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Law Commission of New Zealand
Review of Class Actions and Litigation Funding
Law Commission
PO Box 2590
Wellington 6140

By email: cal@lawcom.govt.nz

Issues Paper | He Puka Kaupapa 48

Dear Madam/Sir

We welcome the opportunity to provide feedback in relation to Issues Paper | He Puka Kaupapa 48 – Class Actions and Litigation Funding: Supplementary Issues Paper.

Please do not hesitate to contact me and my colleagues on +612 8267 0916 or at JGeisker@mauriceblackburn.com.au if we can further assist with the Committee's important work.

Yours faithfully

Jason Geisker
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Maurice
Blackburn
Lawyers
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Claims
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Australia

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1. INTRODUCTION

Maurice Blackburn is Australia's leading plaintiff class actions law firm. Our experts nationwide have an unparalleled record when it comes to delivering for those that have suffered mass wrongs, returning more than AUD $3 billion to clients to date.[1]

Claims Funding Australia (**CFA**) is a litigation funder and wholly owned subsidiary of Maurice Blackburn. Over the last decade CFA has a proud history of funding commercial and civil claims in Australian, Canada and Aotearoa New Zealand, including the landmark representative proceeding of *Ross v Southern Response Earthquake Services Limited.*[2]

Maurice Blackburn and CFA welcome this opportunity to provide this joint submission to Te Aka Matua o te Ture Law Commission's (**Commission**) review of class actions and litigation funding in Aotearoa New Zealand.

We commend the Commission on a thoughtful and balanced Issues Paper He Puka Kaupapa 45 (Issues Paper, **NZLC IP45**), and Supplementary Paper He Puka Kaupapa 49 (Supplementary Paper, **NZLC IP48**) that is considered and well informed by expert input and empirical fact-based research. We agree with the great majority of the Commission's preliminary views and its reasoning for them.

In this submission we comment on those issues where, in our view, the Australian experience of a nearly 30-year statutory class action regime may assist, especially highlighting the new areas of class actions which have given access to justice to millions of Australians who otherwise would have been denied.[3] In our view these new types of class actions will be more available in Aotearoa New Zealand if a statutory regime as now contemplated is enacted.[4] We also comment on issues associated with litigation funding, drawing on our experience as users of litigation funding in our class actions practice and as providers of litigation funding through CFA in various jurisdictions around the world, including Aotearoa New Zealand.

2. OUR SUBMISSION

Our submission to the Supplementary Paper NZLC IP48 builds upon our submission to Issues Paper NZLC IP45. We welcome the recommendation by the Commission that a statutory class actions regime in Aotearoa New Zealand is desirable and commend this approach as productive of greater access to justice for Aotearoa New Zealand citizens and improving efficiency and economy of litigation, consistent with the Commission's objective.

We have provided a comprehensive submission on each of the questions raised by the Commission for comment. We note with interest the approach taken by the Commission to the Draft Legislation and the five topics of significance that have been raised for submission,

[1] We refer to Appendix A of our submission to NZLC IP45, "About Maurice Blackburn" for further details.
[2] We refer to Appendix B of our submission to NZLC IP48, "About Claims Funding Australia" for further details.
[3] For economy we refer to the Australian class action regime as if it were one: In fact, there are five regimes with the Federal regime now substantially copied in four states across Australia (Victoria, NSW, Queensland and Tasmania) with a fifth State regime in Western Australia presently before the Western Australian legislature. The implementation of State based analogues is a testament to, and acknowledgement of, the utility and effectiveness of the class action procedure in Australia
[4] We do not comment on those issues where we do not have experience or where the Australian experience may not assist.

namely; commencement, certification, the effect of a judgment, aggregate monetary relief and settlement. As the Commission recognises, the Supplementary Paper and Draft Legislation omit certain matters for concision and have reserved others for further consideration. Insofar as further consultations will occur we encourage the Commission to seek input from other class actions practitioners, in particular those whom have represented plaintiff's and class members, to assist the Commission in forming its views on matters of practice.

We wish the Commission well in its review and we look forward to engaging with the issues further as they evolve and to receiving the report in May 2022.

3. CHAPTER 1: COMMENCEMENT AND CERTIFICATION OF A CLASS ACTION

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

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

(3) When should sub-classes be allowed? For example:

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

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

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

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

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

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

3.1. In response to question 1, we agree with the overall approach taken in respect of the commencement provisions, subject to our comments below.

3.2. With respect to the numerosity issue, we support the Commission's proposal to specify a minimum number of class members and we agree that a degree of nuance is appropriate to ensure that certain claims are not excluded from the class actions regime simply because the minimum class size is set too high. However, we query whether setting the minimum class too *low* may create inefficiencies and other practical problems, thereby reducing the effectiveness of the proposed regime in achieving its key aims. These issues are likely to be exacerbated in circumstances where a certification requirement is also imposed.

3.3. A minimum class size of three persons (that is, the representative plaintiff and two class members) may result in a substantial number of actions being commenced as class actions. That number is likely to be significantly higher than if a greater numerosity threshold were imposed.

3.4. If the Court is then required to consider the appropriateness of each class action as part of a certification process, this is likely to place significant pressure on Court resources and delay the progress of these claims.[5] It may also increase uncertainty for the parties in determining whether claims should be commenced as class actions (or via another mechanism), and whether they are likely to be certified by the Court. The parties' legal representatives will be required to expend considerable time and costs on commencing and preparing these claims for certification when, for at least some of those claims, those resources could be spent on prosecuting them via another mechanism.

3.5. Furthermore, if the *minimum* class size is three persons, this suggests that class actions involving a *total* class size of three persons may be permitted under the regime. We query whether class actions involving three persons are suited to certain class actions procedures and processes, including certification, opt in/opt out, other notice requirements and/or discovery. It may be that such class claims could be more efficiently prosecuted via another mechanism. Additionally, if only three persons were to have claims sufficiently similar in order to be commenced as a class action, we query whether those claims are more individualised in nature and therefore not well-suited to the class actions regime.

3.6. We propose that the Commission consider whether setting the minimum number higher, at say five persons, may avoid some of the practical issues discussed above. In our view, this number strikes a balance between the class size requirements in comparable regimes.[6] As in the Australian context, in our view the Court should maintain the discretion to permit a class action within fewer than the minimum requirement, however based on the Australian experience, the need to exercise this discretion is likely to be rare. In our view, this alternative approach strikes an appropriate balance between promoting certainty and efficiency on the one hand, and a degree of flexibility, on the other.

3.7. We support the Commission's proposals that the representative plaintiff should ordinarily be a class member, and that a government entity may be a representative plaintiff in some cases, for the reasons set out in our first submission.

3.8. We support the Commission's proposal that at least one representative plaintiff should have a claim against each defendant, and the reasoning provided at paragraphs 1.23 – 1.25 of the Issues Paper in our view appears sound. This approach again affords the parties certainty, but also accommodates for nuances in different claims and defendants.

3.9. In response to question 2, we do not agree with the proposed certification provision. As we discussed in our previous submission, in our view, Aotearoa New Zealand should not include a certification requirement in its class actions regime. We encourage the Commission to reconsider its position on this issue.

[5] As the Commission has already noted, in the United States, where there is a certification test, the general rule is that a class of fewer than 20 persons will have difficulty being certified: Issue Paper 45 at paragraph 10.33(c).
[6] For example, in Canada there is a requirement that there be "an identifiable class of two or more persons". In Australia, seven or more persons are required for a class action. As above, the general rule in the United States is that the minimum class size is 20.

3.10. As we have previously noted, both the Australian Law Reform Commission (**ALRC**) and the Victorian Law Reform Commission (**VLRC**) have considered the need for certification at federal and state level. On both occasions, it was decided that certification was neither necessary nor beneficial for the class action regime, and we agree with this position.[7]

3.11. Notably, when recommending against a certification requirement in the inclusion of the federal class action regime, the Australian Law Reform Commission stated:

> *In class actions in the United States and Quebec, the preliminary matter of the form of the proceedings has often been more complex and taken more time that the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.* [8]

3.12. The ALRC considered that the Court's supervisory role was adequate to protect group members interests. Ultimately, the ALRC definitively rejected the need for a certification requirement, concluding that it saw "*no value in imposing an additional costly procedure, with a strong risk of appeals involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency*".[9]

3.13. As the Honourable Justice Lee has noted, this position must be viewed in the context of the overall regime. Importantly, there are specific provisions built into the statutory framework in the Australian context that mean that the Court is well-equipped to protect group members interests at all stages of the proceeding, and not just at the initial stage when certification would occur.[10] In particular:

(a) the Court provides group members the right to opt out of the proceeding.[11] They must be notified of this right, and the Court closely manages the manner in which they are notified;

(b) group members have the right to make an application seeking substitution of the representative party if they are not able adequately to represent group members' interests;[12]

(c) group members have the right (and are required to be) notified in certain circumstances, for example, when there is a proposed settlement of the proceeding.[13]

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[7] We refer to chapter 10 of our first submission.
[8] ALRC Report at [146].
[9] Ibid at 63-4 [147].
[10] The Honourable Justice Michael Lee, 'CERTIFICATION OF CLASS ACTIONS: A 'SOLUTION' IN SEARCH OF A PROBLEM?' A paper presented to the Commercial Law Association Seminar "Class Actions – Different Perspectives' Friday, 20 October 2017: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-lee/lee-j-20171020, p 3.
[11] *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**), s 33J.
[12] Federal Court Act, s 33T;
[13] Federal Court Act, s 33Y.

3.14. His Honour also noted the important distinction between issues of constitution[14] and continuation [15] In relation to the latter, the Court's power to declass a representative proceeding in certain circumstances is another important safeguard for the protection of group members' interests.[16] These declassing procedures have a number of important advantages when compared to a 'one size fits all' certification test, including that:

(a) they avoid unnecessary cost and delay because they are invoked only when there is a disputed issue;

(b) they are not limited to the initial stage of the proceeding, meaning that they can be utilised to address issues that may arise or become evident at later stages of the proceeding;

(c) they have a wider scope than addressing perceived 'problems' with the proceeding and can be utilised after the initial trial as an effective mechanism for determining individual issues.[17]

3.15. The empirical data in relation to declassing procedures also indicates that there has been relatively little successful interlocutory disputation directed to the question of whether a class action ought continue as such. As his Honour notes, the data suggests that only 28.4% of the group proceedings issued in the Federal Court between 1992 and 2009 involved declassing applications.[18] Further, only 19.1% of applications were successful,[19] which accounts for about 5% of all class actions.[20] In addition, this (already low) success rate decreased over time. In the first five years, there was a 40% success rate. By contrast, in the period 2004 – 2009, there were no successful applications.[21]

3.16. As his Honour states:

> "*Given that in approximately 95% of cases[22] (with the percentage increasing) the class action procedure has been selected without controversy (or where controversy has apparently been unjustified) the suggestion that the undemanding "gateway" provisions have often resulted in class actions that are unsuitable is difficult to justify."*[23]

[14] The relevant provisions are the 'gateway provisions', being ss 33C and 33H of the Federal Court Act.
[15] See in particular, s 33N of the Federal Court Act, as well as ss 33L and 33M. See The Honourable Justice Michael Lee, 'CERTIFICATION OF CLASS ACTIONS: A 'SOLUTION' IN SEARCH OF A PROBLEM?' A paper presented to the Commercial Law Association Seminar "Class Actions – Different Perspectives' Friday, 20 October 2017: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-lee/lee-j-20171020, pp 4 -5.
[16] Ibid.
[17] Ibid, 10 – 11.
[18] Ibid, 11. Vince Morabito and Jane Caruana, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal of Comparative Law* 579, 594.
[19] Ibid, 11. Vince Morabito and Jane Caruana, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal of Comparative Law* 579, 597.
[20] Ibid, 11.
[21] Ibid 11.
[22] Vince Morabito and Jane Caruana, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal of Comparative Law* 579, 597.
[23] the Federal Court Act.

3.17. Ultimately, his Honour's view was that the Australian regime, in which "*[t]he policy choice was to adopt a scheme providing ease of commencement, tempered by a discretionary 'control' mechanism*", has been working well.[24] We agree. We think that same can be achieved in Aotearoa New Zealand without a certification regime, so long as similar protective mechanisms are built into the framework and the Court maintains a clear and overarching supervisory role.

3.18. Given our comments above, we do not propose to comment in detail on the specific aspects of the certification test proposed by the Commission in the draft bill. We note, however, that the Commission has proposed a test with numerous elements, which the Court is either required to, or permitted to, consider. Simply put, the more complex the certification test, the more time, resources and costs will be required by both the parties and the Court to consider and apply it. In our view, this is not in group members interests.

3.19. We make further comments in relation to the scrutiny of the representative plaintiff as part of the certification process in response to chapter 3 below.

3.20. In response to question 3, we agree overall with the Commission's proposal that sub-classes should be permitted. We also agree with the Commission's proposal regarding the circumstances in which such sub-classes may be permitted, namely:

(a) when groups of class members may have conflicting interests. However, if group members have conflicting interests such that they require separate legal representation, we query whether it is appropriate for such claims to be brought as class actions – multiple groups with different legal representation may create inefficiencies, and this is likely to result in increased costs. It may also create complexities regarding how such costs are to shared equitably amongst the overall class;

(b) in order to determine additional issues common to certain class members (so long as all class members share at least one common issue). We agree with the Commission's comments regarding the benefits of this approach, set out at paragraphs 1.106 and 1.108 of the Issues Paper.

3.21. In our respectful view, it is not necessary that each sub-group be represented by a sub-group representative plaintiff, as the Commission appears to be suggesting at 1.104 of the Issues Paper. In Australia, the position is that the representative plaintiff can represent group members at the trial of common issues, notwithstanding that the lead plaintiff may not have a claim with respect to a particular sub-group.[25] It is not a requirement that each sub-group is represented by a sub-group representative, either at commencement or at a later stage of the proceeding. Rather, issues in relation to the sub-class may be dealt with by way of sample group members giving evidence at

[23] See in particular, s 33N of the Federal Court Act, as well as ss 33L and 33M. See The Honourable Justice Michael Lee, 'CERTIFICATION OF CLASS ACTIONS: A 'SOLUTION' IN SEARCH OF A PROBLEM?' A paper presented to the Commercial Law Association Seminar "Class Actions – Different Perspectives' Friday, 20 October 2017: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-lee/lee-j-20171020, P 12.
[24] Ibid, 6. See also p 7.
[25] See, for example, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355, [24(6)]

the initial trial, or alternatively, such issues may be addressed following the initial trial. In our view, this approach is preferable. We believe it would be overly prescriptive, and may lead to unnecessary expense, for the regime to *require* a representative sub-group plaintiff, where in appropriate circumstances sample group members may play a substantively similar role in the litigation, to allow the additional issues relevant to the sub-class to be managed, and where appropriate, determined at the initial trial.

3.22. We do not consider it appropriate to *require* a sub-group representative plaintiff to be identified at an early stage of the proceeding. There may well be instances where the nature of class members claims' is refined over time. Further information may come to light in relation to certain class members' claims throughout the course of the proceeding. We believe it is the representative plaintiff, and their legal advisors, who are best placed to determine whether any individual(s) should be identified as sub-group representatives or sample group members and when that might become necessary. The Court is well placed to manage and oversee these aspects of representative procedure.

3.23. In our view, it follows that it is not necessary for the statute to provide for sub-classes. In our view, the Court is equipped to consider these issues as part of its case management function. However, we do not express a strong view against the statute permitting sub-classes, so long as any provision allows sufficient flexibility for the Court to manage these issues on a case-by-case basis.

3.24. In response to question 4, subject to our comments above in relation to the certification process, we do not express a strong view against the Court making a certification order specifying the matters listed at paragraph 1.109 of the Issues Paper. We agree that it is important for group members to have clarity as to the class definition and common issues in the proceeding.

3.25. We note that such matters are addressed in other ways under the Australian regime, without the need for any certification order. For example, group members receive information regarding the group definition and their rights in the class action in the Court-approved opt-out notice, which is distributed to all known group members in the class action. In respect of matters filed in the Supreme Court of Victoria, it is a requirement that the plaintiff's legal representatives file a 'group proceeding summary statement', which summarises key aspects of the proceeding. The plaintiff's lawyers are required to take reasonable steps to make the statement available to group members as soon as practicable after the commencement of the proceeding.[26]

3.26. These notification processes can occur at various stages of the proceeding, which means they are able to address issues as the arise and evolve throughout the course of each proceeding.

3.27. In response to Question 5, we agree with the Commission's proposal that the suspension of limitation periods should apply to all class actions that are commenced, not just those which are ultimately certified.

[26] *Supreme Court of Victoria Practice Note SC Gen 10 Conduct of Group Proceedings (Class Action).* See s.5.

3.28. In response to Question 6, we support the approach taken in Australia that maintains general flexibility and has regard to the circumstances of each case. The enumeration of specific matters that will re-engage a limitation period will inevitably change the significance of the various interlocutory stages of litigation in the list that may trigger the limitation, with the potential to introduce procedurally complex and cost intensive interlocutory disputes at these stages.

3.29. It is unclear from the proposed list how the issue of limitation will interact with other procedural steps such as certification. For example, if a court declines to certify one class action, but other competing claims have been stayed pending certification, is the effect of this list that the limitation period on the remaining competing claims will also begin to run? Or will the bar continue until those other claims have also proceeded to certification? Further, the matter listed at paragraph 1.122(c) regarding the failure of a class member to opt-in does not sit conformably with the Commission's proposal for class members to opt in at a later stage (albeit that we disagree with this proposal) or circumstances that may convince a Court to order that a class member may opt in at some later stage.

3.30. The issue of limitation periods necessarily involves the potential to extinguish class members claims. The consequential and final nature of this outcome means that class members need to be informed of any event that may trigger limitation periods running on individual claims. Accordingly, if the Commission ultimately takes the proposed approach we submit that it should be paired with a notice that clearly articulates the effect of the event on those class members rights.

4. CHAPTER 2: COMPETING CLASS ACTIONS

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

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

(9) When should the court determine the issue of competing class actions?

a. Prior to certification.

b. At the same time as certification.

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

(10) What powers should the court have for managing competing class actions?

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

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

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

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

a. How each case is formulated?

b. The preferences of potential class members?

c. Litigation funding arrangements?

d. Legal representation?

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

4.1. In response to question 7, as a preliminary point we wish to observe that, in our experience, the term 'competing' class actions can often be an unhelpful and sometimes pejorative description of what might better be described as 'overlapping' class actions. In our experience, those with an ideological opposition of class actions are often keen to take aim at what they describe as 'competing' class actions in that pejorative sense, ascribing that label for *any* claims where multiple representative actions have been commenced against a particular defendant. However, we suggest some caution is required before properly describing a two or more class actions against a common defendant as 'competing'. Firstly, that 'competing' label infers that such class actions are identical in all respects, which in our experience is very rarely the case. Second, it also suggests that the Courts, and putative group members themselves, have a simple choice to make as between identical claims, including, in the Court's case, which one should proceed and which one should not proceed. As noted, so-called 'competing' class actions are almost never identical. They usually differ in their form and substance. Differences often exist between the causes of action pleaded; class definitions adopted to capture (or exclude) some or all putative class members; time periods for alleged contraventions and claims; differences in remedies sought; differences in defendants joined; and differences in legal representation, costs and funding arrangements. For completeness, we also note that the very nature of 'opt in' and 'opt out' class actions provides that group members may elect to either 'opt out' (or decline to 'opt in') as the case may be. If follows that those putative group members who do exercise their right to opt out, (or who decline to opt in), should not themselves be prevented from bringing or participating in their own claims, including if appropriate, alternative representative proceedings.

4.2. In our view a statutory definition of 'competing' class actions, while important, is perhaps less significant than the task of adequately empowering the court to address the procedural issues that might arise on a case by case basis where there are overlapping class or competing actions. Whether class actions are, in fact, 'competing' will likely depend on the circumstances of each case. Ultimately Courts should be adequately empowered to determine these questions and to manage competing or overlapping claims appropriately and in the interests of justice

4.3. Unsurprisingly, there is a diversity of views on the definition of competing class actions. As is self-evident from question 7, the Commission proposes a definition of "*two or more class actions with respect to the same or substantially similar issues filed against the same defendant by different representative plaintiffs*."

4.4. The Australian Law Reform Commission has noted that the definition of competing class actions should be:

(a) "*two or more class actions where there is a non-theoretical possibility that a person may be a class member of more than one class action, or*

(b) *two or more class actions with respect to the same dispute filed on behalf of different claimants*."[27]

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

4.5. Further, the Federal Court Class Actions 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 in 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)*."[28]

4.6. Given the diversity of views, it is our view that the most appropriate way for competing class actions to be defined (if it is necessary to do so) is to provide the court with broad and flexible powers so that the issue can be determined and managed on a case by case basis. Nonetheless, the court would likely benefit from the broad guidance provided in the Federal Court Class Actions Practice Note above.

4.7. It is our view that the court is best placed to deal with the Commission's concerns regarding any potential inefficiencies, burdens on the court and defendants, and any confusion for class members, when faced with more than one class action about the same matter. In *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042, Foster J noted that permitting two proceedings to run in parallel had not resulted in undue cost, confusion or delay.[29]

4.8. In response to the proposed 90-day time limit in question 8, it is our view that a flexible approach is preferred, with the question best left to the court to determine.

4.9. Firstly, if the courts are empowered to address multiplicity by a variety of means,[30] which may include permitting two proceedings to run in parallel,[31] there is no apparent reason why a potentially competing claim must be filed within a 90-day time limit.

4.10. Secondly, Australian courts have provided useful guidance on this issue. The majority of the High Court has endorsed the view that the commencement of a subsequent bona fide set of representative proceedings *prior to the court giving substantive directions* in existing but overlapping representative proceedings does not of itself establish any vexation, oppression or an abuse of process.[32] Further, when considering which of multiple competing class actions should be chosen to proceed, the state of progress of proceedings was one of the eight factors considered by Ward CJ.[33]

4.11. Thirdly, as referred to in the Commission's Issues Paper, the Federal Court Class Actions Practice Note provides useful mechanisms to enable the issue of competing class actions to be dealt with promptly, without providing a statutory time limit.[34]

4.12. In the alternative and if a statutory time limit were to be provided, it is our view that an appropriate time period is six months. A period of six months would be long enough to avoid a de facto first-to-file rule, but not so long that the proceedings are unduly

[28] Federal Court Class Actions Practice Note at [8.1].
[29] *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042 at [74]-[75].
[30] *Wigmans v AMP Limited* [2021] HCA 7 at [106].
[31] *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042 at [75].
[32] *Wigmans v AMP Limited* [2021] HCA 7 at [107] citing *Perera v GetSwift Limited* (2018) 263 FCR 92 at 126 [150].
[33] *Wigmans v AMP Ltd* [2019] NSWSC 603 at [126] and [315]-[325].
[34] Federal Court Class Actions Practice Note at 7.8(f), 8.2.

delayed. At the conclusion of that period, assuming competing cases exist, the cases should be brought together for case management.

4.13. If there is a time limit, we agree with the Commission's proposal of having a publicly available list of current class actions with an ability to sign up for email notifications to ensure information about new class actions is made available to lawyers and funders. However, we question whether the statement of claim should be made available during this period, as access to the pleadings to potentially competing firms may encourage unwanted strategic behavior to "one-up" the first-filed proceeding.

4.14. In response to question 9, it is our view that the court should have discretion to determine the issue of competing class actions *at any stage*, not necessarily prior to certification or at the same time as certification.

4.15. We appreciate that in practice many competing claims will be determined at an early stage (either before or at the same time as certification), and that it has been recognised that there may be merit in such a process involving certification for two competing open class proceedings.[35] However, the benefits of the Australian approach of maximal flexibility in the power of the court to manage competing claims means that it is more appropriate to leave to the court's discretion the stage at which this issue is to be determined, based on the circumstances of the case.

4.16. A flexible approach is also more appropriate given the number of outstanding questions that remain as to how the competing claims process would interact with the certification process.

4.17. For example, if the court determined the issue of competing class actions prior to certification, a proceeding may be selected as having carriage of the claims but may ultimately not be certified. Accordingly, what will the status of the other stayed proceedings be? Will the stayed proceedings be allowed to apply for certification? Will a new certification application need to be made?

4.18. On the other hand, if applications for competing claims and certification were heard simultaneously, there is a risk certification becomes an omnibus procedural hearing. If a competing class actions hearing is to take prior to certification, a hearing involving three or four separate cases would be an unnecessarily costly exercise for defendants to prepare detailed submissions regarding each of those cases, instead of waiting to certification whereby the defendant would only need to prepare its position in relation to one case.

4.19. The above issues are likely best considered and determined by the court on a case by case basis.

4.20. In response to question 10, our view is that the court should have a broad range of powers available to it and that it should not be required to select one class action to proceed and stay the other proceedings. This is because 'multiplicity' (and the true extent of the 'overlap')may be addressed by a variety of means instead of, or in addition

[35] Michael Lee, 'Certification of Class Actions: A 'Solution' in Search of a Problem?' (Paper presented to the Commercial Law Association Seminar 'Class Action - Different Perspectives', 20 October 2017) at 'conclusion'.

to, staying one or more of the proceedings.[36] The Australian High Court in *Wigmans* enumerated a non-exhaustive list of alternative solutions to granting a permanent stay on competing claims. These were[37]:

(a) Consolidating the proceedings (noting that the proceeding which ultimately prevailed in the contest was a consolidation of the *Komlotex* and *Fernbrook* proceedings);

(b) De-classing one or more of the proceedings;

(c) Holding a joint trial of all proceedings with each left constituted as open class proceedings; or

(d) Closing the classes in one or more of the proceedings but leaving one of the proceedings as an open class proceeding, with a joint trial of all.

4.21. Accordingly, the problem of multiplicity may be solved by other armoury of the Court in addition to the use of the discretionary stay mechanism. The minority judgment of Keifel CJ and Keane J draws an important taxonomical distinction between the concepts of "carriage" and "certification" in the North American context and the resolution of "competing" claims by the more orthodox mechanism of a permanent stay in other common law jurisdictions.[38] The concepts of "carriage"/"certification" in North American jurisprudence arise as part of a positive statutory procedure to proactively prevent multiplicity. However, the Australian experience is different and the majority in *Wigmans v AMP* supported the proposition that Australian Courts are able to flexibly fashion orders to meet the circumstances of each case in order to protect the best interests of class members and avoid vexation or oppression upon a defendant

4.22. Accordingly, the court should have the power to make orders ranging from permanent stays of all but one proceeding, ordering the opening or closing of classes, requiring pleading amendments, consolidating cases and ordering various forms of coordination, or allowing the cases to proceed in parallel. Concomitantly, the court should also be able to make ancillary orders regarding legal costs and litigation funding arrangements to ensure that, if there are inefficiencies or duplication of costs arising from the chosen procedure, they will be remediated in any approval process.

4.23. One concern of proposing that a court should be required to select one class action to proceed and stay the other proceedings, is because the nature, extent and likely frequency of "competing" class actions are not yet clear. Accordingly, such a requirement may be inappropriate to address issues that arise as the phenomenon of competing (or overlapping) class actions develops (or does not) over time.

[36] *Wigmans v AMP Limited* [2021] HCA 7 at [106].
[37] *Wigmans v AMP Limited* [2021] HCA 7 [106] at footnote 146. See also at footnote 146; eg, *Bellamy's* [2017] FCA 947 at [9]; *Cantor* [2017] FCA 1042 at [75]; *GetSwift* (2018) 263 FCR 92 at 105-110 [44]-[70]; *Southernwood v Brambles Ltd* (2019) 137 ACSR 540 at 545 [20]; *Wigmans v AMP Ltd* (2019) 373 ALR 323 at 326 [7].
[38] *Wigmans v AMP Limited* [2021] HCA 7 [33], the minority do not develop this taxonomy further, but rather use the distinction to justify the opinion that the multifactorial approach in preference to "first in time" considerations may be in error.

4.24. Another concern of requiring a court to select only one proceeding to continue, is that it would make the threshold determination of which proceeding should continue the defining event of the proceedings. This contemplates a winner-takes-all contest when only limited substantive information may be available, with sole carriage of proceedings for the widest possible class as the prize. Raising the stakes of the *competition* for the class action (to the detriment of the class action itself) is productive of significant risk of perverse incentives, as competing law firms and litigation funders may be compelled to focus their efforts and resources on winning the threshold competition rather than on developing strategies for pleading and pursuing a case on its merits.

4.25. Such a proposal may therefore encourage rather than constrain strategic behavior, including the following:

(a) the race to the courthouse, with the consequent problems of inadequate investigation, poor pre-commencement analysis, and few if any genuine steps towards early resolution;

(b) extravagant and overbroad pleadings designed to exaggerate case value or to manufacture a putative competitive advantage by appearing to represent the biggest possible group over the longest possible claim period;

(c) unsubstantiated public commentary by lawyers or litigation funders about the value of the claims they intend to pursue;

(d) unrealistic litigation budgets (without any guarantee that they will not be revised); and

(e) tactical delay (lying in wait) until other proceedings have been commenced and funding and other terms announced, and then filing (or even announcing an intention to file) copy-cat proceedings based on statements of claim in proceedings on foot, but doing so with the advantage of being able to make the last bid on price.

4.26. Based on the above, it is our view that the Court should have a broader range of powers available to it. The non-exhaustive list of alternative options outlined by the Australian High Court in *Wigmans* provide useful examples of how those powers may be used.[39]

4.27. In response to question 11 and as referenced in our submission to NZLC IP45, the objective of the civil procedure system in Aotearoa New Zealand of securing the just, speedy and inexpensive determination of proceedings has great similarities with the Australian legal system.[40]

[39] *Wigmans v AMP Limited* [2021] HCA 7 [106] at footnote 146. See also at footnote 146; eg, *Bellamy's* [2017] FCA 947 at [9]; *Cantor* [2017] FCA 1042 at [75]; *GetSwift* (2018) 263 FCR 92 at 105-110 [44]-[70]; *Southernwood v Brambles Ltd* (2019) 137 ACSR 540 at 545 [20]; *Wigmans v AMP Ltd* (2019) 373 ALR 323 at 326 [7].
[40] Maurice Blackburn and Claims Funding Australia, Submission to Te Aka Matua o te Ture Law Commission, *Class Actions and Litigation Funding* (11 March 2021) at [1.8].

4.28. When considering competing proceedings, the Australian class actions regime, in addition to the above objective, requires all courts to be astute to protect the *best interests* of group members.[41]

4.29. These objectives are likely to overlap and complement one another. However, where there may be some divergence between:

(a) the aim of resolving class members claims in a just and efficient way; and

(b) the aim of protecting the best interests of group members,

the latter is perhaps broader and therefore more likely to allow the court to resolve multiplicity by a variety of means depending on the circumstances of the case.

4.30. Accordingly, we support any approach whereby the interests of class members, in their totality, are paramount.

4.31. In response to question 12, that the factors that might be relevant to the court's consideration cannot, and should not, be exhaustively listed and that they will vary from case to case.[42]

4.32. Nonetheless, we agree with the four factors identified by the Commission as being relevant to the court's consideration, depending on the circumstances of the case.

4.33. In relation to the factor of how each case is to be formulated, there should be an explanation by the parties of certain key elements of the pleading, such as the class period, which would discourage extravagant pleadings that exaggerate claim value.[43] The parties should also identify the amount and nature of the work done to investigate and analyse the case.[44]

4.34. We consider the preferences of potential class members to be particularly important. Class members are not agnostic. They can and frequently do act on preferences between notionally competing proceedings, and while the reasons vary depending on the nature of the case, giving effect to those preferences does much to avoid both the perception and potential reality of class actions being lawyer-and funder-driven enterprises.

4.35. In cases involving property damage, investment losses or traumatic circumstances, the relationship between individual class members and their legal representatives can become highly personal. It can be a key determinant of a group member's willingness to participate in the proceedings, which may include providing personal information, giving evidence, and making affidavits attesting to often traumatic experiences. In such cases, the personal nature of the relationship between class members and their legal

[41] *Wigmans v AMP Limited* [2021] HCA 7 at [116].
[42] *Wigmans v AMP Limited* [2021] HCA 7 at [109].
[43] Where there are competing proceedings – or competing book builds – it is not uncommon for the later-entering competing law firm or litigation funder to use a longer claim period merely as a tactic to create an impression that group members will recover greater amounts. In fact, given that most cases settle, expanding the claim period on the barest of justifications acts to the detriment of group members with stronger claims.
[44] In particular, the emerging practice of competing actions being commenced with statements of claim that simply cut-and-paste from those already filed should be discouraged, if not disqualified.

representative should be respected, and depriving class members of their preference may discourage vulnerable class members from pursuing meritorious claims.

4.36. In shareholder class actions, where competing actions are most likely to arise, it is similarly the case that class members are far from agnostic. Class members in shareholder class actions are particularly well-placed to evaluate and discriminate between competing proposals and are often accustomed to expressing their preferences accordingly.

4.37. This is particularly the case with institutional class members, who usually comprise the majority (by value) of the class in most shareholder cases. Most institutions are repeat players in shareholder class actions. They are usually sophisticated claimants for whom the decision to participate in a class action – or in which class action to participate – is a strongly informed decision, often made (or recommended) by in-house lawyers and/or external independent advisors. And institutional investors have considerable experience of competing actions and/or book builds. As a result, it is not unusual for institutions to:

(a) require a presentation of the merits of the case by the lawyers proposing to act for the class;

(b) provide trade data and request a preliminary loss estimate and an articulation of the methodology underlying the estimate;

(c) conduct formal due diligence inquiries into the proposed litigation funder;

(d) require a side letter that addresses particular issues, such as confidentiality provisions, costs implications, and "most favoured nation" provisions assuring the institution that no other claimants will receive – on a like-for-like basis – more favourable terms than those to which it agrees; and

(e) in some cases, openly ask why they should choose one firm/funder combination over another.

4.38. In relation to the factor of legal representation, the parties should address the experience of the law firms and the lawyers within that firm in running class actions of the kind at issue, as well as the resources available for pursuing the claims vigorously.[45]

4.39. We agree with the Commission's position that the following two factors are unlikely to be relevant or appropriate for the court to consider –

(f) which class action was filed first, and;

(g) the prospects of success.

[45] This is comparable to certain of the mandatory criteria used to select and appoint class counsel in the US. Rule 23(g) of the Federal Rules of Civil Procedure provides that, in appointing class counsel, the Court *must* consider: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law; (4) "the resources that counsel will commit to representing the class."

4.40. In relation to the factor of which class action was filed first, this is likely to lead to a race to the courthouse. The majority in *Wigmans* resolutely eschewed the "first in time" rule or presumption as the relevant test to resolve competing claims[46] in preference for the aforementioned multi-factorial approach. In making this finding the majority held that such a rule did not sit conformably with the statutory regime[47] and expressed a broader concern with avoiding an "ugly rush" to the court door[48] that may also be counter-productive to the overarching purpose of litigation by promoting poorly pleaded or prepared proceedings that may not be in the best interest of group members.[49]

4.41. In relation to the factor of the prospects of success, we agree with the Commission that there is a risk this factor will turn into a burdensome preliminary merits test at too early a stage. Class actions are notoriously dynamic, complex proceedings in which issues evolve over time and it may be inappropriate to consider prospects of success at an early stage.

4.42. In response to question 13, our view is that defendants should not be heard in a competing class actions hearing because it would seem inconsistent with the interests of justice to allow defendants to choose their plaintiffs.

4.43. As to the Commission's preference that any strategic unfairness to the plaintiffs from the defendants attending the hearing and related confidentiality issues could be managed by redacting documents, this in our view is likely to be inadequate. Firstly, it is likely that the process of the parties identifying and the court approving or rejecting the redactions of the relevant material will be cumbersome and likely add considerable delay and expense to the hearing. Secondly, it is our position that a carriage fight (separate to a certification hearing) should involve the court requiring the competing plaintiff parties to submit simultaneous and sealed applications from each competitor, let alone providing that material to the defendant. This would allow greater candour on substantive legal issues which would assist the court in its determination, and eliminate competitors' ability to "one-up" each other.

[46] *Wigmans v AMP Limited & Ors* [2021] HCA 7 [52], [75], [76], [86], [88], [94], [97], [105]
[47] Ibid at [75]
[48] Ibid at [86]; referring to Lord Templeman in *The Abidin Daver [1984] AC 398 at 426. See also EI Du Pont de Nemours & Co v Agnew [1987] 2 Lloyd's Rep 585 at 593; GetSwift (2018) 263 FCR 92 at 153 [279]; Wileypark (2018) 265 FCR 1 at 8 [18]*
[49] See also *Perera v GetSwift Ltd* (2018) 263 FCR 92 (2018) 263 FCR 92 at 153 [279].

5. CHAPTER 3: RELATIONSHIPS WITH CLASS MEMBERS

(14) What obligations should the representative plaintiff have? For example:

a. Acting in the best interests of the class.
b. Ensuring the case is properly prosecuted.
c. Being liable for adverse costs (or ensuring an indemnity is in place).
d. Making decisions on any settlement, including applying for court approval of settlement.

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

(16) How can a representative plaintiff be supported to meet their obligations?

(17) Do you agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class after certification?

a. If so, what duties should the lawyer owe to the class?
b. If not, what relationship should exist between the representative plaintiff's lawyer and the class?

(18) Do you agree communications between the defendant's lawyer and class members should be directed to the representative plaintiff's lawyer after certification? If not, how should the defendant's lawyer communicate with class members?

(19) Do you agree the court should review defendant communications with class members about individual settlements after certification? If not, what, if any, defendant communications with class members should require court review?

5.1. The High Court already has powers to oversee and manage class actions in a way that protects the interests of class members and has demonstrated its ability to exercise those powers in a way that does so.

5.2. Our view is that clarifying and widening the powers of the court is the best mechanism to protect class members, not imposing potentially burdensome obligations, rules and processes on a representative plaintiff and their lawyer that may reduce the likelihood of meritorious claims being commenced and which may otherwise introduce dispute, create uncertainty and lead to unintended consequences.

Representative plaintiff's suitability as part of a certification test

5.3. Before turning to address question 14, we consider it important to revisit the Commission's view that a court should consider the representative plaintiff's suitability as part of a certification test.[50] We respectfully disagree, for the reasons set out in our submission to NZLC IP45,[51] and as summarised below.

5.4. First, the early scrutiny of a representative by the court but, more problematically, and most likely more intensely, by a defendant,[52] is likely to seriously discourage individuals, especially the disadvantaged and vulnerable, from taking on the role. Given its centrally important, demanding and unpaid nature and the disproportionate risk and cost burden representative plaintiff's carry, that would be a grave error.

5.5. One must consider the range of characteristics of a representative plaintiff, the class they represent and the claims brought. They may come from seriously disadvantaged socio-economic backgrounds and may be vulnerable, young or intellectually impaired. They may not speak English as a first language and their literacy may be poor. They may, for good reason, have antipathy to the law, lawyers and the legal process. They may come from rural, regional or remote communities. Their claims may arise from unconscionable or predatory defendant conduct or serious human rights abuses by State agencies or institutions.

5.6. Their claims as enabled by the proposed regime may be lower value or higher risk actions not already the subject of claims. These types of claims are likely to include consumer, Government liability claims and employment/wage underpayment claims.[53]

5.7. If the objectives of the regime are to be met, it is imperative that its design features do not disincentivise these types of claim being brought by these individuals, even if the features, like a suitability inquiry, may seem reasonable to lawyers and judges in theory.

5.8. Consider, for example, the Northern Territory Detention Youth Class action conducted by this firm on behalf of approximately 1200 aboriginal youth detainees subjected to the illegal use of force by prison officers including handcuffing, strip-searching and isolation.[54] Requiring a representative from that class of persons to be exposed to scrutiny at certification, from their perspective, would be like re-exposing them to a system that represents oppression and cruelty and may stymie the very bringing of such actions. Such an approach does not represent a trauma-informed approach to the law.

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[50] Issues Paper 48, [1.84], draft legislation cl 4(1)(c).
[51] MB submission to Issues Paper 45, Chapter 10 (page 42) and Chapter 11 (page 48).
[52] Other submitters including Professor Michael Legg (Submission 046), have noted how hard defendants in comparator jurisdictions with certification like the United States "strongly fight certification as a method of avoiding the class entirely", paragraph 10(a). The same should be expected in Aotearoa New Zealand.
[53] Being the three most significant types of claims in Australia in the year to 30 June 2021, see KWM, The Review Class Actions in Australia, 2020/2021, page 6. <https://www.kwm.com/en/au/knowledge/insights/the-review-class-actions-australia-2020-2021-20210917>The trend of cases in Australia also shows a strong focus on human rights, environmental and social and corporate governance issues.
[54] *Dylan Riley Jenkings & Anor v Northern Territory of Australia*, Federal Court of Australia, Northern Territory Registry, NTD64/2016. See also https://www.mauriceblackburn.com.au/class-actions/current-class-actions/nt-youth-justice-class-action/

5.9. Take another consumer class action conducted by this firm in which the representative plaintiff was a young aboriginal mother who entered into a contract for the purchase of basic home furniture which, without action, may have led to her making ongoing payments in near perpetuity.[55] Following the launch of the case the young woman was subjected to online abuse leading her to, not unreasonably, want to withdraw from her role as representative plaintiff.[56] Being subjected to attack by a defendant's lawyers on certification is likely to be at least as confronting, if not a significant deterrent to taking on the role.

5.10. The proposed suitability test risks *playing the woman and not the ball*, when the focus of certification, should be on the merits of the claim. It may therefore act as a barrier to access to justice.

5.11. In our experience, it is often very difficult to find a person willing to serve as a representative plaintiff.[57] A suitability assessment at certification is likely to make it even harder. Added to the list of things requiring consideration when selecting a representative plaintiff will be an assessment of a person's ability to withstand attacks as to their motives and capabilities at an early point in the case. That sort of inquiry should not be a feature of a fair and balanced regime. The role of the representative should be open to all individuals with a worthy claim – not just the easily defensible.

5.12. Whilst a representative should always have the capacity and preferably the temperament to give evidence in support of their individual claim at trial if need be, the need for that to occur is rare, given how few cases go to trial and if then, only after years of case conduct and the development of a trusted solicitor client relationship. The time from case preparation and commencement to certification may not be sufficient to allow such relationships to develop.

5.13. Second, scrutiny as to a representative plaintiff's suitability at certification will not manage class actions in an efficient way. By making such an inquiry mandatory in *each* case, it brings forward an issue that rarely ever arises. That is because the interests of the representative plaintiff and group members on the common issues will, in nearly all instances, be wholly aligned.[58]

5.14. We submit it is preferable that the status quo be maintained and the court be left with the flexibility to determine issues which *may* arise. The courts have extensive powers to manage representative and group proceedings. At a practical level it is the courts' supervisory powers, rather than any mechanism of control or supervision by group members or similarity of interest between the representative party and the group members, which ensures the group members' claims are adequately prosecuted.[59]

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[55] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019]FCA 2196. At the time of the commencement of the action the young woman had paid thousands of dollars for a second-hand bed worth less than $300.

[56] She did not, much to her credit, and to the benefit of 54,606 group members who received refunds following settlement of the class action.

[57] A difficulty we note that other submitters have flagged, for example Associate Professor Kate Tokeley's submission (007) in relation to consumer class actions, which persuasively argues for a need for consumer class actions given, inter alia the lack of public enforcement mechanism for breaches of the *Consumer Guarantees Act* 1993 (page 6).

[58] See our response to Question 14 below.

[59] Grave & Adams [5.100]

5.15. Adequate protection of group members is better achieved by the court giving effect to its supervisory and protective role to class members, which is able to be reflected by other aspects of a class action regime, including opt-out provisions[60], mandatory notice requirements,[61] the ability, in certain circumstances, to substitute representative plaintiffs[62] and importantly an application to declass the proceeding.[63]

5.16. Our strongly held view is that the representative plaintiff's suitability as part of a certification test should not be maintained. This can be done by deleting clauses 4(1)(c) and 4(2) of the draft legislation.

> 14. What obligations should the representative plaintiff have? For example:
>
> a. Acting in the best interests of the class
> b. Ensuring the case is properly prosecuted.
> c. Being liable for adverse costs (or ensuring an indemnity is in place).
> d. Making decisions on any settlement, including applying for court approval of settlement.

5.17. Our view is that the obligations of representative plaintiffs should not be overly prescriptive. A list of prescriptive obligations may deter representative plaintiffs from taking on the role. Further, the Australian experience strongly suggests that a need to identify and formulate each obligation with clarity is unnecessary.

5.18. Having said that, we agree in principle with the Commission's formulation of what the core obligations of the representative are[64] - with one important qualification. Any obligation of the representative plaintiff only arises from their representing class members with respect to the claims that give rise to the common issues of law and fact. A representative party and group members are privies in interest only with respect to those common claims.[65] Put another way, the interests of a representative plaintiff and group member only need to be aligned to the extent that each have an interest in the common questions.[66]

5.19. So, given those confines, it is best to not overly prescribe obligations that may encroach into individual issues and invite occasions for argument.

5.20. The Australian *Federal Court Act* and State analogues provide little prescription of the obligations and functions of the representative party.[67] There are no express requirements of the representative party other than that they need standing to bring their own claim. [68] While other steps in a representative proceeding require the

[60] s 33J, *Federal Court Act of Australia 1976* (Cth).
[61] S 33Y, *Federal Court Act of Australia 1976* (Cth).
[62] S 33T, *Federal Court Act of Australia 1976* (Cth).
[63] S 33N, 33L and 33M and *Federal Court Act of Australia 1976* (Cth).
[64] Including to fairly and adequately represent class members, and each of the obligations set out at (a) – (d).
[65] *Timbercorp* (2016) 259 CLR 212, 223 [1]–[2], 224 [7] (French CJ, Kiefel, Keane and Nettle JJ), 242–3 [83]–[87] (Gordon J).
[66] As expressed by Gordon J in Timbercorp, Ibid 254
[67] Grave & Adams [5.100]
[68] Grave & Adams [5.100]

representative plaintiff to make decisions or provide instructions on behalf of class member, the legislation provides little by way of prescription or prohibition of the representative plaintiff's conduct and functions.[69]

5.21. It has been left to the courts to oversee the relationship between representative plaintiffs and group members. That has worked well.

> 15. Should the representative plaintiff's obligations be set out in a class actions statute?

5.22. No, our view is that the representative plaintiff's obligations are better not "set in stone" in statute. It is preferable that the obligations not be overly prescriptive, as in the Australian regime. If they are to be prescribed they are better set out in guidelines or a practice note, or perhaps in the High Court Rules.

5.23. That is because:

(a) The obligations exist independently of any statute, as the Commission notes.[70]

(b) Judicial officers should be given flexibility to manage issues that may arise concerning plaintiff's obligations by turning their minds to the individual facts and circumstances of each case that comes before them, without regard to a list.

(c) Listing the obligations in a statute, may in our view, present opportunities for costly 'satellite' litigation over the consistency or interaction between the obligations as expressed and any contractual commitments, that may undermine the objective that claims be managed efficiently.

(d) The inevitable evolution of the new regime may lead to a reframing of any obligations as formulated on commencement, so that any list may be rendered redundant after a reasonably short period.

5.24. A practice note or guidelines could otherwise incorporate the relevant conflict of interest guidelines for lawyers in the way the Australian Federal and State Courts practice notes do.

> 16. How can a representative plaintiff be supported to meet their obligations?

5.25. A representative plaintiff is best supported to meet their obligations by first, having legal representation with a sufficient level of expertise and resources, and second, through the court exercising its supervisory and case management powers in a just, flexible and efficient way, mindful of its role as guardian of the interests of the class.

[69] Grave & Adams [5.110]
[70] Issues Paper 45, [3.16].

5.26. The representative plaintiff is *not* supported by being subjected to scrutiny of their suitability and understanding of their role in each case as part of a certification process.

5.27. Giving a defendant the opportunity to challenge a representative plaintiff in *every* case is not appropriate or efficient. It may perversely incentivise a defendant to *go hard* given the possibility of it allowing them to avoid the case entirely.

5.28. The regime should provide other means of a defendant challenging a representative, including through use of a s33N declassing application in appropriate circumstances. In practice it rarely does.

5.29. The *defendant's* conduct is the conduct that should be the real focus of scrutiny by the class action, not the plaintiff's understanding of their role in a regime whose objective is to improve access to justice.

5.30. Litigation committees are appropriate in some contexts. A recent example in our experience is used to assist with the conduct of the Queensland Floods Action.[71] But we agree with the Commission that it should be up to the representative plaintiff and their lawyer to decide whether a litigation committee is appropriate in each class action. In many instances it will not simply not be efficient or productive.

> 5. Do you agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class after certification?
>
> a. If so, what duties should the lawyer owe to the class?
> b. If not, what relationship should exist between the representative plaintiff's lawyer and the class?

5.31. No, we do not agree that the representative plaintiff's lawyer should be regarded as the lawyer for the class after certification, if that means having a solicitor- client relationship with the class members. There are significant risks of unintended consequences of imposing that sort of relationship on the representative plaintiff's lawyer and class members which are at odds with the objective of improving access to justice.

5.32. We are strongly of the view that the status quo should be maintained,[72] with the obligations of the representative plaintiff's lawyer towards to class members being those which the Commission sets out at paragraph 3.39.

5.33. It is accepted in Australia that the representative plaintiff's lawyer has obligations to the class.[73] Whilst the precise nature of those obligations are, to some extent, unclear,[74] there is no empirical evidence to suggest that that class members are treated unfairly

[71] *Rodrigues & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater*
[72] See Issues Paper 45, [3.36].
[73] Which obligations the Commission notes, correctly in our view, in the Issues Paper at 3.39. See *Dyczynski v Gibson* [2020] FACFC 120; *CJMcG Pty Ltd as Trustee for the CJMcG Superannuation Fund v Boral Limited (No 2)* [2021] FCA 350; *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd* (administrators appointed) (No 4); *Nakali Pty Ltd v SurfStitch Group Ltd* [2021] NSWSC 121.
[74] As the Commission notes. See the cases cited above.

and that the representative plaintiff's lawyers have not been able to act in the best interests of group members whilst acting for the representative. On the rare occasion where failures have occurred, the system has been shown to be resilient enough to identify and resolve any problem.

5.34. Take the most egregious example of misconduct by a representative plaintiff's lawyers to enrich themselves at the expense of the group members, the now infamous Banksia class action.[75] In this case the lawyers and a litigation funder were found to have engaged in "egregious conduct in connection with a fraudulent scheme" to enrich themselves at the expense of class action members by deceiving the court about their fees and concealing major conflicts of interest. [76]

5.35. Despite the grave misconduct, Justice Dixon observed that the case – which has been frequently cited in arguments for stricter regulation of class actions – served instead to properly demonstrate the capacity of the legal system to properly self-regulate, saying:

> *Care should be exercised in identifying the lessons to be learned for the future. A bad apple is not the harbinger of a diseased orchard. From my 'ringside' perspective, I saw no reason to be concerned about the efficacy or regulation of group proceedings or litigation funding as pathways for access to justice, or about the capacity of the legal system to properly self-regulate.*
>
> *This judgment also records the restorative capacity of the civil justice system to protect fundamental values, to protect its integrity through the commitment of the judiciary and the profession to preserve, maintain and nourish the common law's absolute commitment to the proper administration of justice. Ultimately, despite the best efforts of the Contraveners, the spoils were never divided.*
>
> *The public duty, developed in the common law, to always engender and protect the proper administration of justice remains as deeply rooted in the legal profession as it is in the judges. It was discharged by many, in different ways, throughout the course of this proceeding. For the integrity and commitment of the overwhelming majority, I express the court's gratitude*.[77]

5.36. We have no doubt that the public duty observed by Justice Dixon is just as deeply rooted in Aotearoa New Zealand's legal profession and judiciary.

5.37. Moreover, certification is meant to primarily be a process by which non-meritorious claims are weeded out. Conceptually it should not make a difference to the relationship between the lawyers and the class. To do so is also premature since, in many instances and certainly in open classes, the scope of the class will only become clear after opt out.

5.38. The solicitor client relationship is governed by an existing wide-ranging framework pursuant to which solicitors have obligations to their clients. Solicitors are subject to fiduciary duties to their clients, ethical duties to the Court, statutory duties under legal profession acts and professional codes of conduct and practice rules. This framework

[75] *Bolitho v Banksia Securities Ltd (No 18)* (remitter), [2021] VSC 666
[76] The lawyers involved, have now been struck from the roll of practitioners, will face criminal investigation and must pay group members $11.7m in damages.
[77] Bolitho v Banksia Securities Ltd (No 18) (remitter), [2021] VSC 666 at [1241].

is ill-suited to the application of duties owed to what may be very large groups of unknown persons from a very early stage of a case.

5.39. Whilst the Commission acknowledges that it should not try to apply the traditional solicitor-client relationship to that of the representative plaintiff's lawyer and the class,[78] the Commission's proposal for new legislation and new conduct rules to govern the relationship risks being over prescriptive in an area not requiring remediation.

5.40. Prescriptive rules are unnecessary given that the Court's inherent jurisdiction and powers under the High Court Rules and lawyers' existing professional obligations are adequate to respond to issues as they arise.

Burden on representative plaintiff's lawyer of class wide obligations and class wide communications and possible deterrence

5.41. Importantly, imposing class wide obligations on the representative plaintiff's lawyer at such an early stage of a case may also deter lawyers from conducting class actions or oppressively burden those who do.

5.42. The fact that class members may have limited contact with the representative plaintiff's lawyer and incomplete information about the cost, progress and likely outcome of the proceedings is inevitable to some extent. That is because in most cases the plaintiff's lawyers will not be able establish and maintain with all class members the degree of contact that they have with the representative plaintiff.[79]

5.43. Class member communications require a considerable amount of work and care and are difficult to manage for even the most well-resourced and experienced law firm. The challenges are compounded when the class is large, or vulnerable or unknown or difficult to contact.

5.44. Different types of class action tend to present their own class communication challenges. For example:

(a) Consumer class actions often involve large classes, with many members from the socio-economically disadvantaged background, and some members with housing instability or intermittent or non-existent internet access.

(b) Human rights and social justice class actions may be for class members from rural or remote communities, who may not speak English as a first language and who may be very wary of contact from lawyers and therefore difficult to communicate with.

(c) Shareholder class actions usually require the extraction, transfer and management of complex and often voluminous transaction data sets.

5.45. The representative plaintiff's lawyer needs to be careful that group member communication is efficient and, if possible, closely connected to the conduct of the case. While communications with class members are an essential part of the conduct

[78] Issues Paper 45, [3.50].
[79] A point acknowledged by the Victorian Law Reform Commission in its *Civil Justice Review* (2008), at [4.4].

of class actions, on many occasions they may not advance the case management of the common issues of the case *per se* and may therefore not be recoverable as a cost of the proceeding. Nor will litigation funders want to pay lawyers' high legal fees, or sometimes *any* legal fees, for managing group member communications and notices.

5.46. Law firms with scale and experience have teams of dedicated lawyers and paralegals, response centre staff and digital systems to assist with group members communications. But many, probably *most* law firms, especially smaller firms, will not.

5.47. At a practical level there is the real potential for a representative plaintiff's lawyers to be overwhelmed by the weight of class member communications and notices in a way that may seriously impact their ability to conduct the case.

5.48. Equality of arms of a new regime for class actions will be a real issue. The representative plaintiff's lawyer may lack the resources and funding of defendants' lawyers. Whilst litigation funding can help with that, it won't provide a solution across the board.

5.49. A consideration of the 51 submitters for Issues Paper 45 self-evidently raises this issue. There is a heavy predominance of commercial firms most likely to represent well-resourced fee-paying defendants. As far as we can discern, very few lawyers likely to conduct class actions for plaintiffs have made submissions.

5.50. In light of this, we urge the Commission to consult with those lawyers who have acted for representative plaintiffs in class actions in Aotearoa New Zealand so far. Those lawyers will likely recount the real-world challenges of class actions that they have confronted: how hard fought the cases are, how out-resourced they may have been or felt and the costs pressures they have faced.

5.51. A new regime will likely compound those challenges if it imposes additional obligations on the lawyer in relation to class members at an early stage of the case. That will especially be the case given that the new regime should encourage new types of class actions like consumer class action, which will have larger class sizes and more disparate constituents including the vulnerable.

5.52. If the regime is to operate well and in accordance with the stated objectives it should encourage, or at the very least not *discourage, lawyers* to take on worthy class actions, not confront them with burdensome rules that may act as a bar to entry or which may stymie the development of the regime in its infancy.

> 18. Do you agree communications between the defendant's lawyer and class members should be directed to the representative plaintiff's lawyer after certification? If not, how should the defendant's lawyer communicate with class members?

5.53. If certification is ultimately the approach endorsed by the Commission, we agree with the proposal that following certification communications between the defendant's

lawyer and class members should be directed to the representative plaintiff's lawyer. We address related matters to this issue in response to Question 19 below.

> 19. Do you agree the court should review defendant communications with class members about individual settlements after certification? If not, what, if any, defendant communications with class members should require court review?

5.54. We agree the court should review defendant communications with class members about individual settlements after certification. Indeed, we support an approach that requires all communication between a defendant and all class members (including unrepresented class members) regarding settlement be conducted through the representative plaintiff lawyers after Court review. In our submission, this is consistent with the Court's supervisory jurisdiction and protective role over the interests of class members that was undertaken by the Court in *Ross v Southern Response*[80].

5.55. The general position at law is that unrepresented class members should be able to freely negotiate the resolution of their claims with defendants. This position, when stripped of its contextual features, is axiomatic insofar as it reflects the "general policy of the law to encourage out of court settlement of disputes and to promote the individual's right to enter negotiations for settlement without inhibition"[81]

5.56. However, this principle does not accurately describe the circumstances of unrepresented class members in a class action as it de-contextualises their individual right to bargain from their collective power to achieve an optimal outcome as a member of a class. In most circumstances, defendants will settle individuals claims because the class action is on foot and in an attempt to disaggregate the claims and undermine the proceeding, rather than out of a recognition of liability or contrition which is motivating their conduct.

5.57. By decontextualising a class member's legal right to settle from the procedure that brought the settlement offer into existence there is the potential to expose class members to prejudice and exploitation. Individual settlements offer a strategic advantage to defendants which have, at minimum, objective:

(d) obviate the supervisory jurisdiction of the court;

(e) to minimise the amount of money payable by settling on an individual basis in which the informational and power asymmetry between the defendant and class members confers leverage on the defendant that is likely to result in a lower gross resolution to the class member; and

(f) undermine the efficacy and economics of the class action and take the settlement negotiation outside the expertise of the lawyers running the litigation

[80] *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2453 (results judgment); and *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2451 (reasons judgment).
[81] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [52] per Sackville J)

with subject-matter expertise and an intimate knowledge of the issues in dispute.

5.58 There are circumstances in which defendant communications may prejudice the interests of class members individually and as a whole. We agree with the concern's raised by the Commission that, if defendants are able to communicate and settle claims with class members without supervision:

(a) There are risks that the defendant may seek to unfairly settle a claim quickly and cheaply with uninformed class members[82]

(b) A large number of individual settlements could also effectively dispose of the class action entirely without having gone through the settlement approval process;[83] and

(c) if a settlement offer goes to class members at the same time as an opt-in/opt-out notice, there is potential for confusion.[84]

5.59 In Australia, the position is that the Court will only interfere with settlement communications between a defendant and a class member to avoid injustice or unfairness to class members.[85] In many circumstances it will be difficult to assess whether this is the case in the absence of clear misleading or intentional conduct from the defendant. Practically, it is difficult to assess as the communications and ultimate settlement are typically not available to the representative plaintiff's lawyers in order to undergo this assessment. In *Courtney v Medtel Pty Ltd* (2002) the circumstances in which the Court will intervene were described in the following terms:[86]

> *If, for example, there is evidence that an offer is about to be or has been made to group members in terms that are misleading or in circumstances that are unfair to the group members, the Court may take the view that its intervention is necessary or appropriate to avoid injustice to the group members. Where intervention is considered appropriate, the form of intervention must depend on the circumstances of each case*

5.60 The unique nature of class actions and the prejudice that can be done to individual class members and the class as a whole if individual settlements are not reviewed supports oversight and supervision by the Court. We acknowledge that the Commission has considered the standard of review will be to "check the communication properly characterises the class action and is not otherwise unfair or misleading."[87]

5.61 We do not oppose this standard but refer the Commission to the position in Australia. The categories which may generate unfairness or injustice are not closed.[88] Moreover, as Beach J found in *Davaria "*actual or threatened conduct by a respondent

[82] NZLC IP48 at [3.67].
[83] NZLC IP48 at [3.67].
[84] NZLC IP48 at [3.67].
[85] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [54] per Sackville J; *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCA 398, per Beach J at [21].
[86] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [54]
[87] NZLC IP48 at [3.69].
[88] *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020

concerning such communications need not rise to the level of actual or likely unlawful conduct in order to justify the exercise of such a power [to intervene]."[89]

5.62 In *Courtney v Medtel,* Sackville J thought the following was generally appropriate in relation to settlement offers:[90]

> *I do not think it appropriate to attempt to set out exhaustive guidelines in advance as to the form that a settlement offer to unrepresented group members might take in order to avoid the risk of being characterised as misleading or unfair. In the present case, however, I think that there is much to be said for respondents' offers of settlement to the unrepresented remaining Group Members meeting the following standards:*
>
> - *the offer and any accompanying material be in writing (a proposition the respondents accept);*
> - *the documentation accurately explains the consequences of accepting and not accepting the offer;*
> - *the offer allows a period for acceptance that is sufficient to the Group Member with a genuine opportunity to obtain legal advice, should the Group Member wish to do so; and*
> - *the documentation makes it clear that the Group Member is entitled to seek and might benefit from independent legal advice.*

5.63 The above approach however is not fixed. For example, if there is evidence of susceptibility to exploitation and asymmetry of bargaining power such that the class have been exploited in the same way before, it may enliven the intervention of the Court.[91] In referring to the above approach in *Courtney v Medtel* the Court in *Capic v Ford Motor Company of Australia Limited* stated:

> *There may be cases where a more rigorous regime may be necessary. As is often the case, context is everything. If the group members are definitionally under some disability relating to education or cognition, plainly a different approach may need to be taken.*[92]

5.64 In formulating its approach, we encourage the Commission to consider an expansive and non-exhaustive approach to interpreting matters that may be unfair or misleading so as to justify intervention of the Court. In particular, considering the individual attributes of class members and whether the subject-matter of the proceeding or the context of the individual settlement discloses vulnerability or susceptibility to influence that may be exploited by defendants to the class members ultimate detriment.

[89] *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCA 398, per Beach J at [21]
[90] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [64]
[91] *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020 at [31]
[92] Ibid at [23]

6. CHAPTER 4: DURING A CLASS ACTION

(20) Do you agree with our list of events that should require notice to class members?

(21) Should the court have the power to order the defendant to:

a. Disclose the names and contact details of potential class members to the representative plaintiff?

b. Assist with giving notice directly to class members?

(22) Do you agree with our proposed requirements for an opt-in/opt-out notice?

(23) Do you agree that the High Court Rules and the court's inherent jurisdiction are adequate to ensure the efficient case management of class actions? If not, what specific provisions are needed? For example:

a. A general power for the court to make any orders necessary in a class action?

b. Specific provisions for class actions case management conferences?

c. Restrictions on filing interlocutory applications in class actions or procedures for dealing with interlocutory applications in an expedited way?

d. Automatic dismissal of a class action proceeding that is not progressed within a certain time frame?

(24) Do you agree that:

a. There should be a presumption in favour of staged hearings in class actions?

b. The court should have flexibility as to which issues are determined at stage one and stage two hearings?

(25) How can individual issues in a class action be determined in an efficient way? For example, should the court have the power to:

a. Appoint an expert to enquire into individual issues.

b. Order individual issues to be determined through a non-judicial process, where the parties agree to that.

c. Give directions as to the form or way in which evidence on individual issues may be given.

(26) Are current rules for discovery and information provision adequate for class actions or are specific rules required? For example:

a. Should there be a specific rule permitting discovery by class members?

b. Should the defendant be entitled to any information about class member claims such as a list of class members who have opted in or the number of class members who have opted out?

(27) Do you support?

a. The court having an express power to make common fund orders; and/or

b. The court having an express power to make funding equalisation orders.

(28) If common fund orders are available, when in the proceeding should they be made?

a. At an early stage of the proceeding, with the rate set at this stage.

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

c. After the common issues are determined.

d. At a late stage of proceedings, such as at settlement or before damages are distributed.

e. The court should have discretion in an individual case.

6.1 As an overarching comment to this section, our view is that the management of class actions by the court will be assisted by:

(a) the enactment of a provision to confer the widest possible power on the court to do whatever is appropriate or necessary to ensure the interests of justice are achieved, analogous to s33ZF of the Federal Court Act and its State analogues.

(b) a practice note which sets out the guiding principles for the conduct of class actions, which may be flexibly applied and which addresses the practical matters which frequently arise in class actions, some of which are raised by the questions in this chapter including:

(i) case management;

(ii) conflicts of interest;

(iii) notice to group members;

(iv) discovery;

(v) competing class actions;

(vi) communications to group members;

(vii) opt out notices;

(viii) settlement - requirements for court approval & documentation.

20. Do you agree with our list of events that should require notice to class members?

6.2 We agree that the proposed list of events at [4.5] of the Supplementary Paper may require notice to class members. In most cases, the events identified are the subject of mandatory notice provisions under the various Australian class action regimes.

6.3 As a matter of principle, the legislature should empower the Court to issue notices in a manner that enables appropriate flexibility and judicial discretion to tailor notices to the circumstances of each case and deal with unexpected issues that routinely arise in the course of litigation. A common-sense protection to ensure that mandatory notices are not over-used, costly or unnecessary/unresponsive to the circumstances of a case is to include a discretion that the Court may not issue a notice where, "it is just to do so".[93]

6.4 The Commission has expressed a view that notice should generally be required if an event affects the interests of class members. We agree with this general framing principle, noting that it must be balanced against:

(a) The cost of distributing the notice and the decision should seek to "find the most economical means of ensuring that the group members are informed of the proceeding and their rights"[94]. In particular because that the costs will ultimately be borne by the parties and may reduce the in-hand returns to class members.

(b) Notice should be limited to non-trivial matters that effect the legal rights and interests of class members, particularly stages in the proceeding that invite or require the class members to take an active step (opt out; opt in; registration etc.). It should be noted that over-disclosure to class members can have the effect of confusing or inundating class members with correspondence, which is counter-productive to the objective of keeping class members reasonably informed with clear and concise communications; and

(c) The fact that information about the proceeding is available in real-time from the solicitors for the representative plaintiff and the class at all stages throughout the proceeding.

[93] This type of qualification appears throughout the *Federal Court Act*, in particular at s.33X(4), 33V(2) and s.33ZF. Recourse to what is "just" requires a construction exercise that is broad and consideration of factors which balance the interests of parties and non-parties, costs, balances of convenience and prejudice, and forces an enquiry into the overarching scheme of the legislation, public policy and public confidence in the regime.
[94] *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 at [30] quoting *Femcare Ltd v Bright* [2000] FCA 512, (2000) 100 FCR 331 at [74].

6.5 In Australia, there is a comprehensive statutory regime that covers the distribution and minimum content requirements of notices to class members, pursuant to ss.33X and 33Y of the Federal Court of Australia Act 1976 (Cth). In respect of this regime we refer to and repeat our submission to Question 39.

6.6 Critically, the Australian notice regime includes a general notice provision at s.33X(5). This is an independent head of power that can be exercised at any stage in a proceeding and is not reliant upon some other procedural condition precedent for its exercise i.e. settlement approval.95 This is an important procedural tool to make available to the Court and the parties to deal with any matter that may require notice throughout the litigation and it maintains maximal flexibility and discretion as to the manner and form of the notice. A power similar to s.33X(5) enables a Court to fashion appropriate orders in a manner that is responsive to the circumstances of each case, and flexibly accommodates the type of proceeding (opt in / opt out) and stage of proceeding. We submit that a comprehensive notice regime akin to s.33X and s.33Y of the FCA should be considered for inclusion in the Draft Legislation.

6.7 In relation to the requirement to give notice for an application to discontinue at [4.5(b)], we refer to and rely upon our submission in response to Question 37.

6.8 In relation to the requirements to give notice regarding settlement and where individual participation is required, we refer to and rely upon our submissions in response to Questions 39, 40, 47 and 48.

> 21. Should the court have the power to order the defendant to:
>
> a. Disclose the names and contact details of potential class members to the representative plaintiff?
> b. Assist with giving notice directly to class members?

6.9 Yes, the court should unquestionably have the power to order the defendant to (a) disclose the names and contact details of potential class members to the representative plaintiff and (b) otherwise assist with giving notice directly to class members.

6.10 The reasons for that is that in many situations it will only be the defendant that will have that information and in many instances only the defendant with the systems in place for communicating with class members and the resources to do so.

6.11 The Federal class action practice note relevantly states:

> *12.3 Where the class members are, or are likely to be, identifiable from a respondent's records (for example, shareholders of a respondent corporation or unitholders in a managed investment scheme) then the parties should, subject to any clear statutory or legal obligations requiring otherwise, cooperate with a view to using the respondent's records as the basis for a direct mail or email distribution of notices, whether by the applicant, by the respondent or by a third party (for example, a commercial mail house).*

[95] *Lenthall v Westpac Banking Corp (No 3)* [2021] FCA 1004 at [45].

12.4 An objection to the use of the respondent's records to assist the opt out process in this way must be advised by the respondent to the applicant's lawyer at the earliest practicable opportunity. The parties should engage in a genuine effort to resolve the issue in a practical way before agitating the issue before the Court.

6.12 Our view is that similar provisions should be incorporated in a practice note for the Aotearoa New Zealand regime.

> 22. Do you agree with our proposed requirements for an opt-in/opt-out notice?

6.13 We agree with the proposed requirements for an opt-in/opt-out notice and the principles that inform the proposals.

6.14 We refer to the sample Opt Out Notice that appears at Schedules A of GPN-CA as an example of how standardised forms may assist parties in drafting notices and help the Court develop common principles of interpretation and comprehensibility for class members and parties alike. Consistent with the approach adopted in GPN-CA we submit that the content of the notices should not be unnecessarily prescriptive, but should be presented as *guidance* on those matters which may be appropriate to include in the notice, subject ultimately to Court approval on the content of the notice. We refer to our submission in response to Question 40 on the content requirements of such notices.

6.15 Importantly, the availability of standardised forms in Australia has not eschewed the role of the Court in exercising its protective function to amend standard terms and approve the ultimate language, form and manner of distribution of notices to class members.[96] The issue of comprehensibility, concision and sensitivity to the attributes of the audience (i.e. literacy levels, language skills, sophistication of the class; selection of appropriate forms of communication such as digital, audio-visual and written)[97] are all fact specific issues which underscore the critical importance of flexibility in content requirements and that judicial discretion is required to ensure communications with the class are effective and efficient.[98]

6.16 We submit that proposed content requirements should be construed as instructive but not mandatory and enable the plaintiff to amend the terms of any standardised notice. The plaintiff will be in a position to justify to the Court any departures from the guiding requirements in any application for approval of the notice, based on the circumstances of each case.

[96] *Kuterba v Sirtex Medical Limited* [2018] FCA 1467; *Cantor v Audi Australia Pty Limited (No 2)* [2017] FCA 104; *Blairgowrie Trading Ltd v Allco Finance and Another* [2017] FCA 330; (2017) 343 ALR 476; *Dylan Jenkings and Anor v Northern Territory of Australia* NTD64/2017.
[97] See discussion of these issues in *Lenthall v Westpac Banking Corp (No 3)* [2021] FCA 1004 at [42]-[51].
[98] *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 at [30].

23. Do you agree that the High Court Rules and the court's inherent jurisdiction are adequate to ensure the efficient case management of class actions? If not, what specific provisions are needed? For example:

    a. A general power for the court to make any orders necessary in a class action?
    b. Specific provisions for class actions case management conferences?
    c. Restrictions on filing interlocutory applications in class actions or procedures for dealing with interlocutory applications in an expedited way?
    d. Automatic dismissal of a class action proceeding that is not progressed within a certain time frame?

6.17 We agree that the existing statutory powers and inherent jurisdiction of the High Court are broadly sufficient to ensure the efficient case management of class actions.[99] We make the following submissions in respect of the specific questions raised for comment at 23(a)-(d).

23. (a) A general power for the court to make any orders necessary in a class action

6.18 We agree that a general power to make any orders necessary in a class action is a valuable and arguably essential provision in the armoury of a functioning and adaptive class actions regime. The importance of such a provision is manifold:

(a) For a new regime it is integral to have a general curative or gap-filling power to resolve issues that will inevitably arise in the course of litigation, which will have been outside the contemplation or foresight of even the most prescient drafter;

(b) Such a power enables the Court to incrementally but flexibly evolve its processes and procedures to adapt to the circumstances and nature of the disputes before it;

(c) Such a power confers a necessary discretion that enables the Court to ensure that its processes and determinations align with public confidence and expectations in the justice system and that it is not unnecessarily hamstrung by an absence of power to act where justice dictates.

6.19 The practical utility of the Australian general power provision at s.33ZF, was cogently summarised by Wilcox J in *McMullin v ICI Australia Operations Pty Ltd* 156 ALR 25 at 260:

[99] NZLC IP48 at [4.22].

> *"…s 33ZF(1) was intended to confer on the court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding. It is understandable parliament should have thought it appropriate to make such a provision. In enacting Pt IVA of the Federal Court of Australia Act, parliament was introducing into Australian law an entirely novel procedure.* ***It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to parliament for amendments to the legislation, it was obviously desirable to empower the court to make the orders necessary to resolve unforeseen difficulties****; the only limitation being that the court must think the order appropriate or necessary to ensure ``that justice is done in the proceeding''* (emphasis added).

6.20 The scope and purpose of s.33ZF has recently been the subject of close judicial scrutiny and is undergoing a phase of re-interpretation. We submit that the following considerations may inform the Commission in formulating its own statutory power so as to avoid similar issues.

6.21 The High Court in *Brewster* held that the words "in the proceeding" used in s.33ZF were words of limitation, which must be construed to limit the matters to which the power may have regard. This has the effect that, as a matter of natural and ordinary construction, s.33ZF must be confined to an order that 'advance[s] the effective determination by the court of the issues between the parties to the proceeding'[100]. This reading of s.33ZF has been interpreted by subsequent Courts as indicating that "the issue or problem must be one arising between the parties currently in that proceeding.[101] Practically this construction forecloses the availability of the power in circumstances that involve the interests of non-parties (such as litigation funders) in circumstances where its exercise:[102]

> *"…does not assist in determining any issue in dispute between the parties to the proceeding; it does not assist in preserving the subject matter of the dispute, or in ensuring the efficacy of any judgment which might ultimately be made as between the parties; it does not assist in the management of the proceeding in order to bring it to a resolution. Nor does it assist in doing justice between group members in relation to the costs of litigation."*

6.22 Arising from *Brewster* a nascent line of authority has emerged which reads down the traditionally broad scope that has been given to s.33ZF. This interpretation holds that the broad discretion conferred by s.33ZF is not a power "at large"[103] that may be exercised to ensure that justice is done generally, but it is a power to do so within the text and structure of Part IVA and as an incident of, or supplementary to, some other power.[104] One reading of this analysis leads to a conclusion that s.33ZF is not only

[100] *BMW Australia Ltd v Brewster* [2019] HCA 45, [50] (per Kiefel CJ, Bell and Keane JJ)
[101] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 384 ALR 650 at [35].
[102] *BMW Australia Ltd v Brewster* [2019] HCA 45, [51] (per Kiefel CJ, Bell and Keane JJ); importantly this extract from the plurality judgment was made in the context of finding that s.33ZF did not have power to order a CFO at an early stage in a proceeding.
[103] *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890 at [4] and [106]-[107].
[104] *BMW Australia Ltd v Brewster* [2019] HCA 45, [60] (per Kiefel CJ, Bell and Keane JJ), [124] (per Nettle J) and [147] (per Gordon J); *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 at [60] and *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473 at [50]; ***Prygodicz v Commonwealth (No 2)*** [2021] FCA 634 at [246]-[247]

supplementary but derivative, in that it relies upon another statutory power to operate.[105]

6.23 To avoid similar issues arising in Aotearoa New Zealand we recommend:

(a) That the proposed general power does not include the words of limitation "in this proceeding" so as to enable the Court to exercise its discretion in respect of non-parties and at all stages in the proceedings;

(b) A clear statement in the enacting materials stating the purpose of the general power is not to be read down as supplementary to another power but that it may operate as a separate head of power;[106] and

(c) Ensure that the general power confers necessary discretionary power on the Court but that the discretion is fettered by protections that the power must be exercised with regard to overarching objectives such as what is appropriate and necessary to ensure that justice is done.

23. (b) Specific provisions for class actions case management conferences?

6.24 In our submission the existing case management powers and inherent jurisdiction of the High Court are sufficient to manage class action proceedings. Indeed, the High Court has been doing so efficiently under High Court Rule 4.24 and its supervisory jurisdiction. We support the development of a Class Actions Practice Note akin to GPN-CA to assist parties, practitioners and the Court staff to efficiently manage the business of the Court and incrementally develop its own processes, as appropriate. We submit that this approach is already within the competence of the Court to manage its own processes and does not require a statutory change.

6.25 In the alternative, the Commission may consider undertaking a review of the new class actions regime once it commences after a certain period (2-3 years). This may be an appropriate stage to consider changes once empirical data has been gathered to inform whether processes can be improved.

[105] *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 at [92]; *Parkin v Boral Limited (Temporary Stay)* [2021] FCA 889 [20]; contrast with *Prygodicz v Commonwealth (No 2)* [2021] FCA 634 at [247].

[106] See the minority decision of Gagler J in *Brewster* in which his Honour expresses the view that it is acceptable for statutory provisions to have an intersecting locus of operation which does not limit or confine the application of the other. Gagler J referred to the way in which ss.33V(2), 33Z and 33ZJ may operate conformably with a "prior or contemporaneous" exercise of power under s.33ZF[106], with the effect that, "[n]either alone nor in combination do ss 33V, 33Z and 33ZJ therefore prevent a CFO made under s 33ZF(1) (at [118]). The minority judgment of Gagler J criticises the majority's interpretation of the scope of operation of s.33ZF, stating at [116]:

> *Few of the powers conferred by Pt IVA are so "limited and qualified" as to exclude the operation of other, more generally expressed powers located within the Part or elsewhere in the Federal Court Act. None of them is so limited or qualified as to confine the scope of s 33ZF(1) in any relevant respect (footnotes omitted).*

> 23. (c) Restrictions on filing interlocutory applications in class actions or procedures for dealing with interlocutory applications in an expedited way?

6.26 We repeat our submission to Question 23(c) we support the development of a Class Actions Practice Note akin to GPN-CA that may provide instructive directions on the expedition of interlocutory matters similar to GPN-CA at [7.9].

> 23. (d) Automatic dismissal of a class action proceeding that is not progressed within a certain time frame?

6.27 We agree with the Commission that an automatic dismissal mechanism is not necessary in Aotearoa New Zealand.[107]

> 24. Do you agree that:
>
> a. There should be a presumption in favour of staged hearings in class actions
> b. The court should have flexibility as to which issues are determined at stage one and stage two hearings?

6.28 Yes, we agree with the Commission's preliminary view that the regime should have a provision on staged hearings with a presumption in their favour and that the court should have flexibility as to which issues are determined at each stage.

6.29 As the Commission notes, the Federal Court practice note provides for the appropriateness of a split trial to be considered by the court, allowing the court to have flexibility to determine whether one be ordered and if so, which issues should be determined at the respective hearings. In our experience this works well. Equivalent provisions are in the State analogues.[108]

6.30 The Federal Court class actions practice note also states that

> *Following an initial trial it will be necessary to decide whether the individual claims of class members will be determined within the existing proceeding (e.g. under ss 33Q or 33R of the Federal Court Act) or determined in separate proceedings (s 33S of the Federal Court Act).*[109]

[107] NZLC IP48 at [4.33].
[108] See for example, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions) – Supreme Court of Victoria*, paragraph 15, Trial of Common Questions.
[109] The Federal Court Class Actions Practice Note (GPN-CA) (Practice Note), 13.3.

6.31 Sections 33Q, 33R and 33S of the Federal Court Act and State analogues [110] provide the court with the case management powers to address the non-common issues arising on class members' claims (for example, causation and damages), including by creating sub-groups, including so as to promote finality.

> 25. How can individual issues in a class action be determined in an efficient way? For example, should the court have the power to:
>
> a. Appoint an expert to enquire into individual issues.
> b. Order individual issues to be determined through a non-judicial process, where the parties agree to that.
> c. Give directions as to the form or way in which evidence on individual issues may be given.

6.32 We agree with the Commission that it is important to consider how stage two issues can be resolved in a just and efficient way.[111] The recent Australian experience demonstrates that the efficient determination of individual issues following a stage one trial can be extremely challenging and time-consuming. [112]

6.33 There is a balance to be struck between two competing objectives of precision of assessment and efficiency.[113] Individual compensation in a class action should reflect the merits of each individual claim whilst, on the other hand, the determination process should be completed in a manner that minimises cost and delay.[114] How the balance is achieved should ultimately be a matter for the court to consider, empowered with the widest possible powers to do whatever is appropriate or necessary to ensure the interests of justice are achieved.

6.34 The Australian courts have, until now, been largely spared from having to grapple with the determination of individual issues after conclusion of stage one trials. The jurisprudence hasn't developed as much as may have been expected after 30 years of the regime's operation.[115]

6.35 Most class actions in Australia settle and settle on an aggregate or lump sum basis.[116] That has meant that the means of distributing settlement payments and assessment of what each group member receives has been largely decided by an application of the scheme for distribution devised by the representative plaintiff's lawyers which is required to be approved by the court on settlement.[117] This has proved to work well across the increasingly diverse range of cases being commenced - from shareholder

[110] For example, s 33 Q of the Supreme Court Act 1986 (Vic), *Where not all questions common*, s168, Civil Procedure Act 2005 (NSW), *Determination of questions where not all common, s 103M, Civil Proceedings Act 2011 (Qld), Where not all issues are common*
[111] Issues Paper 45, [4.42[.
[112] As noted by the Commission, Issues Paper 45, [4.42]
[113] VLRC [4.104]
[114] Ibid
[115] As noted by Lee J in Certification speech, page 12.
[116] The most significant reason most class actions settle is simply because they are meritorious.
[117] S 33V(2) of the *Federal Court Act 1986* provides that the court "may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court", and GPN-CA, see 15.1(b)(ii).

cases where the distribution may be by straightforward application of formulas, to the more complex cases with thousands of group members covering different categories of loss which may require the application of complex claim assessments.[118]

6.36 However, with more class actions now proceeding to first stage trial and judgment,[119] the very difficult issues arising on individual *and* aggregate determination[120] and how that can be done in a way that accords with securing a just, speedy and inexpensive determination of the proceedings, have become more pressing.

6.37 We agree that it is unlikely to be feasible to require each class member to give evidence on individual issues and the Court to carry out individual assessments. [121] Such a process is likely to be an extremely cumbersome and time-consuming process that may overburden the court's resources, lead to large disproportionate legal costs being incurred and drag out determinations for years. By doing so, it can undermine the purpose of the class action regime.

6.38 The answer is in giving the court the widest possible powers to do justice in the circumstances at hand, including each of the powers proposed in (a) to (c), informed by the court's consideration of the individual facts and circumstances of each case that comes before it.

6.39 We endorse the Commission's approach of adopting the best of the available approaches used in comparator jurisdictions. In this context, that suggests solutions from Canada.

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[118] An particularly complex example being the combined Kilmore East and Murrindindi Bushfires settlement administrations which involved distribution of almost $700 million to approximately 7,000 group members with approximately 11,653 economic loss/property damage claims and approximately 2,330 personal injury claims among them. Kilmore East bushfire class action, (*Matthews v SP Ausnet)*, settled for $494.7 million; Murrindindi bushfire class action (*Rowe v SP Ausnet*) settled for $300 million.

[119] At least three class actions, each involving large groups of group members are presently grappling with the question of how to determine individual issues following a successful first stage trial, two of which are being conducted by Maurice Blackburn: the Montara oil spill class action with 15,500 group members, (see https://www.mauriceblackburn.com.au/class-actions/current-class-actions/montara-oil-spill-class-action/) and Ryan, R., & Parry, E. (2021). The Montara Class Action Decision and Implications for Corporate Accountability for Australian Companies. *Business and Human Rights Journal,* 1-8. doi:10.1017/bhj.2021.39 https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/montara-class-action-decision-and-implications-for-corporate-accountability-for-australian-companies/175434C5DF3F6361D121A9002B60B49F and the Queensland Floods class action with over 5,000 group members (see https://www.mauriceblackburn.com.au/class-actions/current-class-actions/queensland-floods-class-action/

[120] For an analysis of the current issues in relation to aggregate or lump sum damages see Irina Lubomirska, "*Aggregate damages in disaster class actions"* (2021) 165 Precedent 35

[121] As the Commission notes at Issues Paper 45, [4.50].

26. Are current rules for discovery and information provision adequate for class actions or are specific rules required? For example:

    a. Should there be a specific rule permitting discovery by class members?
    b. Should the defendant be entitled to any information about class member claims such as a list of class members who have opted in or the number of class members who have opted out?

6.40 We agree with the Commission's view that it is not necessary for a class action regime to have a specific provision on obtaining discovery from class members, given that the court already has to power to make an order for non-party discovery.

6.41 Class member discovery prior to an initial trial is an issue that has largely been resolved in Australia as not being required.[122]

6.42 The exercise of any power to order discovery by group members should be the exception, rather than the rule, certainly for stage one trials but also for stage two trials in most cases.

6.43 We urge caution before any adoption of an often-misplaced concern that a defendant must be provided with sufficient information about class members, especially at an early point in the case like certification. In most instances the defendant will know far more about class members than a representative plaintiff. So with respect, ensuring *the defendant has sufficient information about class members* is not a significant problem requiring remedy unless it is required for genuine settlement purposes and should not be a priority for the new regime.

6.44 Our Australian experience strongly suggests that the problem in discovery is not discovery from class members but that discovery from defendants takes too long and is too expensive with insufficient attention to a focused and targeted set of documents being produced by defendants at an early stage of the case.

6.45 To assist with addressing that problem we suggest that Aotearoa New Zealand incorporate into a practice note, equivalent provisions to those now increasingly being in the Federal Court and Victorian Supreme Court practice notes to ensure that critical information is revealed by the defendants early, including the provision of an affidavit setting out where relevant documents are stored, what types of documents exist and in what form they are held.[123] Orders of that nature are now commonplace and effective in Australian cases.

6.46 Turning to question 26(b), in our view, the defendant should not be *entitled* to any information about class member claims – such as a list of class members who have opted in or the number of class members who have opted out. Such an order may be warranted in some circumstances, but in many, and probably most, situations it will not. It is better that the power to make such an order be given to the court for it to

[122] See for example Lee J in *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896
[123] The Federal Court Class Actions Practice Note (GPN-CA) (Practice Note): '*Matters to be dealt with at the First Case Management Hearing*", at [7.8]

consider on a case-by-case basis but that there not be a presumption that the defendant be entitled to it.

6.47 Judges supervising class actions are best placed to make judgments about what is fair and reasonable in the wide-ranging circumstances that will be present in the cases before them. In many instances it will be the defendants who have greater information about class member claims.

27. Do you support?

a. The court having an express power to make common fund orders; and/or
b. The court having an express power to make funding equalisation orders.

6.48 We support an express statutory power to make common fund orders (**CFOs**) and funding equalisation orders (**FEOs**). We repeat and rely upon our submissions to Chapter 21 of NZLC IP45[124] and the ALRCs recommendation for a statutory power to order CFOs.[125]

6.49 A clear statutory power would avoid the recent statutory interpretation issues that have arisen in Australia flowing from the High Court decision in *Brewster*[126] and we commend this approach to ensure clarity and certainty of the position at law.

6.50 Any statutory power to make cost sharing orders should ensure that both CFOs and FEOs are available to the Court. These orders represent alternative approaches to costs sharing and seek to balance and resolve different issues regarding the equitable distribution of litigation funding expenses. Accordingly, the Court should be empowered to make either order as the circumstances of the case require.

6.51 Recent decisions in Australia have introduced a false equivalence between CFOs and FEOs. The majority in *Brewster* advanced an opinion in favour of a FEO over a CFO[127] on the principled basis that it does not impose an additional cost on the unfunded class and takes as it's starting point the actual costs incurred in funding the litigation.[128]

6.52 A significant omission in the High Court's analysis is that it does not consider circumstances in which an FEO may be inappropriate. There is an assumption underlying the reasoning of the plurality and Gordon J that an FEO will reliably produce a better outcome for class members. As was observed by Murphy J in *Uren*, "a funding equalisation order is not always the appropriate counterfactual or

[124] In particular, see [21.15]-[21.32].
[125] *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) - Recommendation 3
[126] *BMW Australia Ltd v Brewster* [2019] HCA 45.
[127] *BMW Australia Ltd v Brewster* [2019] HCA 45, [74], [85]-[90] (per Kiefel CJ, Bell and Keane JJ); and [134], [167]-[169] (per Gordon J)
[128] *BMW Australia Ltd v Brewster* [2019] HCA 45, [88] (per Kiefel CJ, Bell and Keane JJ); referred to approvingly in *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579 at [74]; see also [134]. Importantly, Gordon J expressed a view that an CFO was without power in all contexts and thereby went further than the plurality in expressing a view that an FEO was not merely preferable to a CFO as the accepted solution, see [134]-[135] and [168]-[169].

comparator" to a CFO-type order.[129] Other relevant considerations as to the whether a FEO or a CFO is appropriate in all the circumstances include the following which arise from a mature line of authority in the Federal Court[130]:

(a) The distribution and weighting of losses as between the funded and unfunded group;[131]

(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;[132] and

(c) Whether other expenses are included in the contractual obligations of funded class members under the funding agreement that would be levied upon the unfunded class under an FEO but not necessarily form part of a CFO.[133]

6.53 The clearest example arises in cases where only the representative applicant has entered into a funding agreement, as was the case in *Swann*[134], *Uren*[135] and *Webster*[136]. Murphy J in *Uren* described this circumstance as "significant because a funding equalisation order in the present case could only operate to share across the class the applicant's personal obligation to pay a funding commission to the Funder."[137] The result is a *de minimis* redistribution of costs among the class, amounting to a "free ride" for unfunded members and a *de minimis* return to the litigation funder, which does not fairly recognise the risks and costs assumed by the funder in supporting the litigation to a successful conclusion.[138]

6.54 It is precisely these circumstances which the Court recognised in *Swann*[139], *Uren*[140] and *Webster*[141] as weighing in favour of a CFO-type order being made over a FEO. The approach taken by the funder to only engage in contractual relations with the representative applicant was accepted as appropriate by the Court and may inform how litigation funders will structure their funding arrangements in the future so as to avoid an FEO. In approving the expense sharing order in *Webster*, Murphy J stated

[129] *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [65].
[130] See for example *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* (2017) 343 ALR 476, in particular at [104] in which Beach J concluded that group members would be better off under a CFO than an FEO.
[131] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 338 ALR 188 at [55]-[60]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [162].
[132] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* (2017) 343 ALR 476 at [99(d)]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 338 ALR 188 at [55]-[60]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [168].
[133] *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [167]-[168]
[134] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd and Anor (No. 3)* [2020] FCA 1885 at [26]
[135] *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [65]
[136] *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [119]-[120].
[137] *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [64]
[138] *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [119]
[139] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd and Anor (No. 3)* [2020] FCA 1885 at [26]
[140] *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [65]
[141] *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [119]-[120].

that the inappropriateness of an FEO was relevant to the exercise of his discretion under s.33V:

> *"…whether an expense sharing order or a funding equalisation order is 'just' is necessarily a case specific enquiry. In the circumstances of the present case, in which only the plaintiff entered into a funding agreement and no class members did so, a funding equalisation order would not be just or fair."*[142]
>
> …
>
> *"It would be unjust for class members to receive close to a free ride in the litigation and enjoy windfall gains, and unjust for the Funder to receive a return which would go nowhere near providing a commercially realistic return for the costs he paid and the risks he took in on funding the litigation."*[143]

6.55 Part of the principled justification for the majority's preference for a FEO over a CFO is that it minimises additional costs being levied against class members, particularly the unfunded open class. A counter-intuitive by-product of this preference is that it re-introduces an incentive for funders to undertake book-building, which is a significant contributor to the overall costs of a proceeding that are ultimately recovered against the whole class under an FEO and a CFO. FEOs incentivise book-building in order that the funder's contractual entitlements are maximised across the largest possible group.

6.56 It is arguable that the effect of removing the availability of CFO's early in a proceeding following *Brewster* has been to diminish the power of the Court to regulate litigation funding commissions. In *McKay,* Beach J made the following *obiter* remarks regarding the impact of *Brewster* on competing claims and the ability of the Court to effect commission rates:

> *…flowing from BMW Australia Ltd v Brewster, I now have less flexibility to deal with commission rates. In my respectful view, this is something that the legislature should address sooner rather than later…Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play*.[144]

"Opt out" class actions

6.57 We accept that in an "opt out" proceeding it is entirely appropriate that the Court considers and decides what is a fair and reasonable commission to be recovered from the class in circumstances where not all class members have entered into retainers with the lawyer or funding agreements with a litigation funder. This is on the principled basis that members of the open class that have not entered any funding arrangement have not agreed to be bound by contractual terms. In our submission, Courts should be empowered to make a cost sharing order to ensure that all group members bear a proportionate share of the costs of the litigation so as to ensure they are *"shared fairly*

[142] *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [117]
[143] *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [119]
[144] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 at [34].

between the representative party and those group members who ultimately benefit from the representative proceeding".[145]

6.58 We submit that the most appropriate mechanism to achieve that equity among the class, solicitor and litigation funders is by the operation of a cost sharing mechanism. Cost sharing mechanisms may take various forms such as a CFO or FEO.[146] Cost sharing orders are not derivative of a contractual right under a funding agreement but arise as a separate order of the Court in an "opt out" or open class proceeding in which the class is comprised both by members who have entered a funding arrangement and those who have not. Accordingly, they are a different type of order: the power to order a cost sharing order is not coextensive with the power to vary or amend other terms in a funding agreement.

"Opt in" class actions

6.59 We submit that where the class action is "opt in" there is a reasonable basis for the Court to find that the contractual funding commission rate should be applied to class member recoveries and this does not require further intervention of the Court. We submit that the Court should not disturb the private contractual promises of parties under the funding agreement unless there is a valid basis to challenge those terms under relevant protective legislation or rights at common law or equity.

6.60 There is support for this position in Australia.[147] Indeed, it has been held that *"regard must be had to the foundational matter"* that parties bind themselves to contract by executing agreements, which enables third parties to assume the legal efficacy of the instrument.[148] The power to vary the terms of a funding agreement and *"upset the contractual relations freely arrived at in the absence of any complaint by a party to the contract"*[149] such as hardship, misrepresentation or misconduct does not sit conformably with the law of contract at common law or in equity.[150] Further, it causes a greater mischief[151] to the certainty and efficacy of promises made under contract in general and the commercial certainty that funders require in order to undertake the significant financial burdens and risks of funding representative litigation.

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[145] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 at [111] per Gagler J (in the minority)

[146] For an instructive discussion on the development and types of CFOs see *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 at [8]-[30] and *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

[147] See Pagone J in *Pathway Investments Pty Ltd & Anor v National Australia Bank Ltd (No 3)* [2012] VSC 625, at [20]; See also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41 (**Fostif**) Gummow, Hayne and Crennan JJ said at [92].

[148] *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289 [49], per Lee J, citing the following passage from *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 182-183 [47]-[48], per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

[149] *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289 [50].

[150] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at 182-183 [47]-[48].

[151] Ibid [47]-[48].

28. If common fund orders are available, when in the proceeding should they be made?

    a. At an early stage of the proceeding, with the rate set at this stage.
    b. At an early stage of the proceeding, with the court providing a provisional or maximum rate at this stage and setting the final rate at a later stage.
    c. After the common issues are determined.
    d. At a late stage of proceedings, such as at settlement or before damages are distributed.
    e. The court should have discretion in an individual case.

6.61 We support CFOs being made at an early stage in a proceeding with the court providing a provisional or indicative rate and having ultimate discretion to determine a funding commission that is fair and reasonable in the circumstances at a later stage, typically settlement or judgment.

6.62 This proposal broadly reflects the position stated by the Full Court of the Federal Court in *Money Max*[152] and would effectively bring Aotearoa New Zealand in line with how Australian Courts applied the common fund doctrine pre-*Brewster*. This approach confers ultimate discretion on the Court to determine the appropriate remuneration rate of a litigation funder, in a manner that balances the interests of class members and appropriately remunerates the litigation funder for assuming the financial risk of the litigation. This position was pithily summarised by the Court in *Money Max* at [79]:

> *The central benefit for class members of the orders we propose is that the Court at an appropriate time will approve the funding commission at a rate that it considers reasonable, when the Court is armed with better information including as to the quantum or likely quantum of the settlement or judgment, probably at the stage of settlement approval or at the point of distribution of damages.*[153]

6.63 We submit that the Court is competent to determine what constitutes a fair and reasonable rate of remuneration to a litigation funder, drawing on the multi-factorial approach established *Money Max.*[154] Recently, Lee J in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd and Anor (No. 3)* and Beach J in *Evans v Davantage Group Pty Ltd (No 3)*[155] drew upon the multifactorial approach to further "develop criteria which may be relevant to assessing a reasonable return for providing litigation funding."[156] Lee J referred extensively to historical examples of the Court determining reasonable remuneration in other judicial contexts[157] to reason by analogy that the Court is competent to do so in the context of the "recent development"[158] of litigation funding.

[152] *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2016] (2016) 245 FCR 191.
[153] Ibid at [79].
[154] Ibid at [80]
[155] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 at [55].
[156] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd and Anor (No. 3)* [2020] FCA 1885 at [21]-[22]
[157] Ibid [24]
[158] Ibidat [23]

6.64 The principle issue in dispute in *Brewster* was whether the statutory language of s.33ZF was capable of empowering a Court to make a CFO at an early stage in a representative proceeding. If a statutory power to make CFOs and FEOs were adopted the controversy raised by *Brewster* would not arise and indeed would be cured by the existence of a clear statutory power to do so. The jurisprudence in the post-*Brewster* period has clarified the position that CFOs are available, and within power, when made at the settlement approval stage of a proceeding and that there is power to make a CFO both under statue[159] and in equity.[160] Importantly, these decisions reinforce the recent line of authority of Australian appellate courts[161] that the correct interpretation of *Brewster* does not eschew the availability of a CFO in all circumstances[162] and that the present debate in Australia arises from a lack of statutory clarity.

6.65 Some commentators and Courts have criticised the approach of setting a commission rate early in a proceeding as "speculative"[163]. However, the proposed mechanism merely empowers the Court to make a CFO at an early stage in a proceeding and confers discretionary flexibility on the Court to set the ultimate rate once the "[c]ourt is armed with better information, including information as to the quantum or likely quantum of settlement"[164]. Indeed, where an earlier CFO is in place the potential for hindsight bias is ameliorated as it provides an instructive benchmark of the real risks associated with the proceeding prior to it resolving when the Court is asked to determine the ultimate rate of remuneration at resolution.

6.66 Criticisms of the common fund doctrine that excise the commercial realities of litigation from the substantive outcome of access to justice do not give sufficient regard to the realities of complex, risky, and protracted litigation. Litigation funding is a critical part of the machinery that ensures access to justice as well as *sustains* meritorious litigation. Indeed, it was precisely this tension that Gagler J (in dissent) remarked upon:

> *…the power [in s 33ZF] cannot be divorced from the principal object of Part IVA of enhancing group members' access to justice. … To my mind, it introduces an unrealistic dichotomy to postulate that an order that serves to shore up the commercial viability of the proceeding from the perspective of the litigation funder can have nothing to do with enhancing the interests of justice in the conduct of the representative proceeding*[165]

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[159] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [2]-[20]; pursuant to *Federal Court of Australia Act 1976* (Cth), ss 33V(1) and in the alternative, 33V(2); *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 [49]; *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 (Murphy, J); *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423 (Lee, J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 (Beach, J); *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579 (Moshinsky, J); *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 (NB Beach J made an FEO as a CFO was not ultimately sought by the applicant

[160] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [34]-[40]

[161] *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 (03 November 2020) (Middleton, Moshinsky and Lee JJ); 384 ALR 650 (at 661 [41] per Lee J, Middleton and Moshinsky JJ agreeing); *Brewster v BMW Australia Ltd* [2020] NSWCA 272 (at [28], [30], [41]–[43] per Bell P, Bathurst CJ and Payne JA agreeing).

[162] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885 [14]

[163] *BMW Australia Ltd v Brewster* [2019] HCA 45, [67] (per Kiefel CJ, Bell and Keane JJ); See also *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq)* (2015) 325 ALR 539.

[164] *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2016] (2016) 245 FCR 191 at [146]-[147].

[165] *BMW Australia Ltd v Brewster* [2019] HCA 45, [110] (per Gagler J).

6.67 The Australian experience of CFOs has proven to be demonstrably to the benefit of class members. Professor Vince Morabito conducted a review of CFOs made in the period between *Money Max* and *Brewster* and found that the median commission rate was 21.9% and returns to class members were greater under CFOs[166]. As summarised in the PJC Report:

> *"…the commissions paid to funders, pursuant to such orders, ranged from 8.3 per cent to 30 per cent of the gross settlement sums, with the median commission rate being equal to 21.9 per cent of the gross settlement sum. Professor Morabito concluded that, in most cases, the median return to class members was greater when a common fund order was made. Professor Morabito contended that common fund orders benefit class members more than litigation funders* [167]

6.68 We agree with the Commission's observations at [4.71] that common fund orders are likely to have, at least, three key effects:

(a) Improving the economics of opt-out class actions for litigation funders.

(b) Court supervision of litigation funding commissions, which can directly lower funding commissions as well as incentivise competitive rates more generally.

(c) Fairness as between class members.

6.69 We add that a statutory power to make CFOs, supported by the existing jurisprudence under common fund doctrine, confers an important discretion on the Court that is consistent with, and enhances, its existing supervisory role.

6.70 Cost sharing orders (CFOs and FEOs) generally are an important tool in managing competing claims. As was observed by Beach J in *McKay*:

> *"…one advantage of early common fund orders was that it assisted to resolve the problem of competing class actions, whether each competing action had their own litigation funder or only one of the competing actions had a funder. For the Court, it did not matter how many group members each had signed up or at what contractual commission rates. If one action was to be the winner, the associated funder had to accept the rate to be ultimately struck by the Court under a common fund order. That was the price the Court, in essence, extracted. Control of the commission rate was ceded to the Court as the price of success. But that flexibility is now lost [after Brewster].*[168]

6.71 In Australia, the decision in *Perera v GetSwift Limited*[169] and the subsequent Full Federal Court appeal decision[170] introduced a more Spartan approach to resolving

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[166] Professor Vince Morabito, *Submission 6*, PJC (December 2020). See also Vince Morabito and Michael Duffy "An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions" [2020] NZ L Rev 377 at 393

[167] Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry (December 2020) at [9.65]

[168] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 at [33]

[169] *Perera v GetSwift Ltd* [2018] FCA 732 (per Lee J).

[170] *Perera v GetSwift Ltd* [2018] FCAFC 202 (per Middleton, Murphy, Beach JJ); See *Marion Antoinette Wigmans v AMP Limited & Ors* [2021] HCA 7 at [60].

competing claims. While the task of the Court is "multifactorial",[171] in assessing which, among competing proceedings, is the most appropriate vehicle to litigate the common claims, the Court will give priority to the overriding pecuniary concern to "produce a better return for group members"[172] in which the power to control funding commissions under a CFO is critical.

6.72 The High Court of Australia decision in *Wigmans*[173] broadly affirmed the significance of this consideration, but reaffirmed that a more nuanced and fact-specific inquiry must be engaged in when resolving multiplicity claims, where individual the circumstances of each case must prevail over a formulaic application of the multi-factorial approach[174].

> *In matters involving competing open class representative proceedings with several firms of solicitors and different funding models, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which proceeding going ahead would be in the best interests of group members. The factors that might be relevant cannot be exhaustively listed and will vary from case to case*.[175]

6.73 The Court ultimately preferred a proposal that had a conditional costs model, without support from a third-party litigation funder and with security paid into Court.[176] In doing so the High Court of Australia provided interpretive clarity and detail on the importance of cost model considerations in the multi-factorial approach (viz. litigation funding, cost estimates, hypothetical in-hand returns to group members and security for costs).[177]

6.74 In this context the observations of Beach J in *McKay* are apt to illustrate the importance of Courts having a power to control and regulate commissions under a CFO. When competition "is perhaps the single most important matter giving rise to the lower funding charges"[178] empowering the Court to make a CFO in competing claims is likely to drive better outcomes for class members and strike a fair balance between fair remuneration to funders and in-hand returns to the class.

6.75 We agree with the Commission that "the use of common fund orders and court approval of settlement can provide a useful tool for reviewing the reasonableness of funding commissions in class actions"[179]. This intersects with the Court's duty to maintain public confidence in judicial outcomes while ensuring meritorious class are brought before the Court.

[171] *Perera v GetSwift Ltd* [2018] FCA 732, [325] (per Lee J).
[172] Ibid [329].
[173] *Marion Antoinette Wigmans v AMP Limited & Ors* [2021] HCA 7
[174] *Marion Antoinette Wigmans v AMP Limited & Ors* [2021] HCA 7 [52]
[175] *Marion Antoinette Wigmans v AMP Limited & Ors* [2021] HCA 7 [52]
[176] *Wigmans v AMP Ltd* [2019] NSWSC 603 at [350]
[177] *Wigmans v AMP Ltd* [2019] NSWSC 603 at [210] and [216].
[178] *Perera v GetSwift Ltd* [2018] FCAFC 202 at [282].
[179] NZLC IP45 [21.26]

7. CHAPTER 5: JUDGMENT, DAMAGES AND APPEALS

(29) Do you agree with our draft provision on the binding effect of a class actions judgment? If not, how should it be amended?

(30) Do you agree that aggregate damages should be allowed in class actions?

(31) Should the court be able to order cy-près damages and if so, under what circumstances?

(32) Do you agree with our draft provisions on monetary relief? If not, how should they be amended?

(33) Do you agree that parties to a class action proceeding should be able to appeal:

a. A decision on certification as of right?

b. A decision on settlement approval with leave of the High Court?

(34) Do you agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court?

(35) Do you think there are any other decisions in a class action that class members should be able to appeal, with or without leave?

29. Do you agree with our draft provision on the binding effect of a class actions judgment? If not, how should it be amended?

7.1 We agree with the Commission that a class actions judgment should be binding upon class members in respect of the common issues.

7.2 We agree with the Commission's draft provision on the binding effect of a class actions judgment, subject to one qualification as follows. We reiterate our view set in our earlier submission to NZLC IP45 that Aotearoa New Zealand should not include a certification requirement in its class action regime and strongly encourage the Commission to consider recommending the adoption of mechanisms under the Australian regime for *discontinuation* of a class action in appropriate circumstances, as set out in the Commission's Issues Paper 45 at [10.17].[180] If such measures are adopted, then the draft provision could be simplified to remove any reference to a certification order.

[180] For further detail, please refer to [10.1] to [10.23] of our Submission dated 11 March 2021 in response to NZLC IP45.

7.3 However, provided that the Commission does propose to include a certification process, then we otherwise agree with and support the Commission's draft provision.

7.4 We acknowledge the Commission's observations to the effect that, while there is a need for finality in class action litigation by preventing issues raised in a class action from being relitigated by class members, any such provision needs to safeguard the interests of class members, who have little control over the class action and may not even be aware of it (in an opt-out class action).

7.5 As to where the line should be drawn between these countervailing considerations, we submit that the Commission's proposed provision presents a logical solution, namely that the 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;

(b) relates to a claim described in the certification order; and

(c) relates to relief sought by class members as stated in the certification order.

7.6 Not only is such a provision consistent with authorities identified by the Commission in Ontario and Australia,[181] the provision provides certainty and simplicity for class members, because the process of identifying whether a judgment is binding on a given issue is simple and transparent: a class member simply needs to review the terms of the certification order.

7.7 Further, we agree with the Commission's suggestion that it would be unfair for a class member to be bound by *Anshun* estoppel or by the rule in *Henderson v Henderson*, in circumstances where a class member does not have control over which issues are raised or dealt with in a class action proceeding. Further, adopting these rules would detract from the simplicity of the proposed provision and could hamper the finality of a judgment in class actions, by generating additional satellite litigation as to whether a judgment is binding on certain issues or not on the basis of whether they should have been "raised" or "dealt with" in course of the class action.

7.8 Finally, we submit that section 5(2) of the proposed provision is appropriate, on the basis that a judgment on a common issue in a class action cannot and should not be binding on persons who are not class members, either because they have opted out or because they have failed to opt in to the proceeding.

30. Do you agree that aggregate damages should be allowed in class actions?

7.9 We agree with the Commission that monetary relief should be allowed to be awarded in an aggregate amount in class actions, if for no other reason than it provides flexibility for the Courts to deal with the issue of damages in class action proceedings

[181] With the exception that in Australia, there is no certification process as such and judgments are only binding with respect to the common issues raised.

in an efficient and practical manner, in circumstances where there may be difficulty or undue expense associated with calculating damages for each individual claimant.

7.10 A commonly encountered example of a situation in which an award of monetary relief in an aggregate amount would be suitable is an open-class, opt-out class action in which the identities of the class-members may be unknown at trial, although the number of class members could be estimated at trial and calculations of loss are not dependent on any facts specific to the individuals.

7.11 We agree with the Commission's finding at [5.29] that aggregate awards of monetary relief may also serve the interests of defendants to class action proceedings by achieving finality for all parties and avoiding an additional, and potentially expensive and time-consuming, process of settlement administration or litigation to quantify the claims of individual class members.

7.12 We agree that aggregate awards of monetary relief should only be made available in circumstances where *"a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment"*, as is provided for in Australia by section 33Z(1)(f) of the *Federal Court of Australia Act 1976*.

7.13 Having said this, we consider that once it is determined that an aggregate award of monetary relief is appropriate, the Courts should retain flexibility and discretion in deciding the method for distribution of the award to members.[182] This approach would be consistent with the objective of aggregate awards, being to improve the efficiency and finality of class action procedures once a finding of liability is made against a defendant.

7.14 In Australia, such provisions are afforded the additional protection that they do not *"authorise an award of damages that are not recoverable otherwise at common law or under statute, or are proved."*[183] That is, they are rules merely of practice and procedure and *"[t]hey do not, and do not purport to, change any principle as to the assessment of damages. The most they do is provide for what is hoped to be a simpler and less expensive way of paying properly calculated damages to each member of the class who chooses to claim."*[184]

7.15 In light of the above, we take no position as to whether it would improve the operation of the rule to include a specific requirement that aggregate monetary relief should only be available where no question of fact or law remains to be determined to establish the amount of the defendant's liability other than questions relating to assessment of monetary relief.[185] The reason for this is that, on one view, this would be the position even if that provision were not to be included. We query whether including specific wording to this effect may lead to unintended consequences, in situations where certain key questions of fact, such as the identity of specific class members, remain unknown to the parties and the court at the time of the award being made.

[182] As is provided for by as provided for by draft provision 11(3), proposed by the Commission at NZLC ILPC48 [5.49].
[183] *Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd* [2021] QSC 74 at [584] per Jackson J, citing *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia* Ltd (2000) 1 VR 545 at 558 per Ormiston J.
[184] *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia* Ltd [2000] VSCA 103 at [34] per Ormiston J.
[185] As set out at NZLC IP48 at [5.32(b)].

31. Should the court be able to order cy-près damages and if so, under what circumstances?

7.16 We agree with the Commission that, if deterrence is not to be an objective of the class actions regime in Aotearoa New Zealand, then *cy-près* damages would only be justifiable based on objectives of improving access to justice or managing multiple claims in an efficient way. However, we suggest that the objects of the regime should include deterrence, as has been detailed in the helpful submission from Professor Vince Morabito in his submission to the Commission.[186]

7.17 Naturally, we agree that objectives of compensating class members are best met, where practical or possible to do so, by direct compensation. However, where direct compensation is not practical or possible, *cy-près* damages can play a functional role in achieving the objective of compensation in an indirect way.

7.18 While an award of *cy-près* damages is naturally a practical and imperfect remedy to an intractable problem, the appropriateness of this relief becomes clearer when considering that the only alternatives would be for the available award of damages to be either:

(a) repaid to the defendant, who is thereby rewarded for the damage caused by the defendant's misconduct despite findings of liability having been made;

(b) paid to the government, who may have no role in, or relevant association with, the litigation or misconduct complained of; or

(c) paid by way of a "windfall" to the few class members who have notified their claims, which in limited circumstances may result in overcompensation.

7.19 In light of the above, we agree with the Commission's recommendation that *cy-près* damages, or "alternative distribution" of an award of damages, should be available if it is not practical or possible for the award or any portion of it to be distributed to individual class members.

32. Do you agree with our draft provisions on monetary relief? If not, how should they be amended

7.20 Turning to the draft provisions proposed by the Commission at NZLC ILPC48 [5.49], it follows from the above that:

(a) subject to our comments at paragraphs 7.21 and 7.22 below, we generally support the inclusion of draft provisions 11(1) to (4); and

[186] See also V Morabito, "The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions" (2004) 42 Osgoode Hall Law Journal 473, 490-491; and V Morabito, "The Victorian Law Reform Commission's Class Action Reform Strategy" (2009) 32 University of New South Wales Law Journal 1055, 1065-1068.

(b) we support the inclusion of draft provisions 12(1) to (3).

7.21 For the reasons set out at paragraphs 7.13 to 7.15 above, we neither support nor object to the inclusion of draft provision 11(1)(b).

7.22 As to draft provision 11(4), we query whether this is intended to be the only formal reporting requirement in respect of the distribution of an award of damages by the administrator or the parties. It may be that further oversight, or reporting at regular intervals, may be more suitable in the context of more complex administrations. Having said this, we note that draft provision 11(3) provides the court with sufficient flexibility to impose more rigorous reporting requirements where it considers necessary to do so.

33. Do you agree that parties to a class action proceeding should be able to appeal:
    a. a decision on certification as of right?
    b. a decision on settlement approval with leave of the High Court?

Certification

7.23 We reiterate our view set in our submission to NZLC IP45, that Aotearoa New Zealand should not include a certification requirement in its class action regime and strongly encourage the Commission to consider recommending the adoption of mechanisms under the Australian regime for *discontinuation* of a class action in appropriate circumstances, as set out in the Commission's Issues Paper 45 at [10.17].[187]

7.24 As set out in this submission in answer to Question 2 to 4 and our submission to NZLC IP45, we consider that certification would result in wasted costs and delay without achieving its purpose,[188] and we give examples of circumstances in which the certification process has become extremely time-consuming[189] and has intruded into the substantive merits of the case giving rise to potentially inconsistent findings in the same proceeding.[190] We consider that the question of appeals from certification decisions compounds this problem.

7.25 However, if a certification process is introduced into the Aotearoa New Zealand regime, then we agree with the Commission's view that plaintiffs and defendants should be able to appeal a certification decision as of right given that the implications of such a decision will be significant and, in some cases, determinative. We agree with the Commission that in some cases, if certification is denied, the practical result may be that the plaintiffs (and other class members) are practically unable to bring claims for redress on an individual basis.

[187] For further detail, please refer to [10.1] to [10.23] of our Submission dated 11 March 2021 in response to NZLC IP45.
[188] Submission at [10.2].
[189] Submission at [10.19].
[190] Submission at [10.20].

Settlement approval

7.26 We agree with the Commission's view that the parties should have the right to appeal a court's decision declining to approve a settlement, because this decision will have a significant impact on the parties. While the Commission posits that an alternative to appealing would be to renegotiate the settlement and submit an amended settlement, in some cases it may simply not be possible for the parties to come to an alternative settlement agreement and an appeal may be the only available avenue to resolve the dispute.

7.27 As to whether leave ought to be required, we note the Commission's views that:

(a) leave should be required; and

(b) the test for leave to appeal is well-established, namely that *"the appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of further appeal."*[191]

7.28 We anticipate that nearly all appeals from a court decision declining to approve the settlement of a class action would meet this threshold, on the basis that:

(a) if successful, the appeal would effectively bring the proceedings to an end; and

(b) the approval of the settlement would not only affect the parties but also the class members who stand to benefit from the settlement.

7.29 In light of the above, we submit that it may simply add to the administrative burden of the appeal process to require parties to first obtain leave. In the circumstances, we submit that an appeal as of right may be a more cost-effective solution.

> 34. Do you agree that class members should be able to appeal a substantive judgment on the common issues with leave of the High Court?

7.30 We agree with the Commission that subject to obtaining leave of the High Court to do so, class members should be able to appeal a substantive judgment on the common issues if the representative plaintiff does not appeal or otherwise abandons an appeal.

7.31 Naturally, it is fundamental to a class actions regime that the representative plaintiff represents the interests of class members (who have either opted in, or failed to opt out of, the class action). In that case, if the representative plaintiff pursues an appeal, there appears to be little justifiable basis for a class member to do the same.

7.32 As set out in this Submission, we agree that class members ought to be bound by a substantive judgment in respect of the common issues. If the representative fails to appeal an adverse judgment on a common issue, it therefore stands to reason that

[191] NZLC IP48 at [5.61], citing *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

the class member, who no longer has any opportunity to opt out of the litigation, has an opportunity to seek leave to appeal from that finding, having regard to the interests of the representative plaintiff and other class members.

7.33 In saying this, we echo the Commission's comments that measures are required to protect the parties and other class members from unnecessary appeals and reduce delay.

7.34 The tension between the representative plaintiff and the class member in this circumstance is clear. If a class member wishes to appeal, it may be assumed that is in the interests of the class member to do so. However, it may equally be assumed that the appeal is not in the interests of the representative plaintiff who has declined to pursue it.

7.35 Further, appeals on the common issues may not be in the interests of the representative plaintiff and other class members in circumstances where, for example:

(a) the appeal by the class member is improperly motivated or an abuse of process;

(b) there are insufficient grounds for the appeal; or

(c) the appeal has been prepared in such a way that it unduly jeopardises the interests of the plaintiff or other class members without providing them with any corresponding benefit (for example, because the class member has a relevantly divergent interest from the remainder of the class).

7.36 In light of the above, we consider that the protections proposed by the Commission are *necessary* to protect parties and class members from the above risks. Those are to require that any class member who wishes to appeal from a common issue, in circumstances where the representative plaintiff has declined to do so, must:

(a) seek leave to appeal; and

(b) apply to the court to act as the representative plaintiff for the purposes of the appeal (with the court to consider their suitability for their role adapted to the circumstances of an appeal).

35. Do you think there are any other decisions in a class action that class members should be able to appeal, with or without leave?

7.37 We do not consider that there are any other decisions in a class action that class members should be able to appeal, bearing in mind that, under the proposed regime, class members are to be bound only by a substantive judgment on the common issues.

7.38 We accept that a class member may also be impacted by a judgment declining to certify a class action. However, for the reasons outlined by the Commission at [5.69] of the Issues Paper, we agree that it may be inappropriate to allow a class member to appeal a decision on certification.

7.39 We agree that the existing alternatives to an appeal, which would already be available to a class member, would provide a more suitable alternative so that the class member's rights may be protected. These would be that the class member may:

(a) seek to be substituted as the representative plaintiff in the proceedings; or

(b) opt out of (or simply not opt in to) the proceedings which have not been certified, with the effect that they may either:

(i) commence their own representative proceedings; or

(ii) opt in to an appropriately prepared class action in which the plaintiff is truly representative of the class.

8. CHAPTER 6: SETTLEMENT

(36) Should the court be required to approve class action settlements in both opt-in and opt-out proceedings?

(37) Should the court be required to approve the discontinuance of a class action?

(38) Do you agree with our list of the information that should be provided in support of an application to approve a class action settlement?

(39) Should there be a requirement to give notice to class members of:

a. A proposed class action settlement?

b. An approved class action settlement?

(40) Do you agree with the information we propose should be contained in the notice of proposed settlement and the notice of approved settlement?

(41) Should class members be given an opportunity to object to a proposed settlement?

(42) Do you agree there should there be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval? Should the court be able to order one or more parties to meet some or all of the cost of this?

(43) When the court considers whether to approve a settlement, should it consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole? If not, what test should it apply?

(44) Should there be specific factors a court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole? For example, should the court consider:

a. The terms and conditions of the settlement.

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

c. Any information readily available to the court on the potential risks, costs and benefits of continuing with the litigation.

d. Any views of class members.

e. The process by which settlement was reached.

f. Any other factors it considers relevant.

(45) Should the court have an express power to amend litigation funding commissions at settlement?

(46) Should the court have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement?

(47) Do you agree that class members should be able to opt out of a class action settlement once it is approved?

(48) Should other potential class members have an opportunity to opt in at settlement?

(49) When a settlement is reached prior to certification, do you agree that the court should consider whether to certify it for the purposes of settlement?

(50) Should the court supervise the administration and implementation of a class action settlement?

(51) Should the court have a power to appoint a settlement administrator? Who would be appropriate to fulfil this role?

(52) Should there be an obligation to provide a settlement outcome report to the court? Should this be made publicly available?

(53) Do you have any other feedback on our proposed settlement provisions?

(54) Is there anything else you would like to tell us?

36. Should the court be required to approve class action settlements in both opt-in and opt-out proceedings?

8.1 We agree with the Commission that all class actions settlements should be subject to Court approval, without distinction between opt-in or opt-out proceedings.[192] The Court discharges an important supervisory and protective function when approving settlements, so as to ensure that the interests of all class members are protected in both opt-out and opt-in proceedings.[193] More fundamentally, settlement approval is an important procedural safeguard to maintain public confidence in the integrity of the class actions regime. This is consistent the position of the Supreme Court in *Southern Response v Ross* [2020] NZSC 126.[194]

8.2 The matters to which a Court will have regard in approving an opt-out settlement will have a different emphasis to those matters relevant to approving an opt-in settlement. For example, in an opt out proceeding the Court may be more vigilant to fill the

[192] NZLC IP48 at [6.6] and draft legislation at cl. 9
[193] NZLC IP48 at [6.6].
[194] *Southern Response v Ross* [2020] NZSC 126 at [82].

'adversarial void'[195] on behalf of open class members that have taken a passive role throughout the proceeding are affected by the proposed settlement. In particular, in appropriate cases, this may take the form of appointing *amicus curie,* contradictors to assist the Court in undertaking the onerous and protective duties of settlement approval[196]. In an opt in proceeding the necessity to draw upon all the armoury of the Court to discharge its supervisory duties may be ameliorated by the fact that the class will have taken an active step to participate and the plaintiff's lawyers will be in regular or periodic contact with the class regarding their legal rights. We provide a fulsome response on these issues in the balance of our submission on settlement approval.

8.3 In both an opt out and opt in proceeding, settlement approval is a fundamental function of the Court exercising its supervisory and protective jurisdiction and is critical in order to maintain public confidence in the integrity of the class actions regime and is in the interests of justice.

> 37. Should the court be required to approve the discontinuance of a class action?

8.4 We agree with the Commission that Court approval should be required to discontinue a class action. In support of this position we rely upon our submission in response to Question 36 and the decision of the Supreme Court in *Southern Response v Ross.*[197]

8.5 The Commission has not proposed a draft statutory test for discontinuance. We submit that the Commission may apply the same statutory test as appears at cl. 6(5), namely that the discontinuance is fair, reasonable and in the interest of the class as a whole. We do not support including the balance of the criteria at 6(5)(a)-(e) in the statutory test, instead the Court should be given flexibility to determine if the discontinuance satisfies the general "fair and reasonable" criteria in accordance with common law principles.

8.6 In Australia there are presently two different approaches to the common law test applied at discontinuance.

(a) The first approach is consistent with the common law test for settlement approval and was articulated in *Mercedes Holdings Pty Ltd v Waters (No 1)* [2010] FCA 124; 77 ACSR 265 at [9] [10], [24][198].The question arising on an application for discontinuance is whether the proposed discontinuance would be fair and reasonable not only in the interests of the parties but of the class members as a whole. In particular, the fact that a limitation period under the claim may have expired is germane to the discontinuance question, as granting

[195] NZLC IP48 at [6.3] and [6.6].
[196] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [8]5; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8] (Jacobson, Middleton and Gordon JJ); *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 at [62] (Murphy J); *Blairgowrie* at [81]-[85]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [12] (Murphy J).
[197] *Southern Response v Ross* [2020] NZSC 126 at [83].
[198] In reliance upon the test for settlement approvals as articulated by Finkelstein J in *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, per Finkelstein J at [14]-[15]

the discontinuance would extinguish individual class members right to recommence individual litigation.

(b) The second approach was expressed by the Victorian Supreme Court in *Laine v Theiss Pty Ltd; Beetson v SunWater Ltd* [2016] VSC 689 and asks a Court to consider whether the proposed discontinuance would be "unfair or unreasonable or adverse to the interests of group members"[199].

8.7 Wigney J in *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87 stated that the difference between the two tests is likely to be immaterial where the discontinuance occurs early in proceeding and the effect of the discontinuance is to "return the group members to the position they were in before the commencement of the proceeding"[200]

8.8 There is no requirement in statute in Australia to distribute a notice of discontinuance to class members. The requirement only exists for settlement approval s.33X(4). The authorities suggest that notices to group members of discontinuance are not generally required based consideration on a number of factors[201]:

(a) Discontinuance typically occurs early in a proceeding and therefore class members rights are not commonly prejudiced by being exposed to a limitation period that would exclude individual claims being run;

(b) A weighing exercise that balances fact-specific circumstances in each case; whether the discontinuance is already well known to the class; balance of costs to distribute the notice, convenience, utility of such notice where discontinuance happens early in a proceeding.

(c) There is no requirement in statute in Australia to distribute a notice of discontinuance to class members and thereby the Court has discretion on the balance of circumstances to determine if it is necessary.

8.9 The legal consequence of a discontinuance is materially distinct to that of a settlement. In particular, a discontinuance is a unilateral act which does not bind the non-representative class members for the purpose of extinguishing rights but merely puts them back into their original position. Whereas a settlement does achieve this outcome by merging all class members rights and interest in the settlement and bars future proceedings for the same causes of action. The factors relevant to considering the practical distinction between a discontinuance approval and a settlement approval are discussed in detail *Babscay Pty Ltd v Pitcher Partners* [2020] FCA 1610 at [19]-[23], per Anastassiou J.

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[199] *Theiss Pty Ltd; Beetson v SunWater Ltd* [2016] VSC 689 at [34].
[200] *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87 at [49].
[201] *Babscay Pty Ltd v Pitcher Partners* [2020] FCA 1610, per Anastassiou J – discontinued, no notices sent; *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87, per Wigney J – discontinued, no notices sent; *Simonetta v Spotless Group Holdings Limited* [2017] FCA 1071, per Yates J – discontinued, no notices sent; *Mercedes Holdings Pty Ltd v Waters (No 1)* (2010) 77 ACSR 265 (*Mercedes Holdings*), Perram J – leave to discontinue refused *The discontinuance would have the effect of exposing class members to limitation periods and thereby have extinguished their claims*; *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, per Finkelstein J at [14]-[15].

38. Do you agree with our list of the information that should be provided in support of an application to approve a class action settlement?

8.10 The proposed list of information to be included in the settlement approval application[202] will assist the Court in applying the statutory approval test at cl. 6(5).

8.11 In the Federal Court of Australia, the relevant case management requirements and directions for preparing a settlement approval application are found in Class Actions Practice Note (**GPN-CA**)[203]. We commend the approach taken by the Federal Court for the Commission's consideration in formulating its approach under the High Court Rules, separate to the draft legislation.[204] In particular, we draw the Commission's attention the two aspects of that regime:

(a) The approach taken in the Australian Federal Court is to apply a flexible and non-exhaustive list of material to be filed in support of a settlement approval application. The requirement is formulated in the following terms, "The material filed in support of an application for Court approval of a settlement *will usually be required to address at least the following factors*" (emphasis added)[205]. We submit that this approach should be adopted by the Commission as it maintains maximal flexibility as to the matters which ought to be reasonably and relevantly put before the Court. The guidance is not proscriptive and does not operate in a manner that would require unnecessary cost to be incurred by including extraneous or otherwise irrelevant information to be included in the application.

(b) GPN-CA includes a specific case management direction that discourages lengthy and costly affidavit material in support of the settlement approval.[206] In our view this is a prudent and important recommendation and is directed to ensure that only material relevant to the decision to approval the settlement is before the Court and the approval hearing does not become a forum to litigate trial issues.

8.12 We agree with the Commission's proposal to require settlement approval by way of application[207] and a hearing to determine the question of whether a proceeding should be allowed to settle.[208]

8.13 Joint application for settlement[209] – We do not agree that the settlement approval application should be made jointly with the defendant, but rather the application should be filed by the representative applicant on behalf of the class and the orders may be sought by consent. A joint application provides a putative defendant with an inappropriate and disproportionate degree of input in the application in which the

[202] NZLC IP48 at [6.17].
[203] Practice Note GPN-CA at [15]
[204] NZLC IP48 at [6.19].
[205] Practice Note GPN-CA at [15.5].
[206] Practice Note GPN-CA at [15.6]
[207] NZLC IP48 at [6.14].
[208] NZLC IP48 at [6.12].
[209] NZLC IP48 at [6.18].

evidentiary onus is on the representative plaintiff to establish that the settlement is fair, reasonable and in the interests of the class as a whole under cl.6(5). In many cases there will be confidential information the plaintiffs will need to include in the application that would be inappropriate to share with the defendant as part of a joint application. In the normal course, the defendant will retain the right to file memoranda and an application objecting to the settlement application if there are aspects of the application that it wishes to be heard on or are otherwise contrary to its interests. It is anticipated that in most, if not all circumstances, the settlement application will be prepared in close consultation with the defendant, as the party's interests in having the settlement approved will be aligned. This is likely to create comity in the approach to the application and the hearing. However, a requirement that the application is prepared jointly may invite an unnecessary opportunity for acrimony or *de minimus* disputes that may incur additional cost and delay to resolve.

39. Should there be a requirement to give notice to class members of:

a. A proposed class action settlement?
b. An approved class action settlement?

8.14 We acknowledge that the proposals to issue a notice of proposed settlement[210] and a notice of approved settlement[211] assume that class members should have a right to opt out or opt in to a settlement once it has been approved. We provide our response to these proposals at Questions 47-48.

8.15 In Australia, there is a comprehensive statutory regime that covers the distribution and minimum content requirements of notices to class members, pursuant to ss.33X and 33Y of the *Federal Court of Australia Act 1976* (Cth).

8.16 Broadly, s.33X describes circumstances in which notice will be required and s.33Y describes the content, form and other procedural requirements of notices issued under s.33X. The procedural and content requirements at s.33Y are critical to the dual objectives of consistency and efficiency of notices issued by the Federal Court. They also promote a standardised approach to notices that helps the Court develop common principles of interpretation and comprehensibility for class members and parties alike.

8.17 Critically, this notice regime includes a general notice provision at s.33X(5). This is an independent head of power that can be exercised at any stage in a proceeding and is not reliant upon some other procedural condition precedent for its exercise i.e. settlement approval.[212] This is an important procedural tool to make available to the Court and the parties to deal with any matter that may require notice throughout the litigation and it maintains maximal flexibility and discretion as to the manner and form of the notice. A power similar to s.33X(5) enables a Court to fashion appropriate

[210] Draft Legislation, cl 6(4)(1).
[211] Draft Legislation, cl.9(1)(a)
[212] *Lenthall v Westpac Banking Corp (No 3)* [2021] FCA 1004 at [45].

orders in a manner that is responsive to the circumstances of each case, and flexibly accommodates the type of proceeding (opt in / opt out) and stage of proceeding.

8.18 We submit that a comprehensive notice regime akin to s.33X and s.33Y of the FCA should be considered for inclusion in the Draft Legislation.

Notice of proposed settlement

8.19 We agree with the proposal that class members be given notice of a proposed settlement. This is consistent with the orthodox position in Australia under s.33X(4) of the *Federal Court of Australia Act 1976* (Cth). It is notable that s.33X(4) reserves judicial discretion not to issue a notice if it is just to do so, which is not a feature of the Draft Legislation at cl. 6(4)(a). The notice of proposed settlement is an important procedural document, that has particular significant in an opt out proceeding where members of the class may be at large or have remained passive. The notice conveys critical information about their potential claims and rights of which they may have been previously unaware. Relatedly, the notice performs important secondary function by advising open class members of the right to register any calls forth objections to the proposed settlement.

Notice of approved settlement[213]

8.20 In-principle we do not oppose the proposal to provide a separate notice to class members notifying them that a settlement has been approved. We acknowledge that the proposal to require a separate settlement approval notice[214] interacts with the Commission's interim suggestion that class members should have a right to opt out of a settlement once it has been approved. There is no such statutory requirement in Australia; partly arising from the availability of s.33X(5), s.33ZF and the architecture of our regime as an "opt out" regime in which the election to opt out of a proceeding is usually final.

8.21 Typically, the content and form of a notice sent out following settlement approval will vary depending on the type of proceeding (opt in/opt out), whether a process of opt out has already occurred, the procedure for class members to register and establish their claims (and whether a process of registration has already occurred) and other procedural matters relevant to the administration of the settlement *inter alia*. Accordingly, any statutory criteria or requirements included in the High Court Rules ought to preserve maximum flexibility as to the content requirements of such notices and the manner and form of their distribution. We address these requirements in our response to Question 40.

8.22 There may be circumstances in which a settlement approval notice in the form contemplated by cl.9(1)(a) is not necessary and may cause unnecessary cost and delay to resolving claims. The list of matters the Commission say should be included in the notice includes information which may overlap with other procedural notices, namely an opt out notice and notice of proposed settlement.[215] For example:

[213] NZLC IP48 at [6.25], [6.30] and draft legislation, cl 9(1)(a).
[214] Draft Legislation, cl.9(1)(a)
[215] See criteria at [6.30(c)-(d).

(a) in a conventional opt in class action the information at [6.30(a)[216], (c) and (d)] will not be relevant;

(b) in a conventional opt out class action in which an opt out process has already occurred the information at [6.30(a)[217], (c) and (d)] will not be relevant;

(c) If a registration process has already occurred the information required at [6.30(e)] will have already been obtained.

8.23 In this context, the requirement for a statutory notice communicating the fact of settlement approval may be duplicative of communications and processes that have already taken place. For example, in an opt in proceeding class members will have already taken an active step to participate in the action with the result that:

(a) they will be known to the plaintiffs' lawyers;

(b) the plaintiffs' lawyers will be in regular or periodic contact and provide case updates to the class; and

(c) will typically have commenced, if not completed, the process of providing evidence to verify and quantify their claims.

8.24 The costs and administrative burden of distributing a statutory notice represents additional expense that will ultimately diminish the in-hand returns to class members or alternatively be imposed upon the party's lawyers or litigation funder. It is instructive that the Full Court of the Federal Court stated that the objective in giving notice is "to find the most economical means of ensuring that the group members are informed of the proceeding and their rights"[218] At [8.27] below we describe some of the costs and processes required to distribute notices to class members, which can be significant. These examples are provided to demonstrate that a statutory requirement to issue a notice and incur such costs should only be imposed where it is necessary and where appropriate orders may be fashioned to ensure unnecessary costs are not imposed upon the class and other participants in the litigation (such as the defendants, the lawyers for the parties, insurers and litigation funders).

8.25 For these reasons we submit that notification of settlement approval should be subject to judicial discretion to ensure that unnecessary costs are not incurred under a mandatory notice procedure for proceedings that may not require or justify the additional cost and administrative burden of distributing such notices. This could be achieved by either of the following:

(a) a statutory power akin to the general notice provision at s.33X(5); or

(b) a statutory power akin to s.33X(4) which provides that such an notice may be issued unless the Court is satisfied it is in just not to do so.

[216] Insofar as this information is included for the purpose of a class member using the information to inform a decision whether to opt out.
[217] Insofar as this information is included for the purpose of a class member using the information to inform a decision whether to opt out.
[218] *Femcare Ltd v Bright* (2000) 100 FCR 331 (per Black CJ, Sackville AND Emmett JJ) at [74]

8.26 Typically, notice distribution is accompanied by an appropriate public media campaign depending on the circumstances of each case, composition of the class; whether the action is an opt in or opt out.

8.27 The costs of this process are not insignificant and depending on the characteristics of the class members and available distribution channels can represent costs in the range of tens/hundreds of thousands of dollars. Accordingly, the Court should be empowered to make orders that appropriately apportion the costs of these processes in a manner that is efficient and represents the balance of convenience and the capacity of the party to pay balanced by a standard of fairness. For example, in instances where the defendant will be in possession of relevant contact information of the class members it may appropriately bear the cost of the distribution, particularly where any databasing systems are capable of performing this function at lower cost or with less administrative effort or burden than the plaintiff's lawyers or third-party's undertaking a similar task.

8.28 In Australia, it has become common for defendants to be required to share their database of class member contact information (such as share registers) and to report to the Court by way of an affidavit particularising relevant matters it has undertaken to distribute notices such as[219]:

(a) create and maintain a database that records all relevant contact and identifying information for the class;

(b) record the number of class members contacted;

(c) record the manner of contact (telephone; text message; email; letter or other digital platform correspondence such as Facebook)

(d) the success/fail rate of the attempt and any required attempts to follow-up.

8.29 Class member characteristics that will inform the manner, form and content of the notice include:

(a) Literacy level;

(b) Language choice (e.g. non-English; creole);

(c) Linguistic style to ensure effective communication of information;

(d) Special circumstances – disability; trauma-informed approach to correspondence where the subject-matter of the proceeding requires sensitivity; and

(e) Effective channels of communication – for example due to demographic preferences of changes in the patterns of media and information consumption print media communications may not reach the intended class. In these

[219] See *Jenkings v Northern Territory of Australia* NTD64/2016, orders made 26 October 2020 at [6(d)].

circumstances leveraging social media platforms may be critical to being able to effectively communicate with the class, particularly where they are young and in remote or isolated communities.

8.30 Distribution usually involves a multilayer distribution strategy along difference distribution channels, each incurring expenses to execute, monitor and maintain and may require retaining third-party professional service providers to facilitate these capabilities. For example:

(a) Direct mail

(b) Digital media – website(s) and email

(c) Print media

(d) Social media – targeted Facebook and digital platform advertising.

8.31 We acknowledge that the notice of proposed settlement and the notice of settlement approval assume that class members should have a right to opt out of a settlement once it has been approved. We strongly oppose the suggestion that there be a second or further right to either:

(a) opt back in to a proceeding after settlement; or

(b) opt out of a proceeding after the relevant opt out date set by the court

and provide our response to this proposal at Questions 47 and 48.

> 40. Do you agree with the information we propose should be contained in the notice of proposed settlement and the notice of approved settlement?

8.32 The content requirements for the notice of proposed settlement[220] and the notice of approved settlement[221] assume that class members should have a right to opt out or opt in to a settlement once it has been approved. As discussed in our response to Question 47-48 we strongly oppose this suggested proposed approach and insofar as the content requirements of the notices relate to this procedural issue we refer the Commission to our answers to those questions.

8.33 We note that the matters for inclusion in the notice of proposed settlement are largely consonant with the matters recommended for inclusion in notices issued under GPN-CA at [15.2], in respect of settlement. Consistent with the approach adopted in GPN-CA we submit that the content of the notices should not be unnecessarily proscriptive, but should be presented as *guidance* on those matters which may be appropriate to include in the notice, subject ultimately to Court approval on the content of the notice.

[220] NZLC IP48 at [6.29].
[221] NZLC IP48 at [6.30].

We have one specific objection to the requirement proposed at [6.29(d)], that we address [8.39]-[8.43] below.

8.34 We agree that the content requirements of the notice of proposed settlement should appear as a standardised form included at Schedule 1 of the High Court Rules.[222] We refer to the sample Opt Out Notice that appears at Schedules A of GPN-CA as an example of how standardised forms may assist parties in drafting notices and help the Court develop common principles of interpretation and comprehensibility for class members and parties alike. Importantly, the availability of standardised forms in Australia has not eschewed the role of the Court in exercising its protective function to amend standard terms and approve the ultimate language, form and manner of distribution of notices to class members.[223] The issue of comprehensibility, concision and sensitivity to the attributes of the audience (i.e. literacy levels, language skills, sophistication of the class; selection of appropriate forms of communication such as digital, audio-visual and written)[224] are all fact specific issues which underscore the critical importance of flexibility in content requirements and that judicial discretion is required to ensure communications with the class are effective and efficient.

8.35 Court oversight of the content of the proposed notices, and class communication in general, falls within the supervisory and protective function of the Court in class actions. Standardised content requirements and forms are instructive but not conclusive on the material that may be required to be presented to class members. Indeed, Australian Court continue to refine their approach to accommodate the individual circumstances of each case[225]. Judicial discretion to approve notices that depart from the proposed guidance on content and form is critical to a regime that is workable into the future and flexible to the demands of each case.

8.36 We address our concerns regarding a statutory requirement for a notice of approved settlement in all instances below and how this process may be duplicative where other procedural notices have been issued that cover the same subject-matter. Notwithstanding these observations, we agree in principle that the matters referred to at [6.30] are critically important and include relevant information for class members in order to make decisions concerning their legal rights. The form that this information should be conveyed (i.e. in what notice and at what time) are matters that should be determined by the Court in its discretion.

8.37 Importantly, the proposed notices anticipate a kind of omnibus process whereby other procedural steps are undertaken simultaneously, such as the:

(a) Notice of proposed settlement (including all relevant terms of settlement)

(b) Opt out procedure;

(c) Notice of opposition to a proposed settlement;

[222] NZLC IP48 at [6.31].
[223] *Kuterba v Sirtex Medical Limited* [2018] FCA 1467; *Cantor v Audi Australia Pty Limited (No 2)* [2017] FCA 104; *Blairgowrie Trading Ltd v Allco Finance and Another* [2017] FCA 330; (2017) 343 ALR 476; *Dylan Jenkings and Anor v Northern Territory of Australia* NTD64/2017.
[224] See discussion of these issues in *Lenthall v Westpac Banking Corp (No 3)* [2021] FCA 1004 at [42]-[51].
[225] *Lenthall v Westpac Banking Corp (No 3)* [2021] FCA 1004. See sample opt out notice at the Annexure.

(d) Registration –

(i) Of claim information in an opt in class action

(ii) Of an interest in or claim information for an opt out class action, without taking a positive step to retain the representative plaintiff's solicitors or enter a funding agreement

(iii) Of claim information for the purpose of participating in a settlement only as part of a closed class.

8.38 In the context of the above overlapping procedural steps we refer to our submission at Question 47-48 on how these issues may interact in practice.

Proposed content of Notice of Proposed Settlement[226]

8.39 We do not agree that the proposed wording at [6.29(d)] is appropriate.[227] Specifically, the second phrase "including information that will allow class members to estimate their individual entitlement" poses a number of issues, discussed below.

8.40 This requirement is highly subjective and will depend on the individual circumstances of each class member. In most cases it will be practically difficult to include information that can be meaningfully individualised to allow class member to estimate individual entitlements.

(a) For example, in personal injury claims or claims like the *Ross v Southern Response* proceeding the individual entitlement of a class member may be determined by a separate assessment process under a settlement scheme that is highly subjective and fact specific to their individual injury. Another example is where general damages claims are recoverable, which are again fact specific and rely upon a highly individualised assessment. Further examples include situations where the individual assessment of loss involves some form of accounting for payments that may have already been received by individual group members, which might not be known by the representative plaintiffs or their lawyers at the time of the in-principle settlement proposal.

(b) In an opt out proceeding in which class members have not yet come forward to register their claims, it is not possible for the notice to provide precise information as the scope of class claims will be unknown. Relatedly, the terms of the settlement may be conditional on a particular level of class member participation or some other condition that makes an estimate of individual entitlement unknowable at the time the notice is sent and it would speculative to provide this information to class members.

8.41 There may be some claims where losses may be more easily generalisable or quantifiable. In these circumstances such claims may be susceptible to a general rhetorical formula that is meaningful to a class member. For example, where losses

[226] NZLC IP48 at [6.29]-[6.30].
[227] We note, that the first phrase of the notice requirement at [6.29(d)], namely "a summary of the terms of the proposed settlement", are the same as the requirement at [15.2(g)] of GPN-CA to which we have not objection.

are the difference between two known values (the assessed value of X security *minus* the price paid for X security). However, the limitations of this approach are immediately discernible when subjected to scrutiny and what they cannot say with certainty at the time the notice of proposed settlement is sent. For example, the below non-exhaustive list of common deductions from entitlements may be subject to Court approval, further orders or change that would materially impact any estimate of a class members' individual entitlement:

(a) Interest on entitlements;

(b) Contribution to legal costs (including the costs of the settlement administration); and

(c) Contribution to litigation funding costs (if funded).

8.42 In these circumstances and for all of the above reasons, there is a real risk of misleading class members about estimated entitlements that may not materialise upon an individual assessment of their claims. This has the potential to undermine confidence in the process and the regime more broadly. A requirement to provide sufficient specificity in the notice of proposed settlement about *how* entitlements are calculated is acceptable. However, a requirement to enable sufficient information to provide an estimate, on which class members are likely to rely, but that may not ultimately be realised, is speculative and may cause well-founded objections and disquiet from class members. This is even more the case where a specific estimate is used as the basis for a class member exercising their right to opt out and the ultimate outcome is different.

8.43 We would propose a more generalised requirement that would provide for either of the below:

(a) Remove the second phrase of the sentence "including information that will allow class members to estimate individual entitlement".

(b) Alternatively, wording that captures the process by which claims will be determined rather than the outcome of that process. For example, "including information about how individual entitlements will be assessed".

41. Should class members be given an opportunity to object to a proposed settlement?

8.44 We agree that class members should be given the opportunity to object to a proposed settlement. The right to object is an important statement of principle that provides access to justice and serves an important procedural and evidentiary dual purpose:

(a) Enabling class members to express genuine, well-founded concerns about the proposed settlement; and

(b) The absence of objections is a highly relevant consideration in support of a settlement.[228]

8.45 An objection provides an appropriate mechanism for any concerns to be heard and addressed by the parties and the Court.

8.46 The requirement for an objection to be made to the High Court Registry at the class member's own effort and expense is an important protection of the Court's process that ought to be preserved as part of the proposed reforms. This approach disincentivises unmeritorious objections which are motivated by illegitimate or unfounded concerns regarding a proposed settlement. Importantly, there must be a balance between enabling a class member to object and facilitating meritless or vexatious objections.

8.47 We agree that the following barriers to objections may be simplified:

(a) A clear statement of what is required to evidence an objection. This may be done by something akin to a Practice Note from the High Court that directs objectors on these matters, such as how and where to file an objection.

(b) Costs should be minimised for class members seeking to be heard on well-founded objections. Objectors should be informed of the availability of legal advisors via free legal clinics is one such solution averted to by the Commission that is acceptable and already available. This may also be achieved by reference to a Practice Note and otherwise be information that can be accessed at the Registry.

8.48 We do not endorse the idea of a standardised objection form that departs from the normal standard of other applications to be brought before the Court. This is on the basis that an approach which lowers the standards of evidence and procedure invites an unthinking and quixotic criticism of a settlement that is often complex, attenuated and involves compromise that is in the interests of class members as a whole. If objectors are required to obtain the assistance of a lawyer and legal advice in order to object this is likely to result in a well-prepared and well-founded objection. This in turn will ensure objections are coherent, relevant and will enable them to be considered appropriately by the Court. A requirement for objectors to particularise and evidence their objections to the normal standard is a common-sense protection of the Court process and time, as well as the parties in responding to the objection.

8.49 The intention of the objector is another relevant consideration for the Court and should inform the weight given to any objection received. Moshinsky J in the Federal Court decision *Camilleri v The Trust Company (Nominees) Ltd* identified this issue in the following terms, "where a group member does object to the settlement, an important further question is whether the objector is prepared to assume the role—and risks—of being lead plaintiff".[229]

[228] *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5(f)]
[229] *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5(g)]

8.50 The existing power of the Court to appoint *amicus curie* or contradictors may more meaningfully inform the Court of germane objections or issues with the settlement as a whole than a new objections procedure which facilitates meritless or merely acrimonious objectors.

> 42. Do you agree there should there be an express power to appoint a counsel to assist the court or a court expert with respect to settlement approval? Should the court be able to order one or more parties to meet some or all of the cost of this?

8.51 We note that the Court already has power under High Court Rule 9.36 to appoint a "court expert" to *"inquire into and report upon any question of fact or opinion not involving questions of law or of construction*". Insofar as the subject matter of settlement approval involves questions of law or construction it may be appropriate to include a High Court Rule that enables such an appointment. Relatedly, the power to appoint an *amicus curi*e or contradictor is a power already available to the Court without cause for a statutory amendment.

8.52 The default position should be that the costs of such an appointment are paid for by the defendant. These costs should form part of the standard terms of settlement that the Court would expect to see at settlement approval. The Court should retain the flexibility and discretion to depart from the usual rule, that the defendant bears such costs should, it should only be exceptional circumstances that warrant such a departure.

8.53 We submit that the proposal for an independent advice on the proposed settlement should, in most cases, be provided as a confidential opinion of counsel for the representative plaintiff.[230] There may be circumstances in which an opinion of an independent expert may be required where the subject matter of the dispute requires esoteric knowledge to be put before the Court in order to assess the settlement application. In Australia, this is not an uncommon practice where technical, scientific or forensic skills are required to assist the Court in its determination.[231] In all other circumstances we submit that a confidential opinion of counsel will usually be sufficient alone.

> 43. When the court considers whether to approve a settlement, should it consider whether the proposed settlement is fair, reasonable and in the interests of the class as a whole? If not, what test should it apply?

8.54 We agree with the Commission's proposed formulation of a statutory settlement approval test at cl.6(5), being "*The court must not approve the settlement unless it is satisfied that it is fair, reasonable, and in the interests of the class as a whole after taking into account"*.

[230] NZLC IP 48 at [6.18].
[231] *Matthews v SPI Electricity Pty Ltd [Ruling No 19]* [2013] VSC 180; *Kelly v Wilmott Forests Ltd (No 4)* (2016) 335 ALR 439; *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148

8.55 The proposed statutory test is consonant with the common law test that has developed in Australian jurisprudence on settlement approval, in particular in the Federal Court.[232]

> 44. Should there be specific factors a court must consider when deciding whether a settlement is fair, reasonable and in the interests of the class as a whole?

8.56 The Draft Legislation at Clause 6(5)(a)-(f) introduces a multifactorial list of criteria that the Court *must* consider in deciding whether to approve a settlement.

8.57 We respectfully submit that the multifactorial approach should not require, fetter or bind the Court to consider and be satisfied on each of the criteria enumerated at cl. 6(5). The precise wording of the test should include a "may" provision, consistent with the approach in Australia, which maintains flexibility as to the matters the Court "may" consider versus what it "must" consider.

8.58 We do not dispute the relevance and value of the proposed criteria to assist the Court in the task of assessing whether the settlement is fair, reasonable and in the interests of the class as a whole. Indeed, the proposed criteria materially overlaps with the common law test in Australia[233] and the GPN-CA at 15.5, which enumerates a useful guide of the considerations relevant to deciding whether a proposed settlement is fair and reasonable.[234]

8.59 The benefit of enacting a multifactorial test which guides the Court to matters that it "should" or "may" consider is that it maintains judicial discretion and flexibility. Importantly, this approach enables judges to appropriately weight all factors in a manner that is not formulaic but appropriately balances the circumstances particular to each case against an evolving standard of fairness and reasonableness.

8.60 In *Camilleri v The Trust Company,* Moshinsky J (at [5]) summarises the principles relevant to settlement approval in Australia, describes the delicate balancing exercise required of the Court and the hazard of using mandatory criteria to frame this exercise. An instructive extract on this final point is below:

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[232] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [85]-[88]; *Camilleri v The Trust Company* (Nominees) Ltd [2015] FCA 1468 at [5]; *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* (1996) 71 FCR 250 at 258; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19]; *Wheelahan v City of Casey* [2011] VSC 215 at [57]-[59]; and *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663 at [34]; *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68 at [203]-[208] (Tate, Whelan and Niall JJA) at [203]-[208].

[233] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [85]-[88]; *Camilleri v The Trust Company* (Nominees) Ltd [2015] FCA 1468 at [5]; *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* (1996) 71 FCR 250 at 258; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19]; *Wheelahan v City of Casey* [2011] VSC 215 at [57]-[59]; and *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663 at [34]; *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68 at [203]-[208] (Tate, Whelan and Niall JJA) at [203]-[208].

[234] The list of factors at Class Actions Practice Note (GPN-CA) at 15.5 are largely drawn from *Williams v FAI Home Security Pty Ltd (No 4)* (2000)180 ALR 459 at [19] (Goldberg J).

> *there will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the defendants (inter partes aspects) or in relation to sharing the compensation among claimants (the inter se aspects) – reasonableness is a range, and the question is whether the proposed settlement falls within that range: Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2) (2006) 236 ALR 322 at [50].*[235]

8.61 In making this submission we also rely on the ALRCs recommendation that a statutory settlement approval test is unnecessary[236].In particular, the ALRC made the following observation on the tendency of legislatures and commentators to advocate for a mandatory and formulaic approach to the approval of class action settlements:

> *"…multifactorial lists of legislative criteria fetter judicial discretion and stifle the evolution of principles as factual contexts change over time. Chief Justice Allsop has criticised 'the tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence'. He observes that the desire to do so is '[o]ften, if not always, this is in the name of certainty and completeness, but it is false certainty'."*[237]

8.62 Settlements necessarily involve compromise. In *Botsman v Bolitho*[238] the Victorian Court of Appeal framed the task before a Court at settlement in the following terms and in doing so made a clarion case for why judicial discretion is a crucial feature of a functional settlement regime:

> *[206] The Court is being asked to approve a compromise of litigation. Inevitably, that will require an assessment of whether the plaintiff is likely to succeed in the action, the measure of damages that a successful judgment would yield, the prospects of recovery, and the expenditure in costs, time and effort that would be required to bring the proceedings to a conclusion.*
>
> *[206] That assessment does not involve a simple calculus but calls for matters of judgment based on imperfect knowledge and is influenced by the appetite for risk. It will be informed by the complexity and duration of the litigation and the stage at which the settlement occurs. It is important to acknowledge that it is the state of imperfect knowledge and the existence of risks that will have likely induced the settlement. It follows that those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.*
>
> *[207] Those considerations mean that there will rarely, or ever, be a single correct settlement."*

8.63 In Australia and Canada there is no statutory requirement to consider matters that satisfy the test of whether a settlement is "fair reasonable and in the interest of the class as a whole". The effect has been to maintain judicial discretion and enable the incremental development of the common law. There is no empirical evidence that this approach has resulted in sub-optimal outcomes for class members or that the

[235] *Camilleri v The Trust Company* (Nominees) Ltd [2015] FCA 1468 at [5(b)]
[236] *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) at [5.3]-[5.18].
[237] *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) at [5.6] (footnotes omitted).
[238] [2018] VSCA 278; (2018) 57 VR 68 at [203]-[207] (Tate, Whelan and Niall JJA)

discretion has miscarried to the public detriment. Aotearoa New Zealand Courts are in the advantageous position of being able to leverage the mature jurisprudence and principles of interpretation of other common law jurisdiction, in particular Australia and Canada, to guide their assessment of whether proposed settlement is fair, reasonable. In this context, the justification that Aotearoa New Zealand Courts require a statutory test which relies on a rigid or formulaic set of criteria to prove the elements of that test, is less persuasive and relevant. In fact, such an approach may hinder the development of the Aotearoa New Zealand jurisprudence.

8.64 On an issue of pragmatism, by making the statutory criteria discretionary it also reduces the likelihood of challenges to the settlement approval that are founded on the contention that certain criteria were not considered or given appropriate weight and therefore the discretion has miscarried.

8.65 We have a specific concern regarding the operation of proposed cl. 6(5)(e). Clause 6(5)(e) is in the following terms and requires a Court not to approve settlement unless it has taken into account:

> *"…the process by which the settlement was reached, including whether any potential conflicts of interest were properly managed".*

8.66 This clause has a potentially expansive scope without a clear justification of the harm it is designed to protect against. Practically, it is unclear how this criterion may be satisfied without requiring the parties to:

(a) Disclose material subject to solicitor-client privilege;

(b) Disclose without prejudice communications between the parties; and

(c) Disclose strategically or commercially sensitive negotiations.

8.67 At its lowest, it amounts to a statutory requirement to prove an absence of conflict and starts from a conclusion that conflicts may not have been appropriately managed. At its highest it invites a wide ranging and unbounded enquiry into the machinations of the parties settling the claims. On this basis the proposed clause is problematic without more clarity on its intended scope and purpose.

8.68 The clause is not limited to proving the management of potential conflicts as the main clause of the sentence refers to the "*process by which the settlement was reached*" and the subordinate clause merely provides an example of how that process may have miscarried regarding "*whether any potential conflicts of interest were properly managed*". On this basis it is unclear how and why this provision is intended to operate. Importantly, it is difficult to discern how it would achieve its objective in a manner that doesn't require the plaintiff to i) prove a negative (i.e. that the settlement process did not err) and ii) in a way that does not breach privilege with the result that to avoid a breach any answer to the criteria will be so anodyne on details as to be uninformative to the Court.

8.69 A potential solution may already exist in the catch-all provision at 6(5)(f), which enables the Court to consider "any other factor it considers relevant". This provision

is broad enough to capture any matters that 6(5)(e) purports to respond to. If the Court is concerned about conflicts of interest in the settlement it may ask the representative parties to put on evidence about this issue as a "factor it considers relevant".

> 45. Should the court have an express power to amend litigation funding commissions at settlement?

8.70 We do not object to the Court having an express power to amend litigation funding commissions at settlement of an opt out class action (or beforehand) for the limited purpose of making a common fund order in respect of the class as a whole. Indeed, the effect of a common fund order is to do precisely that. We refer to our submission to Question 27 and 28 in this submission and our response to response to Questions 51-53 of our submission to NZLC IP45[239]. It follows that if a common fund order is made by the Court then the contractual position as between litigation funder and funded class member should be moderated to reflect the particular terms of the Court's common fund order to achieve the stated aim of treating funded class members equally to unfunded class members for the purposes of contributing to the legal and litigation funding costs of the claim.

8.71 We do *not* agree that the Court should have an express power to amend litigation funding commissions at the settlement of an opt in class action or for a closed opt out class (where one of the criteria for class membership is that putative class members *must* have entered into a litigation funding agreement as a condition of class membership).

8.72 Our position reflects the orthodox position at law that the Court should not interfere with the private contractual dealings of consenting parties in the absence of evidence of wrongful conduct. This is consistent with the position expressed by the Aotearoa New Zealand Supreme Court in *Waterhouse* that, "[i]t is not the role of the courts to act as general regulators of funding arrangements. Nor is it the courts' role to assess the fairness of any bargain between a funder and a plaintiff"[240]

8.73 This position is also consonant with orthodox principles of contract law. These principles were cogently summarised by the Australian High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, where a majority comprised of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ observed:

> *… where a man signs a document knowing that it's a legal document relating to an interest in property, he is, in general, bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read or understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.*

[239] In particular see our submission at [21.14]-[21.22].
[240] *Waterhouse v Contractors Bonding* [2014] 1 NZLR 91 at [76(f)]. We acknowledge that the Supreme Court was not referring to a representative proceeding in making this finding, however,

> *In most common law jurisdictions, and throughout Australia, legislation has been enacted in recent years to confer on courts the capacity to ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations. As a result, there is no reason to depart from principle, and every reason to adhere to it, in cases where such legislation does not apply, or is not invoked.*[241]

8.74 We do not suggest that Courts will not have power in all circumstances to look behind a funding agreement in circumstances that warrant intervention, such as wrongful conduct, inducement, unfair or unconscionable terms.[242] But that such intervention is to be done in accordance with established legal and equitable principles under contract and is not a power at large that is to be enlivened at the conclusion of a proceeding when all the risk has come out of the litigation and hindsight brings forth an objection.

8.75 Clarity as to the extent of the Court's powers on this issue will have obvious benefits. In Australia, Courts have grappled with whether it is within power and, if so, appropriate to interfere with contractual funding terms and the absence of a specific statutory power to do so. In the decision of the Full Court of the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, their Honours expressed reservation at the power and appropriateness of judicial intervention[243]:

> *it suffices to note that there are questions as to the Court's power to interfere with the terms of arms-length commercial agreements between the Funder and funded class members, and also as to whether it would be appropriate to do so.*

8.76 The Australian High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 (per Gummow, Hayne and Crennan JJ) said at [92]:

> *[T]o ask whether the bargain struck between a funder and intended litigant is 'fair' assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity.*

8.77 The Victorian Supreme Court in *Pathway Investments Pty Ltd & Anor v National Australia Bank Ltd (No 3)* [2012] VSC 625, at [20] found that it might be necessary in some circumstances for the amount paid to a funder to be justified before a court approves settlement, but that:

> *"[i]t is not for the court to express a view about the commercial desirability of the quantum paid to the litigation funder under [the funding] arrangements*".

8.78 In *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 Lee J provides a comprehensive analysis at [18]-[58] of the relevant

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[241] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [47]–[48]
[242] See for an examination of these issues *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 at [42] and [47].
[243] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at [92].

principles and authorities incident to this question of appropriateness and power. An instructive extract appears below:

> *[42] "…it brings into focus that one is not just dealing with somehow imposing a condition as to the sums payable pursuant to the settlement, but also interfering with and varying contractual promises given by counterparties, in circumstances where the Court cannot assume those promises were given other than freely.*
> *…*
> *[47] For my part, I very much doubt power does presently exist for the Court to interfere and vary funding agreements in the context of a settlement by altering the contractual promises of group members to pay commission, except where, because of individual circumstances, there is an established legal or equitable basis to interfere with those contractual rights.*
> *…*
> *[57] "… if I was to interfere with the funding agreements and the amount paid to the funder, in the absence of identified statutory criteria, I would be left adrift searching for a lodestar. Although this may not be an insuperable difficulty and the Court is often required to make broad evaluative assessments (and is required to do so on the ultimate question arising on these applications), it is not a straightforward task. What I regard as a "fair" return may be quite different from somebody else sitting in my position, and without some statutory guideposts and detailed economic evidence, it presents real challenges.*

8.79 The proposed settlement approval power under cl.6(5) provides Courts with a *de facto* power to influence litigation funding commissions by refusing to approve settlement if legal costs are disproportionate or the funding commission is excessive.[244] In this manner the power already exists but we acknowledge it may not provide the kind of certainty and flexibility that the Court may think is necessary to, of its own motion, fix or vary the funding commission. This has been the subject of extensive attention by Australian Courts. There is no unanimity on the correct approach but there is a line of authority that considers the settlement approval power under s.33V(2) of the FCA has sufficient scope to regulate commission rates of litigation funders.[245]

8.80 In *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 at [27] –[29] Middleton J observed that:

> *I would not readily adopt the view that the very general broad powers found in ss 23, 33Z(1)(g) and 33ZF(1), which are not specifically directed to settlement approvals, would provide the power to vary or effectively vary the funding agreement, or otherwise interfere with the contractual rights and obligations of a litigation funder and class members.*
>
> *Nevertheless, by having recourse to the power of the Court under s 33V(2) of the Act, the Court may still take into account the fee or commission of a litigation funder and make orders*

[244] For an example of how this operates in the Australian jurisdiction see *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 at [22]. See also the Victorian Law Reform Commission (**VLRC**) produced a consultation paper, *Access to Justice — Litigation Funding and Group Proceedings*. At [7.46]–[7.86] and [5.37]: "Until recently, courts have been willing to reject settlements under section 33V where an unreasonable funding fee has been charged, but reluctant to intervene further and state what a reasonable funding fee would be in the circumstances."

[245] In addition to those decision cited in this section, see also; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No. 3) (Petersen)*[2018] FCA 1842; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [113] to [132]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277 at [38] and [42]; *City of Swan v McGraw-Hill Companies, Inc* [2016] FCA 343 (*City of Swan*) at [30] (Wigney J).

accordingly. Oversight by the Court of litigation funding fees or commissions so as to protect class members' interests is required. Of course, s 33V(2) refers to orders that are "just" — this includes taking into account the fact that litigation funders assume the substantial costs and risks of a representative proceeding and should be allowed a commercially realistic return.

8.81 In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* (2017) 343 ALR 476 at [101], Beach J observed that:

> *If it is necessary to say so, I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF. I am empowered to make "such orders as are just with respect to the distribution of any money paid under a settlement". If I make an order that out of monies paid by a respondent, a lesser percentage than that set out in a funding agreement is to be paid to a funder, that is an exercise of statutory power which overrides the otherwise contractual entitlement. That is not an unusual scenario in many and varying contexts. It might also be said that the funding agreement itself contains an implied term reflecting this override in any event; the parties would be contracting in the known setting that the funder's percentage commission entitlement would only operate on a settlement sum if the necessary condition of Court approval had first been given.*

8.82 The ALRC was in favour of the introduction of an express statutory power to amend commission rates[246]. However, the recommendation was made within a broader architecture that assumed open class actions and the availability of common fund orders. The ALRC described the manner in which this power would interact with an overarching regime in the following terms in the context of common fund orders:

> *the ALRC considers that common fund orders should be supported by an express statutory power, as the availability of such orders is consistent with, and supportive of, a number of the other recommendations in this report, including; that class actions be initiated as open class, that the court have an express statutory power to reject, vary, or amend the terms of a third-party litigation funding agreement*[247]

8.83 We submit that any statutory power to amend litigation funding commissions should have the following attributes:

(a) The power only applies to open, opt out class actions;

(b) The power is limited to varying the litigation funding commission and is not some broader power to undertake an assessment of all contractual terms under the funding agreement. There are existing protections at law that already provide class members with appropriate protections and remedies on this point;

(c) The power is being exercised in the context of making a CFO; and

(d) The statutory test is formulated in similar terms to the ALRCs proposal, with appropriate amendments to reflect the above, being:

[246] *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018), Recommendation 14. See analysis at
[247] *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, 2018) at [4.35]

"The Court shall have power to vary or set the terms of the commission under any third-party litigation funding agreement in an open class action, if it is just to do so."

8.84 Consistent with the approach advocated by the ALRC, we propose that such a power be used by the Court in its supervisory role when necessary to protect group members. Additionally this should be balanced by a requirement that it be "just to do so" which will have regard to the interests of the litigation funder who assumed the risk and financial burden of the litigation. We do not propose to include a statutory criterion to define what is "just" in these circumstances, relying on existing jurisprudence of Aotearoa New Zealand Courts and the incremental development of the common law on what is "just" in the circumstances.

46.	Should the court have the power to convert an opt-out class action into an opt-in class action for the purposes of facilitating settlement?

8.85 We agree with the Commission's proposal to include a statutory power to close the class for the purpose of facilitating settlement. We look forward to considering the Commission's proposal on statutory language for this power and commend to the Commission for consideration the language of s33ZG of the *Supreme Court Act 1986* (Vic). We refer to our submissions in response to Questions 47 and 48 regarding other issues regarding closed class actions.

47.	Do you agree that class members should be able to opt out of a class action settlement once it is approved?
48.	Should other potential class members have an opportunity to opt in at settlement?

8.86 We refer to the Commission's proposals in response to **Questions 47 and 48** and provide a joint response to both questions.

8.87 The Supplementary Paper sets out a number of proposals, which may be summarised as follows:

(a) To allow class members a second opportunity to opt out of a proceeding at settlement stage in both opt-out and opt-in proceedings: [6.110] & [6.114].

(b) Conversely, to allow potential class members to "opt in" to a proceeding at settlement (i.e. those who decided against participating in the proceeding at the initial opt-in or opt-out stage): [6.110] & [6.117];

8.88 The practical impact of these proposals on achieving certainty and finality of the disputes by way of settlements is profound. Settlements of actions brokered in good faith between the representative plaintiff (in their individual and representative capacities) on the one hand and the defendant on the other hand, would have no control as to which:

(a) class members might subsequently elect to opt out of the proceeding and therefore not be bound by and benefit from the proposed settlement;

(b) putative class members might subsequently elect to opt in to the proceeding and become bound by and take the benefit of the proposed settlement.

8.89 The practical and commercial difficulties and uncertainties that arise from these proposals is self-evident. Representative plaintiffs and those who fund them will have no certainty at any stage up to the point of settlement approval as to who will benefit from the settlement. Likewise, the defendant to the proceeding will have no certainty at any stage prior to the approval of the settlement as to who will be bound by the settlement.

8.90 Contrary to the proposition at [6.114], the fact that a settlement might occur a long time after the initial opportunity to opt out or opt into a class action is reason not to allow the constitution of the class to be further altered at that late stage. By that time the parties will ordinarily have spent considerable time, effort and expense on the basis of the known parameters and constitution of the class.

8.91 Likewise, any settlement of the representative proceeding should be negotiated on the basis of the dispute being fully and finally resolved for all members of the class *after that time* where the Court ordered opt out/opt in date has expired. As noted in NZLC IP48, this is consistent with the position adopted in both Australia and Canada.[248]

8.92 In this regard we note that the proposed opt out mechanism in the Draft Legislation does not provide for a statutory power to permit opt out in a manner that is independent to the process of settlement approval. In Australia, the Federal Court's power to permit order opt out arises under s.33J as an independent head of power that may be exercised at any stage in a proceeding. This power is not reliant upon some other procedural condition precedent for its exercise i.e. settlement approval. In the ordinary course of litigation, it is assumed that opt out will occur at least prior to the substantive hearing of the representative proceeding, unless leave is granted (s.33J(4)).

Issues

8.93 We respectfully suggest that if the proposals at [6.110]-[6.117] of NZLC IP48 are implemented they will give rise to very significant issues of principle impacting the objectives of a fair, equitable and procedurally coherent class actions regime. They will also present major practical impediments too. These include:

(a) the ability for class members to change their election (to remain in the class; to opt out or to opt in) *after* a settlement is reached will prejudice the interests of all parties and undermine the certainty and finality of settlements;

[248] NZLC IP48 at [6.111]

(b) the indeterminacy problem created by these proposed rules will significantly undermine the ability of parties to negotiate meaningful and binding settlements and the willingness of defendants to offer to do so;

(c) that particular prejudice will be visited upon defendants and their interests in achieving finality and certainty in negotiating settlement sums and resolving claims. In turn, this prejudice is likely to undermine the efficacy of settlements generally by undermining a defendant's willingness to meaningfully engage in discussions to comprehensively resolve the dispute as the composition of the class will be subject to change;

(d) similar to the prejudice to defendants, significant prejudice will also be imposed on those underwriting or supporting the litigation as they will have no assurance as to the status of the class. This may arise in a number of circumstances, for example:

    (i) if class members still have a procedural right to exit the litigation at the time of settlement approval (after previously opting in) they may avoid any liability for contributing to the costs of the proceeding (through the claim registration processes, correspondence with the lawyers etc.); or

    (ii) conversely if class members have a right to opt in (after previously opting opt) they may cause the settlement to fall over or significantly diminish the returns of other class members, due to the increasing number of class members attempting to take advantage of the fruits of the litigation that has been conducted and funded by others.

(e) a significant increase in the likelihood of the "free-rider" problem and attendant issues related to appropriate apportionment of costs and recovery of funders;

(f) more speculative class membership who are unlikely to understand or appreciate the genuine risks and costs of litigation and may have unintended results; such as a higher rate of class member objections to settlements;

(g) an increase the burden on the Courts arising from:

    (i) a likelihood of having to hear and resolve claims that could (and arguably should) have settled earlier;

    (ii) related interlocutory disputes or a "long-tail" to finalising settlement/settlement approval if in-principle settlements are stymied by a change in the composition of the class;

(h) arguably drive down settlements for aggregate damages/award (if they can be achieved at all) on the basis that plaintiffs and defendant's will be unable to meaningfully assess the aggregate loss position during settlement negotiations.

Objective and operation of orthodox "opt out" / "opt in" mechanisms

8.94 We consider there should be a clear and stated purpose attached to the procedural mechanism for the "opt out" / "opt in". We respectfully suggest that the mechanism should follow the well-trodden Australian and Canadian design in preventing second or further opportunities for class members to subsequently alter their previous informed election to either participate or not participate at an earlier stage, as follows.

Opt Out

8.95 In an "opt out" proceeding, the entire class is defined at the outset. All claimants meeting the class member definition are included as putative class members in the proceeding, without the need for an active step to be taken by members.

8.96 During the stage one common issues proceeding, generally *after* the pleadings have closed and the issues between the parties have been crystallised and *before* the trial, the opt out notification process should occur under Court supervision. This enables putative class members who do not wish to be bound by the outcome of the stage one common issues proceeding the opportunity to opt out of the proceeding. At the conclusion of the opt out period set by the Court, all class members who have not actively opted out remain in the proceeding and will be bound by the outcome of the determination of the stage one common issues.

8.97 Should the proceedings settle prior to the determination of the stage one common issues and should that settlement be approved by the Court, class members who have not previously opted out should be bound by the terms of the settlement and entitled to participate in the settlement subject to registering their claims. To participate in the fruits of the settlement class members should be required, only at that point, to take an active step to identify themselves and register their claims. Class members who have not opted out but who do not come forward to register their claims at settlement should still be bound by the settlement but not generally entitled to participate in the settlement.

8.98 If the opt out proceeding does not settle but instead proceeds to trial and judgment on the stage one common issues, class members who have not opted out should similarly be bound by the outcome of the Court's decision on the stage one common issues, whether or not they actively identify themselves.

Opt in

8.99 In an "opt in" proceeding eligible class members are required to take a positive step to "opt in" to the proceeding within a set timeframe specified by the Court. This typically involves an eligible class member completing a form and submitting it to the High Court registry by a fixed date set by the Court.

8.100 By its very nature, the "opt in" procedure alleviates the need for any subsequent "opt out" procedure. Putative class members are entitled to become class members by electing to opt in, via a positive step. At the conclusion of the opt in period set by the Court, all putative class members who have actively opted in and submitted

paperwork to the Court within time become class members in the proceeding and will be bound by the outcome of the determination of the stage one common issues.

8.101 Until the decision of the Supreme Court in *Southern Response v Ross* [2020] NZSC 126 the orthodox position in Aotearoa New Zealand has been to have opt in class actions. As articulated by the Supreme Court in *Southern Response v Ross* (relying upon the Court of Appeal decision in that case; [2019] NZCA 431 at [108]), the circumstances in which an opt in proceeding is appropriate are circumstances where, "… the number of claimants is small, and they have a pre-existing connection which makes it reasonable to seek their positive consent to participation in the proceedings."

8.102 The period over which an eligible class member may "opt in" will generally be longer than an "opt out period" as class members may be expected to seek advice and make other arrangements prior to taking an active step to opt in to the proceeding.

8.103 Like with opt out proceedings, should an opt in proceedings settle prior to the determination of the stage one common issues and should that settlement be approved by the Court, only class members who have previously opted in will be bound by the terms of the settlement and entitled to participate in the settlement. They will not need to register their claims a second time in order to participate in the fruits of the settlement.

8.104 If the opt in proceeding does not settle but instead proceeds to trial and judgment on the stage one common issues, class members who have opted in should similarly be bound by the outcome of the Court's decision on the stage one common issues.

49. When a settlement is reached prior to certification, do you agree that the court should consider whether to certify it for the purposes of settlement?

8.105 We do not agree that the court should consider whether to certify a proceeding for the purposes of settlement. In the unlikely circumstances that a proceeding settles prior to certification (if such a requirement is adopted), a further requirement that the proceeding be certified nonetheless, for settlement purposes, will simply result in significant and avoidable additional costs to the parties in preparing for a hearing on both issues. In circumstance where a settlement has been reached in principle between the parties, any legitimate concerns the defendant to the class action may theoretically have are waived by the defendant's own conduct in seeking to settle the particular representative claim. The question to be asked is: who does certification benefit in such circumstances? Ultimately, the additional costs of preparing for the certification at the same time as settlement will be incurred by class members and unnecessarily diminish their in-hand recovery under the settlement. The additional requirement seems inconsistent with the objectives of achieving a just, speedy and inexpensive determination of proceedings.

8.106 If parties jointly approach the Court seeking approval to resolve their dispute it is in the interests of justice that the Court to facilitate the resolution of the dispute in a

manner that balances cost, efficiency and appropriate judicial supervision. The settlement approval process is sufficient to ensure that the Court is able to exercise its supervisory and protective function without recourse to an entirely otiose procedural hearing on the issue of certification. Procedurally, the hearing will become an omnibus hearing on certification and settlement that will be impractical and costly.

8.107 Practically, it will be difficult for a Court to resolve the legal fiction it is asked to sustain in certifying the class action while simultaneously and summarily resolving the dispute. For example, will the Court be required to find that the statement of claim discloses a reasonably arguable cause of action, pursuant to cl. 4(1)(a)? If the Court finds that it does not and thereby founders the proposed settlement, how can it be said that this decision was in the best interests of class members under the Court's supervisory jurisdiction? For example, will the Court be required to interrogate the suitability of the representative plaintiff and the obligations of their role when the simultaneous application before the Court is to settle and dispense with these obligations?

8.108 The statutory test at cl.6(5) states that a Court "must not approve" the settlement unless all the criteria are satisfied. The issues raised by Question 49 underscore the importance that the settlement approval criteria at cl. 6(5) are flexible, and do not *require* a Court to consider specific factors in order to enliven the power to approve the settlement. Otherwise, this creates a circumstance where a Court may not be able to approve a proposed settlement as the settlement approval clause assumes that certification has occurred and that a class has been certified. This is a potentially unintended consequences of fettering a Court's discretion under cl 6(5).

> 50. Should the court supervise the administration and implementation of a class action settlement?

8.109 We agree with the proposal that the Court should court supervise the administration and implementation of a class action settlement on those matters set out by the Commission.

8.110 We support the proposal that the court should have the power to make any orders it considers appropriate with respect to the administration and implementation of a settlement in order to achieve this outcome. We note that the proposed power at 9(1)(e) uses the following language:

> *"If the court approves settlement, it may make other orders it considers appropriate for the administration and implementation of the settlement".*

8.111 The Supplementary Paper at [6.129] describes this power as akin to the settlement approval power s.33V(2) under the FCA, which relevant provides that:

> *If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court".*

8.112 If the intention is that the proposed clause will operate as a similar or cognate provision to s.33V(2) we raise the following potential issues of construction for close consideration by the Commission. The term "just" in s.33V(2) requires a construction exercise that is broader than the term "appropriate" in cl.9(1)(e). For example, consideration of what is "just" is more susceptible to an interpretation which balances the interests of parties and non-parties (such as litigation funders) and that forces an enquiry into the overarching scheme of the legislation, public policy and public confidence in the regime.[249]

8.113 The term "appropriate" invokes a more pragmatic analysis that is not anchored in these broader considerations and arguably requires a lower standard of justification for the exercise of a broad discretionary power. In this regard, as the scope of clause 9(1)(e) is to confer a general discretion on the Court, it is appropriate that its exercise should have regard to the broader interests of justice.

> 51. Should the court have a power to appoint a settlement administrator? Who would be appropriate to fulfil this role?

8.114 We agree should the court have a power to appoint a settlement administrator. In most cases this role may be discharged by the solicitors for the representative plaintiff or alternatively a court appointed entity with technical or subject matter expertise such as another independent law firm, accounting firm, share registry service or claims administration company.

8.115 We agree with the Commission's view that the court should have discretion as to who is appointed as settlement administrator, as the appropriate administrator will differ depending on the nature of the case.[250]

> 52. Should there be an obligation to provide a settlement outcome report to the court? Should this be made publicly available?

8.116 We agree with the proposal to provide a settlement outcome report. What is unclear from the proposal is how the Court is to deal with the report and its findings and related procedural questions. We raise the following questions for the Commission to consider:

(a) What is the standard of response and level of information required to answer the reporting questions at [6.137]? We suggest that a flexible and non-prescriptive approach is adopted.

[249] *Uren v RMBL Investments Ltd (No. 2)* [2020] FCA 647 at [55]; see *Webster (as trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053 at [117] for a similar conclusion.
[250] NZLC IP48 at [6.135].

(b) If the settlement administrator is unable to answer or sufficiently particularise an answer to the reporting questions, what impact, if any, will this have on the litigation and the settlement process?

(c) Does failure to do these things enliven a liability or right to take the settlement administrator to Court?

(d) If the administrator is unable to report within 60 days of completion of the administration, is there an ability to apply to the Court to have this period extended?

(e) Is the administrator able to seek directions from the Court on how administer the settlement (for non-trivial questions or if questions of legal significance arise)? If so, we submit it should be at its own cost.

8.117 We commend an approach to reporting that does not create the potential for unmerited satellite issues after the substantive obligations of the administrator have been discharged (i.e. distributing the settlement) and the litigation has concluded. Unless there is evidence of a failure to perform non-trivial functions and obligations by the administrator it should not be cause for dispute.

8.118 The settlement outcome report should be made available by making a request to the Registry.

53. Do you have any other feedback on our proposed settlement provisions?
54. Is there anything else you would like to tell us?

9. **Appendix A** - See our submission to NZLC IP45.