject to a general rule requiring court approval of a settlement or a discontinuance. The Supreme Court also considered that applications under HCR 4.24 should more generally include proposed conditions as to the court's supervision of settlement and discontinuance. In this regard, it noted that, even with opt-in representative actions, settlement or discontinuance may operate unfairly to a subset of plaintiffs. Given the Supreme Court's comments, it would be prudent for representative plaintiffs to make provision for court supervision of settlement or discontinuance in making an application under HCR 4.24.

In a subsequent High Court decision in the *Ross v Southern Response* action considering whether to approve a settlement that had been reached, the Court discussed the standard to apply when deciding whether to approve a settlement.21 In doing so it drew on the Supreme Court's discussion of the principles applied in Australia and Ontario. The Court noted that in Australia the courts consider whether the settlement is fair and reasonable not only as between the class members and the defendants, but also as between the class members themselves.22 In Ontario, the standard developed by the Courts, and later codified is whether the settlement was "fair, reasonable and in the best interests of the class". The High Court found those standards represented the appropriate standard in relation to the Court's approval of a settlement.

The High Court in *Ross* also noted that it is only required to determine whether the proposed settlement is within

a reasonable range, not whether it is the best outcome which might have been achieved.

Although *Ross* dealt with a settlement, the High Court also considered the standard to be applied if there was a unilateral discontinuance by a plaintiff, rather than a settlement. The Court noted that the standard applied in Australia and Canada was different with the focus being whether the group members would be disadvantage rather than whether discontinuance would be positively in their interests. The Court considered there was a powerful argument for this different standard to apply to a unilateral discontinuance, but it was unnecessary for this point to be determined in the case at hand.

The New Zealand Law Commission has recommended that judicial approval of settlement be required in both opt-in and opt-out actions. It also proposed a settlement approval test, with mandatory factors that the court must consider when determining whether a settlement is fair, reasonable and in the interests of the class:

1. the terms and conditions of the proposed settlement;
2. any legal fees and litigation funding commission to be deducted from relief payable;
3. any information about potential risk, costs/benefits;
4. any views of class members;
5. any steps taken to manage conflicts of interest; and
6. any other factors relevant.

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

As noted earlier, the Commerce Commission and the Financial Markets Authority are themselves both empowered by legislation to pursue compensation on behalf of multiple individuals. The Commission can apply for a compensation order on behalf of consumers under s 43 of the Fair Trading Act 1986. However, the order must be on behalf of specific persons who have suffered specific loss, rather than an indeterminate group of people. Under s 34 of the Financial Markets Authority Act 2011, the Financial Markets Authority are able to bring proceedings on a representative basis where the persons involved have the same interest.

However, there has also been at least one recent instance of a representative action based on previous regulatory action. In *Simons v ANZ Bank New Zealand* [2022] NZHC 1836, customers of two major New Zealand trading banks have brought a representative action seeking relief under the Credit Contracts and Consumer Finance Act 2003. The representative action followed those banks making voluntary disclosures to the Commerce Commission that loan variation letters and disclosure were inaccurate or incomplete. The banks entered into settlements with the Commerce Commission where they admitted breaches of the lender responsibility principles in the Act and made remediation payments to affected customers, but made no admission of liability in terms of any other aspect of the Act. The representative action is largely based upon the same conduct but pleads breach of a different part of the Act and seeks additional relief, including the recovery of payments made to the banks.

There is also a current instance of representative actions and regulatory proceedings being heard at the same time. In *Livingstone v CBL Corporation (in liq) & Ors* [2022] NZHC 1734, the High Court ruled that two regulatory proceedings being brought by the Financial Markets Authority in respect of the collapse of the CBL insurance group should be heard at the same time as two representative actions being brought by shareholders in the group. The Court considered that the interest in not burdening the defendants with successive trials justified hearing the matters together even though this might add two and a half months to the hearing time.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

New Zealand has not generally seen representative actions being brought in respect of environmental, social, and governance (**ESG**) matters. In its issues paper *Class Action and Litigation Funding*, the Law Commission was able to identify only two representative actions being brought in the High Court in respect of environmental matters, with one of these dating back to 1972.30 There was also one representative action brought in the Environment Court in 2000, although apparently the reason for seeking the representation order was to meet eligibility requirements for the Environmental Legal Assistance Fund.31

One reason representative actions have likely not been used for ESG matters, is that, particularly with environmental matters, test cases and judicial review proceedings can be used to obtain socially beneficial precedents in these areas, without the procedural complexities, and consequent cost, of a representative action. Given that, generally speaking, such claimants

are seeking declaratory relief rather than damages, this may be the more efficient and practical way to bring such claims. The ability in New Zealand for incorporated issue groups or societies to bring such proceedings is likely another reason that representative actions have not been used as the vehicles for such litigation.

There are two recent examples of the test case or judicial review approach in New Zealand. The first is *Michael John Smith v Fonterra Co-operative Group* [2021] NZCA 552 in which the plaintiff, the climate change spokesperson for the Iwi Chairs Forum, has brought three claims against seven New Zealand companies, seeking declarations that each has unlawfully caused or contributed to the effects of climate change as well as an injunction requiring each to produce or cause zero net emissions from 2030. Two of the claims were struck out as disclosing no reasonable cause of action in the High Court. On appeal, the Court of Appeal upheld the High Court's decision on striking out those claims and also struck out the remaining claim. The matter has been appealed to the Supreme Court and judgment is currently awaited.

The second example is *Lawyers for Climate Actions NZ Inc. v The Climate Change Commission* [2022] NZHC 3064 in which an incorporated not-for-profit group of 350 lawyers sought judicial review of advice that the Climate Change Commission provided to the Minister for Climate Change under the Climate Change Response Act 2002 as to New Zealand's emission reduction targets. The group contended, among other things, that the Climate Change Commission had understated the level of emission reductions necessary to be consistent with global efforts to limit global warming to 1.5˚C above pre-industrial levels. Although the Group was unsuccessful in their judicial review application, the Court agreed with them on a number of important issues, including that the Commission's advice to the Minister was amenable to review.

Notwithstanding the above, given the rise of ESG concerns, there is still likely to be an increase in representative actions being used for such matters. There is the potential for issue advocates to use the potential for large scale damages liability to drive social change in these areas.

21. Is litigation funding for class actions or collective redress proceedings permitted?

There is no statutory regulation of litigation funding in New Zealand, which has led to uncertainty about the circumstances in which it is permitted. As mentioned, the torts of champerty and maintenance have historically prohibited third party litigation funding. While the torts remain part of New Zealand law, recent decisions of the courts have considered that the public policy factor of access to justice tells against continuing to use the torts to prevent litigation funding. Instead, the courts have preferred to address the question of whether a given litigation funding arrangement is permissible by considering whether it amounts to an abuse of process. In *Waterhouse v Contractors Bonding*, the Supreme Court said a funding agreement would be an abuse of process if it amounted to an assignment of a cause of action to a third party funder in circumstances where this was not permissible.

The Supreme Court has emphasised that it is not the courts' function to regulate and give prior approval of litigation funding. This has also been emphasised in the representative action context. In *Southern Response v Southern Response Unresolved Claims Group*, the Court of Appeal stated that that there is nothing in HCR 4.24 which enables a court to approve funding arrangements and it doubted the courts' institutional capacity to carry out such a function in the absence of any detailed rules of procedure. However, in the same case, the Court of Appeal noted that there was good reason for it to supervise funding arrangements in representative actions to ensure that the arrangements do not amount to an abuse of process and that the court's processes are not used to mislead prospective class members into joining the representative action.

A plaintiff who is funded by a third party litigation funder is required to disclose the fact that there is a litigation funder, the identity of that litigation funder, and whether or not that funder is subject to the jurisdiction of the New Zealand courts. If new funding arrangements are entered into at a later stage of the proceedings, the Court must also be advised of this. It remains uncertain, however, in the representative action context whether the plaintiff must disclose the funding agreement to the Court and the other parties at the time of filing. In many cases, representative plaintiffs have disclosed the funding agreement at the time of seeking approval to proceed as a representative action and, in light of the Court of Appeal's comments in *Southern Response v Southern Response Unresolved Claims Group*, it may be prudent to do so.

In its *Class Actions and Litigation Funding* report, the New Zealand Law Commission has recommended that its proposed Class Actions Act 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 Commission recommended that in each case the court should need to 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, the Commission's proposed funding approval provision sets out factors the court may consider and also provides that the court may appoint an expert to assist it with assessing the fairness and reasonableness of the funding commission. The factors for the Court to consider are designed to address concerns about funder control of litigation, funder profits and conflicts of interest.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Lawyers can agree to enter a conditional fee agreement under which the lawyer agrees that some or all of their fees and expenses will only be payable if there is a successful outcome. The Lawyers and Conveyancers Act 2006 makes clear that, in such an arrangement, the lawyer can charge a premium which compensates the lawyer for the risk of not being paid at all and for the disadvantages of not receiving payments on account, but this premium cannot be calculated as a proportion of the amount recovered.40 Normally, the premium takes the form of a percentage uplift on the fees incurred.

Due to this, representative actions are not funded in New Zealand through lawyers taking contingency fees, as occurs in the United States and Canada with class actions. Instead, claimants are largely dependent on obtaining third party litigation funding to finance representative actions.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

The general rule in High Court and District Court litigation is that the unsuccessful party must pay costs to the successful party. Costs orders are discretionary, however, so it always remains open to the Court not to award costs, if it considers it appropriate. One circumstance where this applies is where there was a public interest aspect to the proceedings being brought.

Where costs are ordered, this is usually on a scale set out in the relevant Court Rules, which aims to set costs at two thirds of the amount considered reasonable for each given step. In practice, the scale awards for costs can be considerably below the standard amounts charged for litigation, particularly for time intensive tasks such as discovery and drafting of written briefs of evidence. The Court also has a discretion in appropriate circumstances to award increased costs, which is an uplift on scale costs, or indemnity costs, which is a party's actual reasonable costs. This usually will be where a party has taken an unnecessary step or meritless arguments or the proceedings were frivolous or vexatious as a whole.

In the representative action context, it is the representative plaintiff who holds the liability for the costs, if the proceedings are unsuccessful. The individual members of the representative group are not subject to an adverse costs award as a matter of course. It is possible for the Court to award costs against a non-party, but, in practice, this occurs only in exceptional circumstances and we are not aware of this jurisdiction being used against a class member in a representative action.

In practice, a representative plaintiff would usually be indemnified by the litigation funder providing funding for the representative action in respect of any adverse costs order that might be made against them.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

In May 2022, the Law Commission published the final report for its project on class actions and litigation funding in New Zealand. At a high level, the Law Commission concluded that a new Class Actions Act should be developed, and litigation funding should be regulated. These proposals are intended to improve access to justice and efficiency in litigation.

The Law Commission considered that the representative actions procedure in the High Court Rules and District Court Rules is insufficient and unclear. In the Commission's view, while class actions and litigation funding are not a 'silver bullet' for access to justice and efficiency, they can make important contributions in these areas.

The Report makes 121 recommendations for the reform of class actions and litigation funding. The Law Commission were informed by consultation with government agencies, members of the legal profession, litigation funders, business and community organisations and academics and a consideration of overseas approaches to class actions. The recommendations include provisions in a new Class Actions Act, new rules in the High Court Rules 2016 and amendments to the

Lawyers and Conveyancers Act 2006.

The key recommendations are:

1. There should be a new statute called the Class Actions Act – the principal source of law on class actions.
2. A case should require court approval to proceed as a class action, a process known as certification.
3. Both opt-in and opt-out class actions should be permitted in New Zealand.
4. An opt-in class action requires individuals to actively sign up to the class action to be a class member.
5. In an opt-out class action, persons falling within the class definition are part of the class action unless they opt out by the required date.
6. Additional court oversight is needed in class actions to ensure the interests of class members are protected. For example, a settlement of a class action should only be binding if approved by the court.
7. In funded class actions, a litigation funding agreement should only be enforceable by a funder if it has been approved by the court. The court should not approve the litigation funding agreement unless it is satisfied the agreement is fair and reasonable and the representative plaintiff has received independent legal advice.
8. A public class action fund should be created which can provide funding for plaintiffs.

The New Zealand Government has issued a response to the Law Commission report, in which it accepts the Law Commission's recommendations in principle, that:

1. a statutory regime for class actions, underpinned by a Class Actions Act, will provide clarity and could enhance access to justice;
2. abolishing the torts of maintenance and champerty would clarify the permissibility of litigation funding; and
3. court oversight of litigation funding agreements in class actions should aid in ensuring the terms of agreements are fair and reasonable.

However, the Government has said that some aspects of the Law Commission's recommendations require further consideration, namely:

1. the policy and implementation considerations of introducing a public fund for public interest class actions litigation;
2. whether litigation funding oversight should be restricted only to class actions; and
3. analysis on the impact of both class actions and court oversight of litigation funding agreements on court resources.

Any legislative change is likely to take some time with the government stating that the resourcing required to advance reforms will need to be balanced against other Government priorities. It is, therefore, likely that the courts will continue to take an active role in the development of the representative action jurisdiction to help address the access to justice and efficiency issues raised by the Law Commission.

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